RECEIVED by MSC 8/20/2025 11:37:01 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

LAWANNA SMITH, as Personal Representative of the Estate of JACQUELINE HARRIS, Dec'd.

Plaintiff-Appellee,

v

TRI COUNTY ORTHOPEDICS, P.C.; and JACK D. LENNOX, D.O.,

Defendants-Appellants,

BEAUMONT HEALTH, Jointly and Severally,

Defendant.

Supreme Court No. 167720
COA No. 365062

Oakland County Circuit Court
Case No. 21-187353-NH
Hon. Nanci Grant

DEFENDANTS-APPELLANTS TRI COUNTY ORTHOPEDICS, P.C. AND JACK D. LENNOX, D.O.'S SUPPLEMENTAL BRIEF ON APPEAL

SUPPLEMENTAL APPENDIX TO DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF ON APPEAL
(Attached Separately)

*** Oral Argument To Be Scheduled ***

By: ENRICO G. TUCCIARONE (P52767)
LAUREN T RHOADS (P86427)
FOLEY, BARON, METZGER & JUIP, PLLC
Attorneys for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

RECEIVED by MSC 8/20/2025 11:37:01 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES……iv

APPENDIX INDEX……vi

SUPPLEMENTAL APPENDIX INDEX……vii

STATEMENT OF QUESTION PRESENTED……viii

INTRODUCTION……1

STATEMENT OF PERTINENT FACTS……2

STANDARD OF REVIEW……4

LAW AND ARGUMENT……5

I. THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT FOR ABUSE OF DISCRETION BASED UPON THE TRIAL COURT'S FAILURE TO CONSIDER *DEAN/DURAY* FACTORS BECAUSE THE "GOOD CAUSE" STANDARD APPLIES UNDER THE MICHIGAN COURT RULES, THE TRIAL COURT DID CONSIDER CERTAIN RELEVANT *DEAN/DURAY* FACTORS, AND THE *DEAN/DURAY* FACTORS WEIGH IN DEFENDANTS-APPELLANTS' FAVOR……5

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFF-APPELLEE'S MOTION FOR LEAVE TO AMEND HER WITNESS LIST FOR LACK OF GOOD CAUSE PURSUANT TO THE MICHIGAN COURT RULES INSTEAD OF APPLYING THE *DEAN/DURAY* FACTORS……5

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFF-APPELLEE'S MOTION FOR LEAVE TO AMEND HER WITNESS LIST BECAUSE THE COURT APPROPRIATELY CONSIDERED MICHIGAN COURT RULES AND CASELAW PRECEDENT IN ITS DECISION, INCLUDING BUT NOT LIMITED TO RELEVANT *DEAN/DURAY* FACTORS……13

C. EVEN IF THE TRIAL COURT HAD CONSIDERED AND/OR DISCUSSED ALL OF THE *DEAN* FACTORS IN ITS DECISION, APPLICATION OF THE *DEAN* FACTORS WEIGH IN DEFENDANT-APPELLANTS' FAVOR AND SUPPORT A FINDING THAT THE TRIAL COURT PROPERLY DENIED PLAINTIFF-APPELLEE'S MOTION FOR LEAVE TO FILE A SECOND AMENDED WITNESS LIST…….....15

CONCLUSION AND RELIEF REQUESTED……18

CERTIFICATE OF COMPLIANCE……..……20

CERTIFICATE OF SERVICE……..……21

RECEIVED by MSC 8/20/2025 11:37:01 PM

RECEIVED by MSC 8/20/2025 11:37:01 PM

INDEX OF AUTHORITIES

Cases

Cox v Hartman, 322 Mich App 292; 911 NW2d 219 (2017)……..6

Carmack v Macomb County Community College, 199 Mich App 544; 502 NW2d 746 (1993)……..7

Conoco, Inc., v JM Huber Corp., 289 F3d 819 (C.A.Fed. 2002)……..……4

Dean v Tucker, 182 Mich App 27; 451 NW2d 571 (1990)……..….*passim*

Duray Dev, LTC v Perrin, 288 Mich App 143 (2010)…….*passim*

General Electric Co v Joiner, 522 US 136 (1997)…….....4

Hayes-Albion v Kuberski, 421 Mich 170; 364 NW2d 609 (1984)…….6, 7

Helvering v Gowran, 302 US 238, 245 (1937)……14, 15

Herrera v Levine, 176 Mich App 350; 439 NW2d 378 (1989)……7

Kemerko Clawson, LLC v RXIV Inc, 269 Mich App 347; 711 NW2d 801 (2005)…….10

LaFleche v Ybarra, 242 Mich App 692; 619 NW2d 738 (2000)…….4

Macomb Cnty Dep't of Human Servs v Anderson, 304 Mich App 750 (2014)……...4

Maldonado v Ford Motor Co., 476 Mich. 372; 719 NW2d 809 (2006)…….4

People v Babcock, 469 Mich 247; 624 NW2d 479 (2003)…….4

Red Fit, LLC v Red Effect International Franchise, LLC, No. 363686 (Mich Ct App May 30, 2024)……...vii, 11

