IN THE SUPREME COURT OF OHIO

Case No. 2024-1212

CHERI SHEREE MOORE, individually and in her capacity as Parent, Natural Guardian, and Next Friend of P.C.M., a minor,
Plaintiff-Appellant,

-vs-

MERCY MEDICAL CENTER, DR. ALBERT T. DOMINGO, DR. GODWIN I. MENIRU, and OHIO DEPARTMENT OF MEDICAID,
Defendant-Appellees.

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT
STARK COUNTY, OHIO, CASE NO. 2023 CA 00145

MERIT BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Association for Justice ("OAJ") is devoted to the 7th Amendment and the right to trial by jury. OAJ comprises over one thousand attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and promote public confidence in the legal system.

OAJ submits this brief out of concern that affirming the trial court's ruling will set new precedent in Ohio that will provide litigants on both sides an opportunity to game and delay discovery in an attempt to exclude an opposing party's expert opinions. It will also prevent experts from supplementing their opinions based on new information learned in discovery pursuant to Civ.R. 26(B)(7)(c).

STATEMENT OF THE CASE AND FACTS

OAJ defers largely to the statements of the case and facts offered by the parties in this case. However, OAJ would like to highlight certain facts which show that Dr. Martin Gubernick, M.D.'s ("Dr. Gubernick") affidavit was based upon newly discovered evidence and the opinions therein were permitted in a supplemental expert report pursuant to Civ.R. 26(B)(7)(c) and should not have been stricken:

1. Dr. Gubernick's original expert report was issued before the deposition of Defendant Dr. Godwin Meniru, M.D. took place.

On October 19, 2022, Plaintiff Cheri Sheree Moore ("Moore") requested to take the deposition of Defendant Dr. Godwin Meniru, M.D. ("Dr. Menirui"). But Dr. Meniru was not made available for a deposition until March 2023.

On December 9, 2022, Plaintiff-Appellant Moore produced the expert report of OB/GYN standard of care expert Dr. Gubernick in accordance with the case management schedule. Dr.

Gubernick's report contained numerous opinions, including the general and unequivocal opinion against Dr. Meniru that: "**Dr. Domingo, Dr. Meniru, [and] the nursing staff all deviated from good and acceptable practice by not advocating for a c section in the evening of 5-28-2015**."

On March 6, 2023, Plaintiff-Appellant Moore was finally able to take the deposition of Dr. Meniru (nearly 6 months after requesting such deposition). In his deposition, Dr. Meniru testified that he was not the attending doctor on May 28, 2015, but that on the morning of May 29, 2015, via phone calls at 7:27 a.m. and 7:32 a.m., the nurses notified Dr. Meniru of fetal distress. This was the first time Plaintiff-Appellant discovered that Dr. Meniru had been notified of fetal distress on the morning of May 29, 2015, as that information was not contained in the medical records.

2. Dr. Gubernick's additional/supplemental expert opinions were based on information learned in Defendant Dr. Meniru's deposition.

In a highly irregular tactic, *on the same date as his deposition*, Defendant-Appellee Dr. Meniru filed a Motion for Summary Judgment. This prevented Dr. Gubernick from issuing a supplemental expert report based upon Dr. Meniru's deposition testimony—which he was no doubt going to do and would have been required to do under the Rules.

Defendant-Appellee Dr. Meniru's Motion for Summary Judgement claimed that Moore had no expert criticism of the treatment Dr. Meniru provided to Moore since the report focused on the events that occurred on May 28, 2015, and Dr. Meniru claimed he was not responsible for the patient on May 28, 2015. To be sure, Moore disputed the claim that Dr. Meniru had no responsibility for the patient on May 28, 2015, and Dr. Gubernick's expert report expressly stated that Dr. Meniru had breached the standard of care on May 28, 2015. With the trial court being required to accept all facts and inferences in the light most favorable to the non-moving party, the trial court could not have granted summary judgment if it had considered the initial opinions from Dr. Gubernick.

Once Dr. Meniru's deposition was transcribed, it was provided to Dr. Gubernick. After receiving this new information, Dr. Gubernick prepared a sworn affidavit that affirmed his original expert report and provided supplemental opinions regarding the events on May 29, 2015 based on the new evidence learned during Dr. Meniru's deposition. Dr. Gubernick's original report was incorporated into the affidavit.

