STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE MALLORY and LABARON MALLORY,

Plaintiffs-Appellants,

v

BEAUMONT HEALTH SYSTEM, doing business as BEAUMONT ROYAL OAK HOSPITAL, DR. ARTIN BASTANI, M.D., LINDSEY SARNOVSKY, CRNA, and JANICE E. WOLFF, CRNA,

Defendants-Appellees.

UNPUBLISHED
December 22, 2020

No. 350263
Oakland Circuit Court
LC No. 2018-164572-NH

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right following the trial court's order granting a motion for a directed verdict in favor of defendants, [1] Beaumont Health System, Lindsey Sarnovsky,[2] and Dr. Artin Bastani. We affirm.

[1] The trial court entered a stipulated order dismissing plaintiffs' claims against defendant Janice E. Wolff, CRNA, a nurse employed by Beaumont Health System.

[2] For convenience, we collectively refer to Beaumont Health System and Sarnovsky as "Beaumont" in light of their substantial identity of interest and common representation below and on appeal.

I. FACTS

In November 2015, plaintiff Catherine Mallory[3] was admitted to defendant Beaumont Hospital as an outpatient to undergo a medical procedure. Before this procedure, Mallory was evaluated by an anesthesiologist, defendant Bastani, and it was decided that the "anesthesia plan" for the procedure would be "general anesthesia with endotracheal intubation." Mallory signed a consent form that warned the anesthesia procedure came with risks to her "vocal cords" and also with the risk of "hoarseness."

Dr. Bastani was present during the induction of anesthesia for Mallory. After "induction of anesthesia," Mallory's intubation was performed by Sarnovsky, a certified registered nurse anesthetist (CRNA). Dr. Bastani supervised Mallory's intubation, and he testified during his deposition that there "was only one attempt" at the procedure and that he did not recall any trauma or difficulty during that single attempt."

After the procedure, Mallory woke up in the recovery room experiencing soreness in her throat beyond what she expected. The soreness did not subside after the procedure, and eventually Mallory was diagnosed by Dr. Glendon Gardner with "left vocal cord scarring."

Subsequently, plaintiffs commenced this cause action. Ultimately, the trial court granted defendants' motions to strike the testimony of plaintiffs' standard-of-care witnesses, denied plaintiffs' motion for leave to amend their witness list before trial, and granted defendants' motion for a directed verdict. This appeal followed.

II. DR. WEINGARTEN

Plaintiffs first argue on appeal that the trial court erred when it granted Bastani's motion to strike the testimony of their physician expert witness Dr. Alexander Weingarten. We disagree.

"We review a trial court's decision on a motion in limine for an abuse of discretion." *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 63; 836 NW2d 898 (2013) "A trial court's rulings concerning the qualifications of proposed expert witnesses are reviewed for an abuse of discretion." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Questions of law "underlying evidentiary rulings, including the interpretation of statutes and court rules," are reviewed de novo. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016).

"In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). "Failure to prove any one of these elements is fatal." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003). "Expert testimony is required to establish

[3] Because Catherine Mallory is the patient alleging medical malpractice, and plaintiff LaBaron Mallory has only a derivative claim, references to "Mallory" in this opinion will refer to Catherine.

the applicable standard of care and to demonstrate that the defendant breached that standard." *Gonzalez v St John Hosp & Med Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007).

MCL 600.2169(1) provides, in relevant part, as follows:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c),[4] during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

In *Woodard*, the Michigan Supreme Court explained that a " 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified.' " *Woodard*, 476 Mich at 561. Relatedly, a " 'subspecialty' is a particular branch of medicine or surgery in which one can potentially become board certified that falls under a specialty or within the hierarchy of that specialty." *Id*. at 562. "A subspecialty, although a more particularized specialty, is nevertheless a specialty," and therefore, "if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action." *Id*.

Plaintiffs retained Dr. Weingarten as an expert witness to offer standard-of-care testimony in support of their claim of medical malpractice against Dr. Bastani. Dr. Weingarten authored an affidavit of merit that was attached to plaintiffs' complaint, in which he stated that he "devoted

[4] Subdivision (c) comes into play "[i]f the party against whom or on whose behalf the testimony is offered is a general practitioner . . . ."

more than 50% of [his] professional time to either or both of . . . [t]he active clinical practice of Anesthesiology," or instructing "students in an accredited health professional school or accredited residency or clinical research program in Anesthesiology."