Stepp v Dep't of Natural Resources, 157 Mich App 774; 404 NW2d 665 (1987)……16

Tisbury v Armstrong, 194 Mich App 19; 486 NW2d 51 (1991)…….4, 6

Velez v Tuma, 283 Mich App 396; 770 NW2d 89 (2009)…….10

Vicencio v Ramirez, 211 Mich App 501; 536 NW2d 280 (1995)……13

Woods v SLB Prop. Mgt., LLC, 277 Mich App 622; 750 NW2d 228 (2008)……4

RECEIVED by MSC 8/20/2025 11:37:01 PM

Rules

MCR 2.313(B)……6, 8, 10

MCR 2.401(B)……11

MCR 2.401(B)(1)……10

MCR 2.401(B)(2)(a)……..……..5

MCR 2.401(I)(1)……*passim*

MCR 2.401(I)(2)……*passim*

Statutes

MCL 600.2169……...3, 9

Publications

Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 20 (2001)……14

Kevin Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 955 (2007)……...14

RECEIVED by MSC 8/20/2025 11:37:01 PM

APPENDIX INDEX

Appendix to Application for Leave to Appeal filed on October 24, 2024[1]

Title	Appx Pgs
COA's September 12, 2024 *Harris* Opinion	3-15
COA's September 19, 2024 *Morris* Opinion	16-23
Plaintiff's Complaint & AOM	24-41
Initial Scheduling Order	42
Plaintiff's Witness List	43-53
Plf's Resp to Defs Lennox, et. al's Disc Requests	54-57
B. Sonny Bal, M.D.'s Curriculum Vitae	58-142
Plf's Supp Resp to Defs Lennox, et. al's Disc Requests	143-146
Plf's First Amended Witness List	147-157
Plf's Emergency Mtn to File Second Am'd Witness List	158-321
10/12/22 Hearing Transcript	322-335
Orders Granting Defs Lennox, et. al's Mtns	336-341
Plf's Mtn for Voluntary Dismissal w/o Prejudice	342-349
Defs Lennox, et. al's Resp to Plf's Mtn for Vol Dismissal	350-364
Def Beaumont's Mtn for Summary Disposition	365-379
11/14/22 Order & Opinion	380-381
12/08/22 Order & Opinion	380-381
12/14/22 Opinion & Order	384-387

[1] Defs-Appts' Appendix to Application for Leave to Appeal is not submitted with this filing in order to avoid duplication. Please refer to the initial Appendix filed on October 24, 2024 for citations to Appx 3-387.

RECEIVED by MSC 8/20/2025 11:37:01 PM

SUPPLEMENTAL APPENDIX INDEX

Title	Appx Pgs
Excerpt of Dr. Bal Deposition Transcript in Unrelated Lawsuit	388-389
Excerpt of Dr. Bal Trial Transcript in Unrelated Lawsuit	390-391
Red Fit, LLC v Red Effect International Franchise, LLC, unpublished opinion per curiam of Court of Appeals, Docket No. 363686, 2024 WL 2790504 (May 30, 2024)	392-410

RECEIVED by MSC 8/20/2025 11:37:01 PM

STATEMENT OF QUESTION PRESENTED

I. **WHETHER THE COURT OF APPEALS ERRED WHEN IT REVERSED THE TRIAL COURT FOR ABUSE OF DISCRETION BASED UPON THE TRIAL COURT'S FAILURE TO CONSIDER *DEAN/DURAY* FACTORS IN ITS DENIAL OF PLAINTIFF-APPELLEE'S MOTION TO AMEND HER WITNESS LIST WHEN THE "GOOD CAUSE" STANDARD APPLIES UNDER THE MICHIGAN COURT RULES, THE TRIAL COURT DID CONSIDER CERTAIN RELEVANT *DEAN/DURAY* FACTORS, AND THE *DEAN/DURAY* FACTORS WEIGH IN DEFENDANTS-APPELLANTS' FAVOR?**

Plaintiff-Appellee answers: No.

Defendants-Appellants answer: Yes.

The trial court would answer: Yes.

The Court of Appeals would answer: No.

RECEIVED by MSC 8/20/2025 11:37:01 PM

INTRODUCTION

The instant appeal arises out of the Court of Appeals' reversal of the trial court's denial of Plaintiff-Appellee's Motion for Leave to File a Second Amended Witness List and grant of summary disposition, which was based upon the appellate court's finding of abuse of discretion. Specifically, the Court of Appeals held the trial court abused its discretion by failing to apply the factors set forth in *Dean v Tucker*[2] and *Duray Dev, LLC v Perrin*[3] when the trial court considered Plaintiff-Appellee's motion to amend her witness list. The Court of Appeals reasoned that a more rigorous analysis for consideration of a motion to amend a witness list under *Dean/Duray* was warranted because denial of Plaintiff-Appellee's Motion would (and did) effectively result in dismissal.

However, these Defendants-Appellants contend that the Court of Appeals erred in its analysis and reversal of the trial court's decision to deny Plaintiff-Appellee's motion to amend her witness list because the "good cause" standard is the appropriate standard under the Michigan Court Rules and relevant case law , the trial court clearly did consider certain relevant *Dean/Duray* factors in its decision, and the *Dean/Duray* factors weigh in Defendants-Appellants' favor, which warrant affirming of the trial court's decision.

