If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

JB, a legally incapacitated person, by Guardian VERONICA STEIN,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant/Third-Party Plaintiff-Appellant,

and

PROGRESSIVE MARATHON INSURANCE COMPANY,

Third-Party Defendant.

UNPUBLISHED
July 22, 2026
9:11 AM

No. 367360
Washtenaw Circuit Court
LC No. 20-000134-NF

MORIAH, INC., doing business as EISENHOWER CENTER,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

No. 367361
Washtenaw Circuit Court
LC No. 19-000635-NF

Before: MARIANI, P.J., and O'BRIEN and WALLACE, JJ.

O'BRIEN, J. (*concurring*).

I concur in full with the majority opinion. I write separately because, while I am troubled that plaintiff was allowed to call defendant's expert, Dr. Gerald Shiener, as a witness at trial after defendant decided not to, I do not believe that defendant has framed its argument in a way that would allow this Court to get to the crux of the issue.

As the majority recounts, defendant argued below that plaintiff should not be allowed to call Shiener because doing so violated various court rules, which is different than the argument that defendant raises on appeal. Defendant's appellate argument is therefore waived. Even if defendant's appellate argument was not waived, however, it is not clear that defendant would be entitled to relief. Defendant stresses that an expert cannot be subpoenaed to give his or her opinion because an expert "has a property right in his opinion and cannot be made to divulge it in answer to a subpoena." *Klabunde v Stanley*, 384 Mich 276, 282; 181 NW2d 918 (1970). Parties therefore generally do not compel an expert to testify via subpoena but get the expert to agree to testify by paying the expert in exchange for his or her testimony. It follows that, if defendant raised the argument below that it now raises on appeal, then this issue could have been readily resolved by having plaintiffs pay Shiener in exchange for his testimony. Regardless, to the extent that Shiener may have improperly given expert testimony (as opposed to factual testimony) that was beneficial to plaintiffs' case, that testimony was cumulative to other evidence that the jury heard, so it is difficult to see how defendant was prejudiced.

That is not to say that I believe that Shiener, an expert retained by defendant, should have been permitted to testify on plaintiffs' behalf. While defendant has always observed that it originally retained Shiener as an expert, defendant has never argued that this fact should have precluded plaintiffs from calling Shiener as a witness at trial. Had defendant raised this argument, it would have presented a much more interesting issue.

MCR 2.302(B)(4)(b) provides that "[a] party may not discover the . . . opinions held by an expert who has been retained . . . by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except" in circumstances not relevant here. Defendant originally expected to call Shiener as a witness but changed its mind, so Shiener was not expected to be called as a witness by the defense when plaintiffs listed Shiener on their witness list. MCR 2.302 is modeled after FR Civ P 26, and federal courts who have encountered this fact pattern—where one party originally intends to call an expert witness but ultimately decides not to, and then the other party seeks to call the defense's expert to testify—have held that, while the court rule does not explicitly cover this situation, the concern for fairness underlying the rule remains. To account for that concern, some federal courts have held that the proper way to resolve the issue is to conduct the equivalent of a 403 balancing test to determine whether the probative value of the expert's testimony is outweighed by the danger of unfair prejudice. See, e.g., *House v Combined Ins Co of America*, 168 FRD 236, 247 (ND Iowa, 1996); *Ferguson v Michael Foods, Inc*, 189 FRD 408, 409 (D Minn, 1999). Some states that have court rules modeled on FR Civ P 26 and have confronted this issue have adopted a similar approach. See, e.g., *Para v Anderson ex rel Co of Maricopa*, 231 Ariz 91, 94; 290 P3d 1214 (2012); *McClendon v Collins*,

132 Nev 327, 332; 372 P3d 492 (2016); *Sovde by & through Kinney v Scott*, 410 P3d 778, 784 (Colo App, 2017). I would consider adopting a similar approach in Michigan.[1]

As already stated, however, defendant has never framed its argument in a way that presents this issue. This case is therefore not the proper vehicle to address whether this approach should be adopted in Michigan. With that being the case, I concur with the majority opinion in full.

/s/ Colleen A. O'Brien

[1] Defendant stresses on appeal how severely it was prejudiced when the jury was allowed to hear that Shiener was originally hired by defendant, and plaintiffs counter that there was nothing wrong with Shiener testifying about the factual circumstances of his hiring and the information that defendant gave him. Under a 403 balancing test, this information would have almost certainly been excluded because the jury hearing "that the expert called by one party had originally been hired by the other" is generally considered " 'explosive' unfair prejudice." *Ferguson*, 189 FRD at 410. See also *Sovde by & through Kinney*, 410 P3d at 784 (recognizing that "this sort of prejudice" has been called "explosive"); *House*, 168 FRD at 241 (same); *Rubel v Eli Lilly & Co*, 160 FRD 458, 460 (SDNY, 1995) (recognizing that "[o]ne leading commentator aptly has characterized the fact of the prior retention by the adversary as 'explosive' "); *Peterson v Willie*, 81 F3d 1033, 1037 (CA 11, 1996) (citing *Rubel* and recognizing its discussion of the commentator's description of "this prejudicial fact as 'explosive' ").