Dr. Bastani testified that he was a board-certified anesthesiologist, and that the medical specialty he spent the majority of his time practicing was anesthesiology. While Bastani also testified that he was board certified in the subspecialty of critical care, he only practiced critical care "six weeks a year," and there was no evidence that Bastani was practicing critical care when he treated Mallory.

Dr. Weingarten testified that he was board certified in the practice of anesthesiology and the medical subspecialty of pain management. He estimated that he generally worked between 80 to 100 hours each week. When he was asked how many of his weekly work hours were devoted to his practice of pain management, Dr. Weingarten explained, "Well, right now, I guess probably around 80 to 85 percent when I am not doing—you know, basically I am doing a majority of my pain management. And I do some office space anesthesia . . . ." According to Dr. Weingarten, he had spent approximately 80 percent of his professional time practicing pain management since "about 2007, 2008."

According to Dr. Weingarten, the common procedures he performed during his pain management practice included "lumbar epidural injections, whether interlaminar or trans-foraminal," which constituted the majority of the procedures, and he also performed "trigger point injections," "facet blocks," "radio frequency ablation," "sympathetic blocks," "spinal cord simulator trials," "percutaneous diskectomies," and "some plate rich plasma, occasional stem cell injections." He last practiced as a member of an anesthesia group providing anesthesia to hospital patients in 2017, and this practice occupied between "5 to 8 percent" of his weekly professional time. When he was asked if his scope of work as an expert witness reached beyond standard-of-care issues, Dr. Weingarten replied, "I don't believe so."

Dr. Weingarten testified that as of the date of the deposition he had "medical students and residents . . . fairly frequently come through [his] office," and he taught "them about pain management." He previously trained anesthesiology residents at the Nassau University Medical Center, but that program disbanded in 2010.

Dr. Bastani filed a motion to strike Dr. Weingarten's testimony on the ground that he was unqualified to offer expert testimony under MCL 600.2169 in light of his deposition testimony that he spent the majority of his professional time practicing pain management, where the medical specialty relevant to plaintiffs' malpractice claim against Dr. Bastani was anesthesiology. In their response, plaintiffs argued that Dr. Weingarten was qualified to offer expert testimony because he taught medical students anesthesiology even though he also testified that he spent a significant amount of his professional time practicing the subspecialty of pain management. Plaintiffs also argued that there was conflicting evidence regarding the extent of time Dr. Weingarten spent practicing, respectively, pain management and anesthesiology, given the contents of Dr. Weingarten's affidavit of merit, and therefore the trial court should weigh the evidence and consider the substantial overlap between the practice of pain management and anesthesiology. Plaintiffs alternatively contended that even if Weingarten was not qualified to offer standard of care testimony, he was nonetheless qualified to offer causation testimony.

During the hearing on the motion to strike Dr. Weingarten's testimony, the trial court acknowledged that there was a conflict between the affidavit of merit and Dr. Weingarten's deposition testimony. But the court noted that Dr. Weingarten's testimony came after the affidavit of merit, and that he "clearly admit[ted] and concede[d] that 80 to 85 percent of his time" was spent on a specialty other than anesthesiology. And the trial court stated that even when viewing the "vague reference to teaching" in the light most favorable to plaintiffs, that reference did not "overcome the fact there [was] an insufficient amount of time" to "meet the majority of time threshold" given Dr. Weingarten's other testimony.

The trial court also rejected plaintiffs' contention regarding overlap between specialties, on the ground that "the authority cited very plainly reveals that subspecialties do not permit the determination of an overlap to eviscerate the timing requirements." Ultimately, the trial court noted that Dr. Weingarten testified that he was only providing an opinion on standard of care, and therefore allowing Dr. Weingarten to testify regarding causation "would be trial by ambush" and otherwise "dubious in light of the fact he would not be able to testify as a standard of care expert." The trial court subsequently entered an order granting the motion to strike.