[2] *Dean v Tucker*, 182 Mich App 27 (1990)
[3] *Duray Dev, LLC v Perrin*, 299 Mich App 143 (2010).

RECEIVED by MSC 8/20/2025 11:37:01 PM

STATEMENT OF PERTINENT FACTS

The key issue in the underlying medical malpractice case is the fatal effect of an invalid Affidavit of Merit on Plaintiff's claim. When initiating this litigation, Plaintiff filed an Affidavit of Merit (AOM) executed by orthopedic surgeon Sonny Bal, M.D. with her Complaint. The Complaint and AOM alleged that orthopedic surgeon Jack Lennox, D.O. failed to prescribe the decedent, Jacqueline Harris, outpatient Lovenox or anticoagulation medication after her May 29, 2019 right total knee arthroplasty, and instead prescribed Aspirin as her sole anticoagulation medication. (**Appx 28-30**).[4] Plaintiff further alleges that the decedent expired on June 28, 2019 of an "overwhelming thromboembolic event" due to an inappropriate anticoagulation regimen. (**Appx 28**).

Pursuant to MCL 600.2169, based upon the at-issue date of treatment, Plaintiff was required to demonstrate to the court that Dr. Bal was board certified in orthopedic surgery and devoted a majority of his professional time to the active clinical practice of orthopedic surgery or the instruction of orthopedic surgery residents/students from May 29, 2018 to May 29, 2019 in order to author a valid AOM and provide standard of care testimony. Dr. Bal testified to this qualification in his AOM dated March 11, 2021. (**Appx 37**).

Through the course of discovery, questions of whether Dr. Bal met this requirement arose, and thus, the question of whether Plaintiff's AOM was valid became an issue. (See **Appx 58, 60**; see also **Supp Appx 389; 391**). Plaintiff never produced Dr. Bal for deposition to establish his expert qualifications or substantiate his affidavit with standard

[4] Defendants-Appellants' Appendix to Application for Leave to Appeal involves pages **3-387**, which are not bates-stamped. Defendants-Appellants' Supplemental Appendix on Appeal begins at bates-stamped **page 388** (document page 3) and extends through bates-stamped **page 410** (document page 25).

of care testimony, in violation of court order (**Appx 337**). Instead, Plaintiff attempted to file a late amended witness list naming a new expert (see **Appx 147-157**), which was stricken, and then filed an emergency motion to amend her witness list pursuant to a court order (see **Appx 158-166**), which the trial court denied for lack of good cause shown and undue prejudice to Defendants (see **Appx 324-334**; **380**).

Ultimately, the trial court determined Plaintiff's AOM was invalid, Plaintiff failed to timely and properly name an additional standard of care expert and secure a valid AOM within the appropriate discovery window, and thus, Plaintiff failed to establish her claim under Michigan law. (See **Appx 322-335**; **384-387**). The trial court awarded summary disposition in favor of Defendants and dismissed the case on December 14, 2022.

Plaintiff-Appellee's appeal of right followed, and the Court of Appeals overturned the trial court's decision for abuse of discretion and judicial error, remanding the case for further proceedings on September 12, 2024. Specifically, the Court of Appeals found that the trial court failed to "engage in more rigorous considerations" before precluding Plaintiff-Appellee's witness in a manner that effectively resulted in a dismissal, including analysis of *Dean v Tucker* and *Duray Dev, LLC v Perrin* factors. Defendants-Appellants timely filed their applications for leave to appeal to this Honorable Court thereafter, which were accepted for oral argument and supplemental briefing on June 11, 2025.

RECEIVED by MSC 8/20/2025 11:37:01 PM

RECEIVED by MSC 8/20/2025 11:37:01 PM

STANDARD OF REVIEW

Appellate courts review evidentiary rulings, including whether to admit or exclude expert testimony, under the abuse of discretion standard. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); see also *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 N.W.2d 738 (2000). The decision of whether to allow a party to amend its witness list to add an expert witness is soundly within the discretion of the trial court. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

"An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes." *Macomb Cnty. Dep't of Human Servs. v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014) (citing *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008)). The abuse of discretion standard acknowledges there are circumstances in which no single outcome is correct and there can be multiple reasonable and principled outcomes. *People v Babcock*, 469 Mich. 247, 269; 666 N.W.2d 231 (2003). When a trial court selects one of the principled outcomes, there is no abuse of discretion, and it is proper for the reviewing court to defer to the trial court's judgment. *Id.* When the trial court selects an outcome outside of the principled outcomes and does not have a substantial and compelling reason for its departure, an abuse of discretion has occurred. *Id.*; see also *Conoco, Inc, v JM Huber Corp*, 289 F3d 819, 826 (CAFed 2002); see also *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

RECEIVED by MSC 8/20/2025 11:37:01 PM

LAW AND ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT HELD THE TRIAL COURT ABUSED ITS DISCRETION DUE TO FAILURE TO CONSIDER RELEVANT FACTORS UNDER *DEAN V TUCKER* BECAUSE THE "GOOD CAUSE" STANDARD APPLIES UNDER THE MICHIGAN COURT RULES, THE TRIAL COURT DID CONSIDER CERTAIN RELEVANT *DEAN/DURAY* FACTORS AND THE *DEAN/DURAY* FACTORS WEIGH IN DEFENDANTS-APPELLANTS' FAVOR.