In the Affidavit, Dr. Gubernick clearly avers that "**After writing my report, I received and reviewed the deposition transcripts of the following witnesses: a. Dr. Godwin Meniru[,] b. Kamerie Allen, RN [and] c. Leslie Pettay, RN**." (Gubernick Aff., ¶ 10.) He then proceeded to detail the supplemental opinions: "**Based upon the above, I stand by my opinions listed in my November 16, 2022 report. Further specificity and additional opinions are as follows**." (Gubernick Aff. ¶ 13). Dr. Gubernick goes on to state that, "**Dr. Meniru was notified at 7:27AM and again at 7:32AM [on May 29, 2015] of fetal distress. . . . At a minimum, Dr. Meniru fell below the standard of care by failing to begin a caesarian delivery within 30 minutes of receiving reports of fetal distress**." (Gubernick Aff. ¶¶ 29-30).

Defendant-Appellee Dr. Meniru moved to strike the affidavit as a sham affidavit. The trial court decided to strike Dr. Gubernick's affidavit **in its entirety** (which necessarily included both the original report regarding the treatment on May 28, 2015 and the supplemental opinions regarding the treatment on May 29, 2015), because, in the court's opinion, Dr. Gubernick's supplemental opinions contradicted the original report. After striking the affidavit in its entirety, the trial court ruled that Plaintiff-Appellant Moore no longer had any expert opinion critical of Dr. Meniru and granted summary judgment to Dr. Meniru.

ARGUMENT

I. ALLOWING TRIAL COURTS TO STRIKE EXPERT OPINIONS IN THEIR ENTIRETY UNDER THE SHAM AFFIDAVIT RULE WILL INCENTIVIZE GAMESMANSHIP IN DISCOVERY AND SEVERELY HAMPER LITIGANTS' ABILITY TO SUPPLEMENT EXPERT OPINIONS PURSUANT TO CIVIL RULE 26, WHICH FRUSTRATES THE TRUTH-FINDING FUNCTION OF LITIGATION.

In this case, Plaintiff-Appellee Moore was forced to issue an expert report *before* the deposition of Defendant-Appellee Dr. Meniru took place. This is a highly unusual sequence of events.

Without the benefit of Dr. Meniru's deposition (and without knowing what Dr. Meniru had been told by the nurses on the phone calls that took place the morning of May 29, 2015), Dr. Gubernick's initial report focused on the events on May 28, 2015.

Dr. Meniru then, with full knowledge of what Dr. Gubernick's report stated, testified that he was not responsible for the patient on May 28, 2015. He also testified that he had been notified of fetal distress on the morning of May 29, 2015. In the normal course of litigation, Moore would have simply issued a supplemental expert report. Today, Civ.R. 26(B)(7)(c), states:

> Other than under subsection (d), a party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. The report of an expert must disclose a complete statement of all opinions and the basis and reasons for them as to each matter on which the expert will testify. It must also state the compensation for the expert's study or testimony. **Unless good cause is shown, all reports and, if applicable, supplemental reports must be supplied no later than thirty (30) days prior to trial.** An expert will not be permitted to testify or provide opinions on matters not disclosed in his or her report.

Trial courts of course have the authority to strike supplemental expert opinions if they are not actually based on newly discovered information, but such a ruling would only strike the supplemental opinions, not the initial opinion against Dr. Meniru and the supplemental opinions as the trial court did in this case by applying the sham affidavit rule and striking the entire affidavit (to which the original report was attached). Indeed, the trial court was not even permitted to consider the unsworn

initial report after striking the affidavit.[1] Affirming the trial court in this case would create an entirely new way under Ohio law for a trial court to strike an expert's entire opinion—both the initial report and supplemental opinions—and then grant summary judgment because the party did not have any expert testimony to support its claim. Allowing the sham affidavit rule to exclude experts in their entirety would be a huge shift in Ohio law—and would create dramatic changes to the way parties litigate cases.

Both plaintiffs and defendants routinely issue supplemental expert reports based upon new facts that are learned as discovery progresses. For example, during discovery defendants might learn from new fact witnesses the ways in which a plaintiff was negligent in causing her own injuries; or they might learn about third parties who were negligent and contributed to the plaintiff's injuries; or they might learn about information that affects a plaintiff's life expectancy. These are all subjects on which a defense expert might seek to issue a supplemental report. On the other hand, plaintiffs often learn during depositions of fact witnesses new ways in which a defendant was negligent such that a supplement expert report should be issued.