Plaintiffs argue that the trial court erred because Bastani contended that Weingarten spent the majority of his professional time practicing pain management, but that Bastani's motion failed to address Dr. Weingarten's testimony that he taught medical students anesthesiology. Curiously, plaintiffs' appellate argument does not directly address the trial court's rejection of this argument. Indeed, as discussed above, the trial court ruled that "the vague reference to teaching" failed to overcome Dr. Weingarten's unequivocal testimony that he spent the majority of his time practicing pain management.

Regardless, closer examination of Dr. Weingarten's testimony reveals that he had "medical students and residents come through [his] office," and that he "teach[es] them about pain management." Therefore, that portion of Dr. Weingarten's testimony only reinforces that he spent the majority of his time involved in the practice of pain management and not anesthesiology. Dr. Weingarten also explained that as of April 2018 he had a "current appointment at New York Medical College through the Department of Pharmacology," and that he previously was an instructor for an anesthesiology residency program that disbanded in 2010. Given that the relevant time period is the year preceding Mallory's intubation, these teaching activities are irrelevant because they fall outside of that time range.

Plaintiffs contend that even if Dr. Weingarten's testimony established that he spent the majority of his time practicing pain management, such testimony conflicted with his affidavit of merit in which he indicated he spent the majority of his time practicing anesthesiology. Plaintiffs offer no explanation why Dr. Weingarten's affidavit of merit should be afforded the same weight as his unequivocal and more detailed deposition testimony.

This Court has rejected attempts by a party "to contrive factual issues by relying on an affidavit when unfavorable deposition testimony shows that the assertion in the affidavit is unfounded," even when the affidavit in question was an affidavit of merit authored before the unfavorable deposition. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 481-482; 633 NW2d 440 (2001) (quotation marks and citation omitted). Therefore, plaintiffs have not

demonstrated that the trial court erred in how it dealt with the conflict between Dr. Weingarten's testimony and affidavit of merit.

Plaintiffs nonetheless argue that the conflict between Dr. Weingarten's testimony and the affidavit of merit provided the trial court an opportunity to consider the overlap between pain management and anesthesiology. Plaintiffs explain that their "overlap" analysis is based on an unpublished, per curiam opinion of this Court.

We have reviewed the decision relied upon by plaintiffs[5] and note that it does not create or endorse an "overlap" analysis when considering conflicting evidence regarding which medical specialty an expert witness spent the majority of his or her professional time practicing. Rather, in that decision this Court merely noted indications that the defendant's expert witness practiced orthopedic surgery largely in the context of sports medicine. Thus, plaintiffs' reliance on that decision is wholly misplaced.

Regardless, Dr. Weingarten did not offer any contradictory testimony regarding which specialty he spent the majority of his professional time practicing. And despite plaintiffs' contention regarding the overlap between pain medicine and anesthesiology, Dr. Weingarten listed the common procedures he performed as a pain management physician, and his list did not include intubations.

Plaintiffs contended in their statement of questions presented that that trial court erred when it disqualified Dr. Weingarten from offering causation testimony, but plaintiffs' brief on appeal contains no further developed argument or any legal authorities in support of their contention. Similarly, plaintiffs' reply brief contains no discussion of plaintiffs' contention regarding the barring of Dr. Weingarten as a causation witness. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position." *Seifeddine v Jaber*, 327 Mich App 514, 519-520; 934 NW2d 64 (2019). "Failure to adequately brief an issue constitutes abandonment." *Id*. at 520. Plaintiffs have abandoned this contention by failing to brief it.

Plaintiffs assert that *Woodard* was wrongly decided, with the result that "overqualified" expert witnesses are prevented from offering testimony. However, plaintiffs also correctly concede that "this Court does not have the power to overrule or modify *Woodard* in any meaningful way." Therefore, this Court need not address plaintiffs' assertions further.

[5] *Turkish v William Beaumont Hosp*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2018 (Docket No. 339522). "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, such opinions may be consulted as persuasive authority. See *Hicks v EPI Printers, Inc*, 267 Mich App 79, 87 n 1; 702 NW2d 883 (2005).

III. NURSE BUETTNER

Plaintiffs argue that the trial court erred when it granted Beaumont's motion to strike the testimony of their CRNA expert witness, Neil Buettner. We disagree.