The Court of Appeals committed reversible error when it held that the trial court abused its discretion in its consideration and subsequent denial of Plaintiff-Appellee's Motion to Amend to File a Second Amended Witness List. Specifically, the appellate court failed to appreciate that the trial court appropriately considered Michigan Court Rules, which enforce a "good cause" standard, as well as precedential Michigan case law, including *but not limited to* relevant factors set forth in *Dean v Tucker* and *Duray Dev, LLC v Perrin*, in its decision to deny Plaintiff-Appellee's motion to amend her witness list. Nevertheless, even if the trial court had considered all of the *Dean/Duray* factors on the record, analysis and application of the factors to the instant case supports a finding that the trial court correctly denied Plaintiff-Appellee's Motion to File a Second Amended Witness List and appropriately granted summary disposition on the grounds discussed in Defendants-Appellants' Application.

A. The trial court did not abuse its discretion when it denied Plaintiff-Appellee's Motion for Leave to Amend her Witness List for lack of good cause pursuant to the Michigan Court Rules instead of applying the *Dean/Duray* factors.

MCR 2.401(B)(2)(a) provides that a trial court must issue scheduling orders to set times for relevant litigation events, including deadlines for the exchange of witness lists. MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. *Duray Dev, LTC v Perrin*, 288 Mich App 143, 162-163 (2010).

RECEIVED by MSC 8/20/2025 11:37:01 PM

Specifically, the Michigan Court Rules state: *"[n]o later than the time directed by the court* under subrule (B)(2)(a), the parties shall file and serve witness lists…[which] must include…the name of each witness,…whether the witness is an expert, and the field of expertise." MCR 2.401(I)(1)(a)-(b) (emphasis added). Failure to timely file and/or amend a witness list is governed by MCR 2.401(I)(2), which provides that "[t]he trial court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial *except upon good cause shown*." *Duray*, 288 Mich App at 162-163 (emphasis added); see also *Dean v Tucker*, 182 Mich App at 32-34.[5]

Indeed, the court rules specifically identify the standard for serving and amending witness lists to require "*good cause*." In clear support of the Legislature's intent, Michigan appellate case law has firmly established that it is within the trial court's sound discretion to determine what may or may not constitute "good cause." See *Duray*, 288 Mich App at 162-163; see also *Dean v Tucker*, 182 Mich App at 32-34 (1990); see generally *Hayes-Albion v Kuberski*, 421 Mich 170, 188 (1984) (affirming a trial court's refusal to admit an unlisted witness as it was an issue "for the trial court to decide in the exercise of discretion"). Michigan appellate courts have routinely held that late motions to amend witness lists fail to demonstrate good cause when "'the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness,'" and, in such circumstances, denial of the motion to amend is proper. *Cox v Hartman*, 322 Mich App 292, 315; 911 NW2d 219 (2017), quoting *Tisbury*, 194 Mich App at 20; see also *Hayes-Albion*, 421 Mich at 188.

[5] A court may issue sanctions, up to and including striking a party's experts, for violation of court orders under MCR 2.313(B); however, sanctions are not specifically required under that rule. Notably, MCR 2.401(I)(1)-(2) does not specifically contemplate violation of court orders and does not implicate or discuss sanctions.

RECEIVED by MSC 8/20/2025 11:37:01 PM

Importantly, the appellate courts have also clearly recognized that it is soundly within a trial court's discretion to strike or reject proposed new witnesses, which has been established by a multitude of published and unpublished Michigan case law. See, e.g., *Hayes-Albion,* 421 Mich at 188 (1984); *Herrera v Levine*, 176 Mich App 350, 355-356 (1989) (per curiam) (affirming a trial court's refusal to permit an unlisted expert to testify after a case was placed on standby status for trial); *Carmack v Macomb County Community College*, 199 Mich App 544, 546 (1993) (The Court of Appeals "will not disturb a trial court's decision regarding whether to permit a witness to testify, after a party has failed to comply with a deadline for submission of a witness list, absent an abuse of discretion"). Michigan appellate courts have routinely affirmed and upheld the trial court's discretion to strike untimely named witnesses.

Dean and *Duray*, on the other hand, specifically set forth factors to consider where a court intends to bar witnesses as a sanction for discovery offenses. In *Dean*, the plaintiff failed to file his witness list by the court-appointed deadline, and the court struck the witness list "as a sanction for Plaintiff's tardiness." 182 Mich App at 31. In *Duray Dev, LLC*, the plaintiff failed to file a witness list in accordance with the trial court's scheduling order, and the Court of Appeals found that it was within the trial court's discretion to impose sanctions against that party for the offense. 288 Mich App at 164.