Allowing trial courts to strike both the initial expert report and an expert's supplemental opinions under the sham affidavit rule will incentivize lawyers to delay discovery of fact witnesses—and hide the ball—until after expert reports are issued and then file motions for summary judgment before the opposing party has the opportunity to issue a supplemental report once new evidence is discovered.

> In order for our legal system to work, pursuant to our rules of procedure, a litigant must have the ability to investigate and uncover evidence after filing suit. The intentional concealment or destruction of evidence not only violates the spirit of liberal discovery but also

[1] The trial court and the Fifth District seem to suggest that they considered the initial expert report even though it had been stricken along with the affidavit, but they nevertheless disregard the fact that the original report states: "**Dr. Domingo, Dr. Meniru, [and] the nursing staff all deviated from good and acceptable practice by not advocating for a c section in the evening of 5-28-2015**."

> reveals a shocking disregard for orderly judicial procedures and traditional notions of fair play. Damage is caused not only to the parties to the suit, but also to the judicial system and the public's confidence in that system. Wal-Mart harms the sanctity of the judicial system and makes a mockery of its search for the truth.

Davis v. Wal-Mart Stores, Inc., 93 Ohio St. 3d 488, 493 (2001) (Sweeney, Sr., J., concurring).

Here, Dr. Meniru's counsel filed a motion for summary judgment as soon as Dr. Meniru's deposition had been completed (before the transcript was even available). Clearly, Dr. Meniru had planned to file this motion before his deposition. If the sham affidavit rule is applied to Rule 26 expert reports—and can be used to strike expert opinions in their entirety (both the initial opinions and the supplemental opinions)—litigants on both sides will be incentivized to use this case as a playbook to game discovery as a means of getting expert opinions excluded. This will lead to additional motions to compel discovery, requests to reset expert report deadlines, and ultimately, delays in the resolution of cases. Encouraging such gamesmanship is antithetical to the concept of deciding cases on the merits, rather than on procedural tactics or nuances.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY STRIKING THE EXPERT'S OPINIONS IN THEIR ENTIRETY, ESPECIALLY WHEN THE SUPPLEMNTAL OPINIONS WERE BASED ON NEW EVIDENCE AND DID NOT CONTRADICT THE INITIAL OPINIONS.

As the facts noted above show, Dr. Gubernick's supplemental opinions in his affidavit were based on newly discovered evidence—namely that Dr. Meniru had received reports of fetal distress on the morning of May 29, 2015. This was new information that Dr. Gubernick only learned from the deposition of Dr. Meniru. Furthermore, Dr. Gubernick's opinions that Dr. Meniru violated the standard of care on May 28, 2015 (the initial opinion)—and—that Dr. Meniru violated the standard of care on May 29, 2015 (the supplemental opinion) are not contradictory. "If an affidavit appears to be inconsistent with a deposition, the court must look to any explanation for the inconsistency." *Byrd v. Smith*, 110 Ohio St. 3d 24, 30, ¶ 27 (2006). Finally, the Court went well beyond its discretion in

excluding Dr. Gubernick's opinions in their entirety (both the initial opinion and his supplemental opinion). The initial opinion alone would have prevented summary judgment against Dr. Meniru since there was still a genuine dispute over whether Dr. Meniru was involved in the patient's care on May 28, 2015, especially when taking all facts and inferences in the light most favorable to the non-moving party as a trial court must.

The Court should find that the trial court abused its discretion in applying the sham affidavit rule to exclude Dr. Gubernick's opinions and reverse and remand the case to the trial court.

CONCLUSION

For all the foregoing reasons, this Court should reverse the trial court's granting of summary judgment, and further order the trial court to consider Dr. Gubernick's affidavit as properly submitted evidence in response to the summary judgment motion. Such a decision will promote the purpose behind this Court's precedent regarding expert opinions and the search for the truth and will affirm the utility of supplemental expert reports pursuant to Civ.R. 26.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Amicus Brief** has been served by e-mail on February 18, 2025, upon:

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