"The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169." *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067; 729 NW2d 221 (2007). MRE 702 states as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 "incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharm, Inc*, [509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)], in order to interpret the equivalent federal rule of evidence," and, under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable . . . ." *Elher*, 499 Mich at 22 (quotation marks and citation omitted). Thus, MRE 702 "requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable." *Id*. Or, in other words, "MRE 702 requires trial judges to act as gatekeepers who must exclude unreliable expert testimony." *Lenawee Co v Wagley*, 301 Mich App 134, 162; 836 NW2d 193 (2013) (quotation marks omitted).

"Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Edry v Adelman*, 486 Mich 634, 642; 786 NW2d 567 (2010). "A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Elher*, 499 Mich at 23.

"MCL 600.2955(1) requires the court to determine whether the expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied on by the expert[.]" *Ehler v Misra*, 499 Mich 11, 23; 878 NW2d 790 (2016). MCL 600.2955(1) provides that a trial court "shall consider" the following factors when it makes this determination:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

However, not every factor may be relevant to the determination in every case. *Ehler*, 499 Mich at 27. And, ultimately, "it is within a trial court's discretion how to determine reliability." *Id*. at 25.

"Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community." *Wiley*, 257 Mich App at 492. "Although nurses are licensed healthcare professionals, they do not engage in the practice of medicine." *Decker v Rochowiak*, 287 Mich App 666, 686; 791 NW2d 507 (2010). Thus, "the standards of care for general practitioners and specialists do not apply to nurses," and instead "the common-law standard of care applies to malpractice actions against nurses." *Id*.

" '[T]he applicable standard of care is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities.' " *Id*., quoting *Cox ex rel Cox v Bd of Hosp Managers*, 467 Mich 1, 21-22; 651 NW2d 356 (2002) (alteration in the original). "A nonlocal expert may be qualified to testify if he or she demonstrates a familiarity with the standard of care in an area similar to the community in which the defendant practiced." *Decker*, 287 Mich App at 686.

Plaintiffs retained Buettner to offer expert testimony in support of their malpractice claims against Beaumont relating to defendant Sarnovsky's intubation of Mallory. Buettner testified that he was first certified as a CRNA in 1987, and had approximately 33 years of experience. Asked if the standard of care for a CRNA was a local or national one, he replied that, "generally speaking, it's probably a national standard," that he "testified in some jurisdictions in which they had a local standard," but that he could not "tell the difference in terms of things that [he] was opining on." Buettner had no opinion whether plaintiffs' claims implicated a local or national standard of care.

Buettner did not agree that an injury to the vocal cords could occur when a CRNA complied with the standard of care for intubating and extubating a patient. Asked if a patient could sustain an injury from intubation in the absence of malpractice, he replied, "No."

Buettner stated that "if you injure the vocal cords, that is a breach of the standard of care," and agreed that it was "impossible to use proper technique during intubation or extubation, comply with the standard of care and still get a vocal cord injury." Buettner stated that he did not have any literature that supported his opinion, but also that he was not aware of any literature stating that an injury during intubation or extubation could occur absent malpractice. Buettner did not do any research or speak with any of his colleagues relating to his opinion, and could offer no support for his position other than his "personal practice," including his understanding that "hoarseness" was usually "a short-term issue" because only "one percent or two percent of patients" experienced hoarseness following intubation that lasts longer than a week. He believed that malpractice occurred when there was "visual evidence" of an "injury or scarring to the vocal cord."

When asked "[w]hy is it not possible to have a vocal cord injury and have the CRNA comply with the standard of care," Buettner replied that "based on [his] training, education, and experience, [he] can sit here and opine, and [he] just know[s] it's a breach of the standard of care to injure the vocal cords and that it should be a never event."

Beaumont filed a motion to strike Buettner's testimony on the grounds that he did not satisfy the requirements imposed by MRE 702 and MCL 600.2955, because the only support he offered for his opinion was his personal experience, and because he did not know if his opinion that vocal cord injury caused by intubation would only occur during a breach of the standard of care was accepted among CRNAs generally. Beaumont also contended that Buettner's opinion was unreliable because his testimony showed that he was unfamiliar with the local standard of care, and because his testimony that the intubation at issue was traumatic lacked evidentiary support and contradicted Dr. Bastani's testimony that Mallory's intubation occurred without incident.