The Court of Appeals' error lies in the fact that *Dean* and *Duray*, among the other published cases cited in the Court's opinion, differ from the case at hand because they explicitly involved imposing discovery sanctions as a result of violating court orders. None of the cases involved or otherwise discussed good cause under MCR 2.401(I)(2) because they specifically dealt with discovery offenses that warranted sanctions under

RECEIVED by MSC 8/20/2025 11:37:01 PM

MCR 2.313(B), i.e., failing to timely file witness lists in violation of court orders. The implications of sanctions in those cases, which accordingly involved application of a more rigorous standard under *Dean/Duray*, are not analogous to the instant case.

In this case, Plaintiff-Appellee did not fail to timely file a witness list; instead, she failed to show good cause for her late-stage request to amend her timely-filed initial witness list. In Plaintiff-Appellee's timely-filed initial witness list, she solely disclosed Sonny Bal, M.D. as her only orthopedic surgery standard of care expert witness. Dr. Bal remained her only orthopedic expert between April 9, 2021 and September 16, 2022, when she abruptly attempted to file a late amended witness list without requesting permission from the trial court and without demonstrating good cause for the amendment, as required under MCR 2.401(I)(2).

Indeed, for more than a year after filing her lawsuit and initiating discovery, Plaintiff-Appellee timely named Dr. Bal numerous times as her only orthopedic surgery standard of care expert, including in her initial and supplemental disclosures, initial witness list, and discovery responses. Then, Plaintiff-Appellee sought to remove and replace Dr. Bal with a new, never-before-disclosed orthopedic surgery expert, John H. Hall, MD, in her First Amended Witness List on September 16, 2022—133 days after the May 6, 2022 deadline for expert witness disclosure issued by the trial court. (**Appx 155**). She did not seek leave to amend from the trial court or provide Defendants-Appellants with any notice or opportunity to stipulate before filing her 133-days-late amended witness list. Importantly, Plaintiff-Appellee concedes that she never disclosed the new potential orthopedic expert, Dr. Hall, until she filed her first amended witness list. (See **Appx 160-164**).

RECEIVED by MSC 8/20/2025 11:37:01 PM

The issue here is that Plaintiff-Appellee sought to remove her only timely-named orthopedic expert and file an amended witness list *months* after the deadline had passed without requesting permission from the court and, even after she was afforded an opportunity to justify her need to amend, she never provided a reliable explanation for why amendment was necessary. Plaintiff-Appellee failed to demonstrate "good cause" as required under MCR 2.401(I)(2), because she never actually demonstrated that she had any difficulty contacting Dr. Bal while securing his affidavit, scheduling his deposition, communicating regarding his alleged emergency on the morning of his August 15, 2022 deposition, or after cancelling his August 15, 2022 deposition. She also has never demonstrated any other discernable, legally sufficient reason for why Dr. Bal needed to be replaced.

Instead, her supplied information demonstrates that she simply did not try to contact Dr. Bal after his cancelled deposition and abruptly moved on to Dr. Hall. Noticeably absent from Plaintiff-Appellee's filings throughout this litigation, up to and including her appeal of dismissal, is evidence of any attempted communication with Dr. Bal following his cancelled deposition on August 15, 2022. Plaintiff-Appellee attached no affidavits, no text messages, no email communications, or any other evidence to demonstrate the alleged difficulties her counsel had contacting Dr. Bal. Plaintiff-Appellee's failure to provide such support merely suggests that such communications are non-existent because she did not try. More importantly, a failure to try to re-establish contact suggests that Plaintiff-Appellee knew and was attempting to conceal that Dr. Bal did not meet the practice requirements of MCL 600.2169. When replacement of Dr. Bal with Dr. Hall did not work, she attempted to unilaterally voluntarily dismiss her case to

RECEIVED by MSC 8/20/2025 11:37:01 PM

avoid her expert situation being found out, which would have necessitated dismissal of her case for lack of a valid AOM.

Plaintiff-Appellee clearly failed to act in good faith with respect to her disclosure of her experts, and without any verifiable evidence to support Dr. Bal's alleged lack of cooperation or ineffective communication, failed to demonstrate good cause to untimely amend her witness list after the court's appointed deadline. However, *even though Plaintiff-Appellee failed to act in good faith or establish good cause*, she did not commit a discovery offense that warrants sanctions under MCR 2.313(B), and the trial court did not consider the imposition of same. This is the critical component that sets this case apart from *Dean*, *Duray*, and the other cases cited by the Court of Appeals.

Requiring the trial court to apply the *Dean/Duray* factors for sanctions to a case that does not involve sanctions is an improper interference with the trial court's authority to manage its caseload, which is granted by the Michigan Court Rules. Under MCR 2.401(B)(1), the trial court has the authority to set timelines with scheduling orders and other means of case management to facilitate the "fair and expeditious disposition of the action." The trial court also has "the discretion to decline to consider motions filed after [its] deadline." *Velez v Tuma*, 283 Mich App 396, 402; 770 NW2d 89 (2009) (citing *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005)). Like MCR 2.401(I), subsection (B) is silent as to considering or imposing sanctions for failure to comply with the court's case management. Forcing a framework involving the consideration of sanctions upon a case where there are none is improper interference with the trial courts authority over case management under the Michigan Court Rules.