Plaintiffs answered that Buettner's expert opinion was reliable given his extensive education, training, and experience working in cities similar to Royal Oak. Plaintiffs also argued that Buettner's testimony regarding the traumatic intubation was consistent with the other evidence that showed that Mallory's scar occurred when she was intubated in 2015.

The trial court held that Buettner's opinion fell "well short of the standards that are required [by] MRE 701 through 703" and that Buettner's opinion was "not well-grounded" or "reliable." The court explained that there was no need for an evidentiary hearing because of "the very thorough analysis both in the motion, but also in the testimony" where Buettner made several "very vivid, clear, unequivocal admissions with regard to the source of his opinion, which reveal[ed] the unreliability of it." Therefore, the trial court granted the motion to strike on the basis of Buettner's testimony "and for the other reasons articulated in the motion."

Plaintiffs contend that the trial court erred because Buettner's opinion was reliable in light of his education, training, and experience. Yet it is generally insufficient to rely on a proposed expert's experience and background to establish the reliability of his or her opinion. *Edry*, 486 Mich at 642. Plaintiffs do not identify any other basis for Buettner's opinion. Our Supreme Court has explained that the concern in relying on an expert witness's personal opinion is that the expert witness "may have held himself to a higher, or different standard than that practiced by the medical community at large." *Ehler*, 499 Mich at 28. Plaintiffs' reiteration that Buettner's opinion was supported solely by his education and experience does not show that the trial court erred when it ruled that Buettner's opinion was unreliable.

Plaintiffs also argue that Beaumont improperly argued that Buettner's description of Mallory's intubation as traumatic contradicted record evidence on the ground that some of Mallory's medical records indicated that the intubation was indeed traumatic. We note that plaintiffs' argument is based on records of an assessment of Mallory performed by Dr. Glendon Gardner, but that those records were not attached to plaintiffs' response to Beaumont's motion to strike Buettner or otherwise presented to the trial court at that time, and, therefore, those records were not part of the lower court record when the trial court granted the motion to strike.

"This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Accordingly, plaintiffs' reliance on Dr. Gardner's assessment for any purpose on appeal is unavailing.

Plaintiffs assert that Buettner was qualified to offer standard-of-care testimony regardless of whether it pertained to a local or national standard. In *Decker*, this Court held that an expert witness was qualified to offer such testimony despite having testified that a national standard of care governed the defendant's actions, because the expert explained how the same standard applied locally and nationally given the commonplace nature of the procedures at issue. *Decker*, 287 Mich at 686-687.

As noted, Buettner admitted that he did not know if plaintiffs' claims involved a local or national standard of care, but supposed generally that it was a national standard, and added that when he "testified in some jurisdictions in which they had a local standard" he could not "tell the difference in terms of things that [he] was opining on." Thus, Buettner did not testify to any similarities between national and local standards of care regarding intubations, but merely reported that he personally could not tell the difference when he testified in jurisdictions that recognized local standards. Therefore, plaintiffs have not shown that the trial court erred when it accepted Beaumont's argument that Buettner was unfamiliar with the relevant standard of care.

IV. LEAVE TO AMEND WITNESS LIST

Finally, plaintiffs argue that the trial court erred when it denied their motion for leave to amend their witness list before trial. We disagree.

"This Court reviews for an abuse of discretion a trial court's decision whether to allow a party to add an expert witness." *Cox v Hartman*, 322 Mich App 292, 312; 911 NW2d 219 (2017).

"Witness lists are an element of discovery." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). "The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial." *Id*. "The purpose of witness lists is to avoid trial by surprise." *Id*. (quotation marks and citation omitted).

MCR 2.401(I) provides as follows:

> (1) No later than the time directed by the court . . . , the parties shall file and serve witness lists. The witness list must include:

> (a) the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
>
> (b) whether the witness is an expert, and the field of expertise.
>
> (2) The 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.
>
> (3) This subrule does not prevent a party from obtaining an earlier disclosure of witness information by other discovery means as provided in these rules.

"Once a party has failed to file a witness list in accordance with the scheduling order, it is within the trial court's discretion to impose sanctions against that party." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 164; 792 NW2d 749 (2010). "These sanctions may preclude the party from calling witnesses." *Id*. "Disallowing a party to call witnesses can be a severe punishment, equivalent to a dismissal." *Id*. However, " '[t]he mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a sanction.' " *Id*. at 166 n 53, quoting *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). Additionally, Michigan policy favors "the meritorious determination of issues." *Tisbury v Armstrong*, 194 Mich App 19, 21; 486 NW2d 51 (1991).

Thus, the " 'record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it.' " *Duray Dev*, 288 Mich App at 165, quoting *Dean*, 182 Mich App at 32. In *Duray Dev*, this Court reiterated the nonexhaustive *Dean* factors, which trial courts should consider before sanctioning a party:

> "(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive." [*Duray Dev*, 288 Mich App at 165, quoting *Dean*, 182 Mich App at 32-33 (alteration in the original).]

"The court should also evaluate other options before concluding that a drastic sanction is warranted." *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994). This Court has held that a trial court's failure to consider other sanctions "on the record before concluding that dismissal of the complaint was warranted constituted error." *Thorne v Bell*, 206 Mich App 625, 635; 522 NW2d 711 (1994).

"Where the sanction is the barring of an expert witness resulting in the dismissal of the plaintiff's action, the sanction should be exercised cautiously." *Dean*, 182 Mich App at 32. In *Thorne*, this Court held that the plaintiffs' violation of the trial court's scheduling order by failing to timely file witness and exhibit lists did not justify dismissal of the action, in part because the record did not indicate "a history of recalcitrance or deliberate noncompliance with discovery orders, which typically precedes the imposition of such a harsh sanction." *Thorne*, 206 Mich App at 633-634. Yet, where the lateness of the disclosure of a witness prevents pertinent discovery from being conducted, barring the witness may be proper. See *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90-91; 618 NW2d 66 (2000) (disallowing expert testimony from a late-disclosed expert because the opposing party "had no chance to conduct any discovery of the expert and . . . it would be unfair to require [the party] to prepare on such short notice").

After the trial court granted the motions striking Dr. Weingarten and Buettner, plaintiffs filed a motion for leave to amend their witness list to add two experts to replace the stricken ones, arguing that plaintiffs' claims would fail without expert testimony, that because denying their motion would be tantamount to a dismissal of their claims this required consideration of the *Dean* factors, and that public policy supported resolution of their claims on their merits.

The trial court denied the motion on the grounds that they filed it approximately six weeks before trial, where discovery had "long since closed," case evaluation was conducted, the filing deadline for dispositive motions had passed, and "trial preparation [was] underway." The court observed that plaintiffs essentially wanted a "redo" after their expert witnesses were stricken even though plaintiffs' "case was built around" those witnesses, and that such a redo would result in palpable prejudice to defendants because defendants would be unable to properly investigate, depose, and evaluate the new experts before trial.

The trial court also considered the *Dean* factors, and found that they weighed in favor of denying plaintiffs' motion. The court found that plaintiffs' failure to disclose their new expert witnesses was "the result of the culpable negligence" of plaintiffs, there would be significant prejudice to defendants, plaintiffs provided actual notice of the new witnesses "just weeks before trial," plaintiffs "squandered approximately 7 weeks between the initial rulings striking the experts" before they filed their motion, plaintiffs "obstructed discovery in the past and [were] ordered to allow" defendants "to conduct discovery on [their] fact witnesses,"[6] and that granting the motion would result in either substantial delay or prejudice to defendants.

Plaintiffs assert that the trial court was responsible for their need to file an amended witness list because the court granted defendants' motions to strike plaintiffs' experts, which were de facto motions for summary disposition filed past the deadline for dispositive motions. "Courts are not bound by a party's choice of labels because this would effectively elevate form over substance.''

[6] Dr. Bastani filed a motion to strike plaintiffs' fact witnesses on the ground that plaintiffs failed to provide them for deposition before the close of discovery. The trial court responded by denying Bastani's motion, but also ordering plaintiffs to answer interrogatories within seven days, and that the "outstanding depositions" of plaintiffs' fact witnesses be completed by the end of May 2019.

Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co, 324 Mich App 182, 204; 920 NW2d 148, 161 (2018) (quotation marks and citation omitted).