RECEIVED by MSC 8/20/2025 11:37:01 PM

Instead of requiring the astringent application of *Dean/Duray* to this factually and legally distinguishable case solely for the purpose of keeping Plaintiff-Appellee's case alive despite its failings, the Court of Appeals should have followed its prior decisions in cases like *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, No. 367109 (Mich Ct App Sept. 19, 2024) (**Appx 15-23**), wherein the Court of Appeals came to the opposite conclusion of this case, just one week after the instant opinion was issued, and *Red Fit, LLC v Red Effect International Franchise, LLC*, unpublished opinion per curiam of Court of Appeals, Docket No. 363686, 2024 WL 2790504 (Mich Ct App May 30, 2024) (**Supp Appx 392-410**). In *Red Fit, LLC*, the Court of Appeals explicitly (and appropriately) held "[t]he *Dean* factors are considered when deciding on a sanction, such as dismissal, for failing to timely file a witness list, *not as a consideration for accepting a late-filed witness list*" (**Supp Appx 405**). The *Red Fit* Court further concluded that "the trial court's decision to not accept the late-filed witness list was not a sanction for their failure to timely file a witness list," but rather, "a decision to adhere to the court's scheduling order"—a decision that is squarely within the trial court's power and discretion. (**Supp Appx 405**).

It is clear, given recent holdings of the Michigan appellate courts, that it is within the trial court's authority to decide how to manage its cases, including whether to adhere to its scheduling order(s) and to decide not to accept late-amended witness lists, even if doing so ultimately results in dismissal. In accordance with MCR 2.401(B), 2.401(I)(2), and the Michigan courts' longstanding precedent of striking untimely named witnesses (with or without the intent of sanctions), this Honorable Court should not uphold a ruling that interferes with the trial court's authority and discretion granted under the Michigan

RECEIVED by MSC 8/20/2025 11:37:01 PM

Court Rules, especially when doing so would have a substantial prejudicial effect upon the non-moving party.

Indeed, had the trial court permitted Plaintiff-Appellee to proceed with her First Amended Witness List and substitution of her orthopedic surgery standard of care expert, more than 133 days after the expert disclosure deadline closed, a mere five months from the set trial date, and without the newly-named expert's deposition scheduled (especially in light of the fact that it took months of diligent communication by Defendants-Appellants and a court order to schedule Dr. Bal's deposition) Defendants-Appellants would have been subject to a trial by surprise and severely impaired in defending this lawsuit at trial. Plaintiff-Appellee's attempt to untimely replace Dr. Bal with Dr. Hall, in violation of the trial court's scheduling order, was abusive to the litigation process, was an attempt to conduct a trial by surprise, and would have required lengthy re-litigation of this matter if permitted, thereby subjecting the parties to additional costs and expenses.

Although Plaintiff-Appellee's actions did not demonstrate good faith and Plaintiff-Appellee did not provide good cause for her actions, they were not sanctionable in accordance with *Dean/Duray*. The trial court appropriately disallowed Plaintiff-Appellee's attempt and request to file a late amended witness list, which was well within its discretion to make. Thus, the trial court did not abuse its discretion in striking Plaintiff-Appellee's First and Second Amended Witness Lists and disallowing Plaintiff-Appellee from calling a new orthopedic surgery expert witness. This Honorable Court should reverse the Court of Appeals and uphold the trial court's decision.

RECEIVED by MSC 8/20/2025 11:37:01 PM

B. The trial court did not abuse its discretion when it denied Plaintiff-Appellee's Motion for Leave to Amend her Witness List because the court appropriately considered Michigan Court Rules and case law precedent in its decision, including relevant *Dean v Tucker* factors.

In its September 12, 2024 Opinion, the Court of Appeals held that the trial court abused its discretion when it denied Plaintiff-Appellee's Motion for Leave to file an Amended Witness List, effectively resulting in dismissal, because "the trial court did not consider the *Dean* factors." This is not accurate. The Court of Appeals failed to appreciate that the trial court *did* consider the factors set forth in *Dean* and *Duray* when making its decision but only discussed the factors which were most relevant on the record.

Under *Dean*, a trial court's determination in whether a party may call a new witness should carefully consider a number of factors to justify its determination and, where it does not, an abuse of discretion has occurred. 182 Mich App 27, 32-33 (1990). The factors for the court's review are as follows:

> (1) Whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice.

Id. at 32-33; see also *Vicencio v Ramirez*, 211 Mich App 501, 507 (1995) (citing *Dean*).

The trial court has made its decision-making process and reasoning abundantly clear throughout these proceedings, including in the October 12, 2022 hearing and its November 14, 2022 and December 14, 2022 Opinions. Moreover, Plaintiff-Appellee's motion actually relied upon *Dean*, which necessitated the trial court's thorough analysis of that case when deciding the motion. The trial court clearly considered Plaintiff-Appellee's late filings, willful intent to conceal those filings, failure to comply with the

ordered witness list deadline and order to produce Dr. Bal for deposition, Plaintiff-Appellee's lack of compliance with other discovery-related orders and obligations, and the interests of justice. Although the court may not have considered all of *Dean/Duray* factors on the record, these were the factors that were clearly relevant to the case at hand at the time that the trial court was considering the amended witness lists, motion for same, and motions for summary disposition.

Defendants-Appellants do not deny that "the record *should* reflect that the trial court gave careful consideration to the factors involved." *Dean*, 182 Mich App at 32 (emphasis added). However, the court's lack of lengthy discussion on the record when providing its reasoning does not mean that the factor(s) were not considered at all.

Furthermore, even if a court's decision is based upon the wrong grounds or the court gives a wrong reason as the basis of its decision, the reasoning alone is not justification for reversal or remand. *See Helvering v Gowran*, 302 US 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason."). *See also* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 20 (2001) (noting that a common ground for reversal of an administrative order is the failure to state adequate reasons, but pointing out that the fact "[t]hat a lower court gave the wrong reasons for a correct decision is not by itself a justification for reversal or remand"); see also Kevin Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 955 (2007) (noting that, even in the face of faulty reasoning, a correct decision cannot be overturned on appeal).

RECEIVED by MSC 8/20/2025 11:37:01 PM

RECEIVED by MSC 8/20/2025 11:37:01 PM

As will be further discussed below, even if this Honorable Court finds that the good cause standard is not the appropriate standard and the *Dean/Duray* factors should be applied in entirety, thereby determining that the trial court cited the wrong basis for its decision in its reasoning, the trial court still came to the correct decision. It therefore follows that even if it is determined the trial court cited the wrong basis for its reasoning, the trial court's decision should not have been overturned on appeal. *Helvering*, 302 US at 245. Accordingly, this Honorable Court should affirm the trial court's decision and uphold dismissal of this case with prejudice.

C. Even if the trial court had considered all of the *Dean/Duray* factors in its decision, application of the *Dean/Duray* factors weigh in Defendants-Appellants' favor and support a finding that the trial court properly denied Plaintiff-Appellee's Motion for Leave to File a Second Amended Witness List.

Plaintiff-Appellee claims that the trial court did not even attempt to apply the *Dean/Duray* factors, and if it had, the result would weigh in her favor. Defendants-Appellants contend to the contrary that the factors, when applied to the facts of this case, weigh in Defendants-Appellants' favor as follows:

First, Plaintiff-Appellee's violation of the initial scheduling order was willful. This is demonstrated by the text messages to Dr. Hall on August 17, 2022, and her failure to request leave to amend from the trial court in August 2022, when Plaintiff-Appellee's counsel allegedly began having issues getting into contact with Dr. Bal. Plaintiff-Appellee's counsel had been in contact with Dr. Bal just two days before when he cancelled Dr. Bal's deposition on its eve, so Plaintiff-Appellee's claim that she could not re-establish contact Dr. Bal is nonsensical.

RECEIVED by MSC 8/20/2025 11:37:01 PM

Second, Plaintiff-Appellee has a history of refusing to comply with the initial scheduling order, evidenced by her failure to identify Dr. Hall in any of her discovery responses until September 16, 2022—more than 30 days after she abruptly cancelled Dr. Bal's deposition and 133 days after witness lists were due and experts were required to be disclosed, and her failure to even attempt to contact Dr. Bal regarding his court-ordered deposition by November 2, 2022. Further, Plaintiff-Appellee made no attempt to supplement her discovery responses as required by the Court Rules.

Third, Defendants-Appellants would have been severely prejudiced if Plaintiff-Appellee was allowed to replace her standard of care expert who signed the AOM, Dr. Bal, with Dr. Hall, who had not previously been disclosed until September 16, 2022, as noted above. This would have been akin to a trial by surprise, something that has been disapproved of by the Michigan Court of Appeals. *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 779; 404 NW2d 665 (1987).

Fourth, as demonstrated above, Plaintiff-Appellee's attempt to replace Dr. Bal with Dr. Hall on September 16, 2022, 133 days after witness lists were due and experts were required to be disclosed, and more than 30 days after Dr. Bal's cancelled deposition and alleged communication desertion, without notice or previously seeking leave of the trial court, is indicative of deliberate delay.

Fifth, as this involved the late naming of an expert, Plaintiff-Appellee did not comply with the trial court's initial scheduling order pertaining to this issue. Adjacently, it also involved Plaintiff-Appellee failure to comply with the Michigan Court Rules and supplement her disclosures and discovery responses as information became known.

RECEIVED by MSC 8/20/2025 11:37:01 PM

Sixth, Plaintiff-Appellee knowingly failed to attempt to cure the defect until these Defendants-Appellants filed a motion to compel Dr. Bal's deposition on September 9, 2022. Instead, Plaintiff-Appellee filed an amended witness list and offered dates for Dr. Hall's deposition, even though the trial court never permitted her to amend her witness list and Defendants never agreed to the same.

Lastly, a lesser sanction would not serve the interests of justice, as Plaintiff-Appellee's attempts to amend her witness list do not rectify the issue of the Complaint being filed with an invalid AOM, signed by Dr. Bal on March 11, 2021. The trial court gave her the opportunity to produce him to demonstrate qualifications to execute the affidavit. (*See* **Appx 320-333**). Plaintiff-Appellee ignored the witness list disclosure deadline, and more importantly, the trial court's order to produce Dr. Bal for deposition by November 2, 2022, and thus, ignored her opportunity to demonstrate Dr. Bal's qualifications. Critically, Plaintiff-Appellee also fails to recognize that her attempts to amend (and any argument in support of amendment) are ultimately rendered moot because amending her standard of care expert does not address the fatal issue of her deficient AOM.

Nevertheless, as applied, the *Dean/Duray* factors support Defendants-Appellants' position that the trial court was correct to deny Plaintiff-Appellee's motion to amend her witness list and strike the amended witness lists, and in fact highlights Plaintiff-Appellee's unabashed and bad-faith attempts to deceive the trial court and the parties regarding the true status—that is, the invalidity—of her standard of care expert witnesses. The trial court decided correctly on this matter and did not abuse its discretion in doing so, as application

RECEIVED by MSC 8/20/2025 11:37:01 PM

of the *Dean/Duray* factors supports this conclusion. Accordingly, this Honorable Court should reverse the Court of Appeals and uphold the trial court's decision.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals committed clear error in issuing the conflicting opinions and these Defendants-Appellants face material injustice as a result. The decision that must be affirmed is that which was issued by the Court of Appeals panel in *Morris v St. Clair Orthopaedics & Sports Medicine, P.C. and Glenn Minster, M.D.*, No. 367109 (Mich. Ct. App. Sept. 19, 2024).

The *Minster* panel's decision is the right one to apply in this case on the following grounds: the numerous evidentiary issues brought before the lower courts were properly within the discretion of the trial court and the trial court properly denied Plaintiff-Appellee's various evidentiary motions regarding her expert witnesses and properly struck her untimely amended witness lists pursuant to the good cause standard set forth by the Michigan Court Rules and relevant case law. In light of the trial court's sound decisions that were not an abuse of discretion, the trial court properly denied Plaintiff-Appellee's Motion for Voluntary Dismissal and granted summary disposition in favor of Defendants-Appellants, dismissing Plaintiff-Appellee's Complaint for lack of a valid Affidavit of Merit. The trial court's rulings are solidly based in medical malpractice law, the Court Rules, and case precedent. Accordingly, the trial court's dismissal of Plaintiff-Appellee's Complaint must be upheld by this Honorable Court.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

/s/ Enrico G. Tucciarone
By: */s/ Lauren T. Rhoads*
ENRICO G. TUCCIARONE (P52767)
LAUREN T. RHOADS (P86427)
Attorney for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

Dated: August 20, 2025

RECEIVED by MSC 8/20/2025 11:37:01 PM

RECEIVED by MSC 8/20/2025 11:37:01 PM

CERTIFICATE OF COMPLIANCE WITH MCR 7.312 AND 7.212

I, Lauren T. Rhoads, certify that Defendants-Appellants Tri County Orthopedics, P.C. and Jack D. Lennox, D.O.'s Supplemental Brief on Appeal to the Michigan Supreme Court complies with the type-volume requirements and limitations set forth in MCR 7.312 and 7.212. I am relying on the word count of the word-processing system used to produce this document. Defendants-Appellants' Answer uses 12-point Arial font, one-inch margins, and double-line spaced text, and the word count is 6,301.

Respectfully submitted,

FOLEY, BARON, METZGER & JUIP, PLLC

/s/ Enrico G. Tucciarone
By: */s/ Lauren T. Rhoads*
ENRICO G. TUCCIARONE (P52767)
LAUREN T. RHOADS (P86427)
Attorney for Defendants-Appellants
Tri County Orthopedics, P.C.
and Jack D. Lennox, D.O.
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1800/(734) 521-2379
etucciarone@fbmjlaw.com
lrhoads@fbmjlaw.com

Dated: August 20, 2025

RECEIVED by MSC 8/20/2025 11:37:01 PM

CERTIFICATE OF SERVICE

I state that I am employed with the firm of Foley, Baron, Metzger & Juip, PLLC, and I hereby certify that on __August 20, 2025__, on behalf of Defendants-Appellants Tri-County Orthopedics, P.C. and Jack D. Lennox, D.O., I served the foregoing document upon counsel of record via the MiFile E-File and Serve System which will send notification of such filing to the following:

BRIAN J. McKEEN (P34123)
VICTOR BALTA (P77805)
Attorneys for Plaintiff-Appellee
645 Griswold Street, Suite 4200
Detroit, Michigan 48226
(313) 961-4400
vbalta@mckeenassociates.com

MARK GRANZOTTO (P31492)
BETH A. WITTMANN (P63233)
Co-Counsel for Plaintiff
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649
mg@granzottolaw.com

KAREN E. BEACH (P75172)
PAUL J. DWAIHY (P66074)
Attorneys for Defendant
Beaumont Health
38777 Six Mile Road, Suite 101
Livonia, Michigan 48152
(313) 964-4500
karen.beach@tnmdlaw.com
paul.dwaihy@tnmglaw.com

/s/ Laura J. Pilarski
lpilarski@fbmjlaw.com
(734) 742-1800