The trial court's scheduling order required that all dispositive motions be filed no later than April 5, 2019, and that all motions in limine be filed no later than July 31, 2019, and it set the trial date as September 3, 2019. Defendants filed their respective motions to strike plaintiffs' experts in May 2019. When plaintiffs argued that Bastani's motion to strike was nothing more than an untimely de facto motion for summary disposition, the trial court held that the motion was a timely motion in limine that contained no reference to MCR 2.116 or prayers for dismissal.

Plaintiffs argue on appeal that, because the effect of the trial court's granting of the motions to strike was dismissal of their claims, those motions were necessarily untimely motions for summary disposition. Plaintiffs' thus base their argument on the effect of the motions, rather than their substance, which pertained to only the qualifications and reliability of the proposed experts. Because both motions were properly filed within the terms of the scheduling order, we are not persuaded by plaintiffs' characterization of them as untimely dispositive motions. "There is no statutory or case law basis for ruling that a medical malpractice expert must be challenged within a 'reasonable time.' " *Greathouse v Rhodes*, 465 Mich 885, 885; 636 NW2d 138 (2001). It was plaintiffs' responsibility to ensure their expert witnesses were qualified. *Clerc*, 477 Mich at 1067. Moreover, plaintiffs' problems with establishing their experts' qualifications should have been foreseeable to plaintiffs. See *Rock*, 499 Mich at 267 (MCL 600.2169(1)(a) "allows a plaintiff to ensure that an expert is qualified well in advance of the time of the testimony"). Plaintiffs' attempt to place the blame for their expert witness woes on the trial court is thus misplaced.

Plaintiffs additionally urge this Court to independently apply the *Dean* factors, even though the trial court actually fulfilled its obligation to do so, and explained its findings in a written opinion and order. Regardless, plaintiffs argue on appeal that the *Dean* factors weighed in favor of granting their motion to amend.

First, plaintiffs do not address whether their violation was willful or accidental, but they do assert that the trial court's "tardy rulings" created plaintiffs' "emergency." But, as discussed above, the trial court's rulings on defendants' timely motions to strike were proper under the trial court's scheduling order. And the trial court itself found that plaintiffs' motion for leave to file an amended witness list was "the result of the culpable negligence" of plaintiffs.

Second, plaintiffs argue that they fully complied with discovery in the trial court, yet the court found that plaintiffs "obstructed discovery in the past and [were] ordered to allow" defendants "to conduct discovery on [plaintiffs'] fact witnesses." Plaintiffs do not address the trial court's finding in their brief on appeal, and the trial court's finding was supported by the record.

Third, plaintiffs assert that defendants would not have been prejudiced if the trial court granted plaintiffs' motion because the court could have allowed defendants time to perform discovery on plaintiffs' new experts. Plaintiffs once again do not address the trial court's finding that defendants would be significantly prejudiced where plaintiffs' disclosure of their new witnesses would occur months after the close of discovery and "a few weeks before trial," and where defendants "would be required to swallow whole the testimony" of the new experts as the result of the lack of time investigate the veracity of the positions of the new witnesses. The trial court

also astutely observed that plaintiffs essentially requested a "redo" of the proceedings in response to plaintiffs' "self-inflicted wounds."

And fourth, plaintiffs contend that they provided notice to defendants on the day before case evaluation that they might offer additional expert witnesses, and that they took prompt steps to do so after Dr. Weingarten and Buettner were disqualified. The trial court entered orders granting the motions to strike on May 22, 2019, and May 29, 2019, but plaintiffs waited until July 9, 2019, to file their motion for leave to amend their witness list. Thus, the record supports the trial court's finding that plaintiffs "did not attempt to cure the defect" caused by the loss of their expert witnesses "until the eve of trial," having "squandered approximately 7 weeks between the initial rulings" and their filing of the motion to amend.

While not addressed by plaintiffs on appeal, the trial court also contemplated the lesser sanction of reopening discovery and adjourning the trial, but it found that would "lead to the dilatory and uneconomical determination of the action because it, in essence, would add months of delay and expense to the case without necessarily any corresponding improvement of the substantial rights of the parties," and it would "encourage parties to flaunt the scheduling orders of the court with no concomitant sanction." Given the foregoing, plaintiffs have not shown that the trial court erred by denying their motion for leave to amend their witness list.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen