STATE OF MICHIGAN
IN THE SUPREME COURT

On appeal from the Court of Appeals,
Jane Markey, P.J., Deborah Servitto and Amy Ronayne Krause, JJ.

ESTATE OF BARBARA JOHNSON, deceased,
By JODEANNA HOWARD., Successor Personal Representative,

Plaintiff-Appellee

-v-

ROBERT F. KOWALSKI, M.D.,

Defendant-Appellant

and

TRINITY HEALTH-MICHIGAN, dba
MERCY HOSPITAL CADILLAC,
a Michigan corporation,
Jointly and severally,

Defendant

/

Supreme Court No 145773
Court of Appeals No. 297066
Wexford Circuit Court No. 07-020602-NH

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT OF ISSUES PRESENTED

I. **Is an affidavit signed by a testifying witness admissible at trial as a prior inconsistent statement for the purpose of impeaching the witness's testimony regarding facts of consequence to the case?**

Amicus answers, "Yes."

II. **Is extrinsic evidence relevant and admissible for the purpose of giving context to a witness's affidavit speaking to facts of consequence to the case, again for the purpose of impeaching a witness's credibility?**

Amicus answers, "Yes."

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The Michigan Association for Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. Although this case does not present a novel issue of law, the Court's decision could have far-reaching consequences that affect all jury trials.

ARGUMENT

I. Introduction

This Honorable Court granted leave to appeal and asked the parties to address (1) whether the affidavit of Charles J. Urse, M.D. is admissible; and (2) whether correspondence between the plaintiff's counsel and Dr. Urse's claims representative is admissible. *Estate of Johnson ex rel Johnson v Kowalski*, 837 NW2d 274 (Mich 2013)).

The legal issues presented by these questions are: (1) whether an affidavit signed by a testifying witness is admissible at trial as a prior inconsistent statement for the purpose of impeaching the witness's testimony regarding facts of consequence to the case; and (2) whether extrinsic evidence is relevant and admissible for the purpose of giving context to the witness's affidavit, again for the purpose of impeaching a witness's credibility.

The Court of Appeals considered these questions, answered both in the affirmative, and correctly determined that the trial court abused its discretion by not admitting Dr. Urse's affidavit and the correspondence between plaintiff's counsel and Dr. Urse's claims representative giving context to the affidavit.

As set forth in detail by Plaintiff-Appellee's Brief on Appeal, plaintiff in this case formulated her litigation strategy based on conversations between Dr. Urse's insurance carrier representative and the affidavit supplied by Dr. Urse as a consequence of those conversations. Plaintiff's counsel sent a pre-suit Notice of Intent[1] to sue to (among others) Dr. Urse and Defendant Dr. Kowalski. Plaintiff's counsel then engaged in extensive communication with counsel for all parties as well as Dr. Urse's liability insurance representative, Nancy Croze.

As aptly set forth by the Court of Appeals:

> On July 26, 2007, counsel wrote Croze and indicated that on the basis of his reading of the medical records, Dr. Kowalski bore sole responsibility for the medical accident because Dr. Kowalski failed to summon Dr. Urse in a timely fashion. After setting forth his understanding of the facts of the case, an understanding he gleaned from the medical records, plaintiff's counsel indicated that he was planning to file a lawsuit only against Dr. Kowalski, *assuming that his information was accurate*. Counsel stated in his letter that he needed "*some kind of verification perhaps in the form of an affidavit by Dr. Urse*" that would confirm his understanding of the facts and that counsel "could draft such an affidavit." At counsel's behest, Ms. Croze undertook to obtain an affidavit from Dr. Urse. (Emphasis Added.)
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> Dr. Urse testified that he was shown the plaintiff's notice of intent, together with the proposed affidavit by a "legal representative."
>
> He then signed the affidavit. On August 15, 2007, Croze sent the affidavit to plaintiff's counsel with the disarming note stating, "I am confident that this document will meet your needs as you assess your intentions for pursuit of the case."
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> *Howard v Kowalski*, 296 Mich App 664, 683-84; 823 NW2d 302, 312 (2012), *app gtd* 837 NW2d 274 (2013).

Thus, from the inception of the lawsuit, plaintiff's counsel relied on the representations made by Ms. Croze, and Dr. Urse's affidavit which was sent as an "assurance" of those representations to assume 1) the medical records accurately set forth what occurred in the Emergency room, and 2) Dr. Urse was unequivocally not in the procedure room while Dr. Kowalski was and was not present when Ms. Johnson started to suffer complications.

Dr. Urse changed his story and gave a completely different version of events during deposition and during his testimony at trial. Dr. Urse testified that he was, in fact, in the procedure room at the time that Ms. Johnson suffered complications, Dr. Kowlaski was also in the procedure room with him, and the medical records do not, in and of themselves,

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1 See MCL 600.2912b.

present a full and accurate portrayal of what occurred.

Plaintiff attempted to impeach Dr. Urse's testimony by seeking admission of his earlier affidavit and the correspondence between plaintiff's counsel and Ms. Croze in order to give context to the affidavit. The trial court wrongfully denied plaintiff's request to admit the documents. The Court of Appeals, however, reversed and remanded the matter, correctly determining that the documents should have been admitted, and that the resulting error was not harmless.

This case does not present a novel issue of law—a party's right to impeach a witness with the use of prior inconsistent statements is codified at MRE 613 and supported by this state's jurisprudence. The Michigan Rules of Evidence and Michigan case law also allow a party to admit corroborative evidence speaking to facts of consequence to establish an inconsistent statement for the purpose of impeaching a witness. The trial court wrongfully denied plaintiff's request to admit the documents. The Court of Appeals appropriately corrected this error, and this Court should allow such correction to stand, either by denying leave as improvidently granted, or in the alternative, by issuing a ruling affirming the Court of Appeals decision.

II. The Court of Appeals Correctly Determined that the Trial Court Erred By Excluding the Affidavit

The Court of Appeals correctly determined that Dr. Urse's affidavit is a prior inconsistent statement and was admissible pursuant to MRE 613(b), which provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision

does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

"A previous inconsistent statement of a witness, admissible to impeach credibility, is not regarded as an exception to the hearsay rule because it is not offered as substantive evidence to prove the truth of the statement, but only to prove that the witness in fact made the statement." *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696, 702 (1998).

In *Barnett v Hidalgo*, 478 Mich 151; 732 NW2d 472 (2007), this Court set out the appropriate method for laying the foundation to offer extrinsic evidence of a prior inconsistent statement, and then set out the parameters of when a prior statement is deemed inconsistent in the context of a medical malpractice action:

> Before attempting to impeach a witness by offering extrinsic evidence of a prior inconsistent statement, a litigant must lay a proper foundation in accordance with the court rule. *Merrow*, supra,; *People v Jenkins*, 450 Mich. 249, 256; 537 N.W.2d 828 (1995); *People v Weatherford*, 193 Mich. App. 115, 122; 483 N.W.2d 924 (1992). To do so, the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness. MRE 613(b); *People v Malone*, 445 Mich 369, 382-385; 518 NW2d 418 (1994); *Weatherford*, supra, p 122. However, "extrinsic evidence may not be used to impeach a witness on a collateral matter . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984).
>
> The affidavits of merit provided by plaintiff's experts were inconsistent with their testimony at trial and were not offered on a collateral matter. Graham, Borson, and Wassermann clearly shifted the focus of their testimony against Albaran, and to a lesser extent against Hidalgo, after plaintiff and Shah settled. In their affidavits of merit, none of the experts stated that Albaran or Hidalgo violated the standard of care because they failed to diagnose or recognize TTP or failed to follow up on the DIC screen results. In her affidavit of merit, Borson claimed that Shah had a duty to diagnose TTP and follow up on the blood tests. However, at trial, Borson testified that all of Barnett's treating doctors had been at fault for failing to

> review and follow up on Barnett's blood test results. Graham, who made no mention of any error in diagnosis regarding the blood disorder in his affidavit of merit, testified at trial that Albaran had violated the standard of care by failing to review the DIC screen results and recognize that Barnett was suffering from TTP. Furthermore, although Wassermann made no reference to this fact in his affidavit, Wassermann testified that Hidalgo violated the standard of care by failing to order a hematology consultation when he first saw Barnett, rather than waiting until the next day. *Barnett*, supra, p 165.

The Court of Appeals herein conducted the inquiry deemed appropriate by this Court in *Barnett*. Further, there was not merely a "shift in focus" by the medical affiant after a settlement in the case; there was a wholesale attempt to create new facts once Dr. Urse and/or his insurance adjuster had facilitated Dr. Urse's exclusion from the litigation as a party defendant. The inconsistency is sufficient under *Barnett*, and, as found by the Court of Appeals, the affidavit should have been admissible.

As the Court of Appeals lucidly set forth:

> MRE 613(b) recognizes that a prior inconsistent statement of the witness is admissible to impeach the credibility of the witness. *Merrow v. Bofferding*, 458 Mich. 617, 631, 581 N.W.2d 696 (1998); *Gilchrist v. Gilchrist*, 333 Mich. 275, 280, 52 N.W.2d 531 (1952). If admitted, a prior inconsistent statement of a witness is not regarded as coming within the rule excluding hearsay, MRE 802, because it is not offered as substantive evidence to prove the truth of the matter asserted, MRE 801(c), but is only offered to test the credibility of the witness's testimony in court. *Merrow*, 458 Mich. at 631, 581 N.W.2d 696; *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009).
>
> But a party seeking to impeach a witness with a prior inconsistent statement must satisfy the foundational criteria provided in MRE 613(b). *Barnett*, 478 Mich. at 165, 732 N.W.2d 472; *People v. Jenkins*, 450 Mich. 249, 256, 537 N.W.2d 828 (1995). One criterion for admissibility of a prior inconsistent statement, not disputed here, is that the witness actually made the prior statement. *Merrow*, 458 Mich. at 631–632, 581 N.W.2d 696. Another criterion for admissibility of a prior inconsistent statement under MRE 613 is that the prior out-of-court statement of the witness was in fact inconsistent with the witness's testimony in court. *Barnett*, 478 Mich. at 165, 732 N.W.2d 472; *Gilchrist*, 333 Mich. at 280, 52 N.W.2d 531.
>
> The Michigan Rules of Evidence do not expressly prescribe a test for

inconsistency. McCormick, Evidence (6th ed.) § 34, pp. 151–152 sets forth the prevailing view:

> Under the more widely accepted view, any material variance between the testimony and the previous statement suffices. The pretrial statement need "only bend in a different direction" than the trial testimony. For instance, if the prior statement omits a material fact presently testified to, which it would have been natural to mention in the prior statement, the statement is sufficiently inconsistent. The test ought to be: Could the jury reasonably find that a witness who believed the truth of the facts testified to would be unlikely to make a prior statement of this tenor? [Citations omitted.]

Kowalski, 296 Mich App at 677-78.

In order to be admissible for impeachment purposes, plaintiff had the burden of establishing the foundational requirements that Dr. Urse in fact made the statements, and that the statements were inconsistent with his trial testimony. The relevant two sections of the Urse affidavit read:

> 4. I was contacted, by beeper or through the [operating room] front desk staff (I can't recall completely which one) in regards to a STAT ER page on patient Barbara Johnson on the afternoon of April 4, 2005. Then I immediately proceeded to the [post anesthesia care unit] to obtain the anesthesia department airway box, and then immediately proceeded to the Emergency Room, arriving within approximately two to three minutes after I was notified.
>
> 5. That my findings and treatment are summarized in my hand-written progress note contained in the medical record.

It is undisputed that the Urse affidavit was in fact made, and signed under oath, by Dr. Urse. Whether the affidavit was inconsistent with Dr. Urse's trial testimony is a more nuanced inquiry.

As the Court of Appeals correctly analyzed, the trial court determined that, at the very least, a reasonable juror could perceive an inconsistency. The trial court allowed plaintiff to

cross-examine Dr. Urse about the contents of the affidavit, and allowed plaintiff to have the contents of the affidavit read on the record. The court further allowed plaintiff to argue the contents of the affidavit to the jury and instructed the jury regarding prior inconsistent statements, M Civ JI 3.15. These proceedings were tantamount to admitting the affidavit into evidence, and the trial court's failure to admit the actual document is incongruent. See *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972).

Again, as the Court of Appeals correctly determined, the affidavit itself was admissible as an inconsistent statement because the issues raised in the affidavit spoke to the very heart of plaintiff's case, and were not collateral. "[T]he matter is non-collateral and extrinsic evidence consequently admissible if the matter is itself relevant to a fact of consequence on the historical merits of the case." McCormick On Evid. § 49 (7th ed.). See also *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168, 173 (1995). McCormick on Evidence provides the following hypothetical to help distinguish collateral issues versus non-collateral issues:

> Consider the following illustration. Bob is called to testify that the color of the traffic light facing Apple Street was red at the time of an automobile accident he witnessed at the corner of Apple and Main. On direct examination, Bob testifies that he distinctly recalls that when he witnessed the accident, he was driving on the street Piagano's Pizza Restaurant is situated on and indeed was heading toward the restaurant. He adds that Piagano's is located on the corner of Apple and Peach. On cross-examination counsel asks, "Isn't it true that Piagano's Pizza Restaurant is located on Apple three blocks east of Peach at Maple?" This cross-examination question is permissible as potentially affecting the jury's assessment of Bob's powers of perception and recollection. However, if Bob continues to maintain that the restaurant is on Peach Street, extrinsic evidence may not be offered during the cross-examiner's case in chief as to the location of the restaurant. The matter is collateral because the location of the restaurant is not relevant in the litigation other than to contradict Bob's testimony. Even if Bob denied on cross-examination making a prior statement in which he allegedly said that the restaurant was on Apple and

Maple, extrinsic evidence of the prior statement would be inadmissible because the matter is collateral.

On the other hand, the color of the traffic light facing Apple is non-collateral; the color of the traffic light is itself relevant in the case. Thus, specific contradiction evidence that the light facing Apple Street was green is admissible. Likewise, if Bob denies on cross-examination having previously stated that the traffic light was green, extrinsic evidence of Bob's prior inconsistent statement is admissible. Assuming Bob is then asked on cross-examination if he was wearing his glasses while driving, a yes answer may be contradicted by extrinsic evidence that his only pair of glasses was being repaired at the time of the accident. Evidence disputing the witness's ability to gain personal knowledge of facts relevant in the case is non-collateral. Similarly, if Bob denied on cross-examination that his wife was related to the plaintiff, extrinsic evidence of that fact would be admissible. Evidence of the witness's partiality is non-collateral. Extrinsic evidence offered to establish the witness's bias, interest, corruption, or coercion may be admitted following a witness's denial of a fact giving rise to an inference of bias.

McCormick On Evid. § 49 (7th ed.)

As stated above, plaintiff's theory of the case was predicated on the fact that the medical records and the Urse Affidavit presented the true picture of what occurred on the day of the medical emergency, and that Dr. Urse changed his position 180-degrees in his deposition and trial testimony. The subject matter of the affidavit speaks directly to the central factual disputes giving rise to liability in this case. Thus, Dr. Urse's testimony, and the contents of the Urse Affidavit, speaks to "facts of consequence" in this litigation. Accordingly, the affidavit itself was admissible and the trial court erred by precluding it. The Court of Appeals appropriately corrected this error, and this Court should allow such correction to stand, either by denying leave as improvidently granted, or in the alternative, by issuing a ruling affirming the Court of Appeals decision.

III. The Court of Appeals Correctly Determined that the Trial Court Erred By Excluding Evidence of Correspondence Between Plaintiff's Counsel and Ms. Croze

The correspondence between plaintiff's counsel and Ms. Croze is also critical to the inquiry of whether the Urse affidavit was contradictory and speaks directly to the heart of plaintiff's case, and thus is relevant and admissible. MRE 401, 402. It is important to recognize that the Urse affidavit was not created, and does not exist, in a vacuum. The affidavit was created for the specific purpose of deflecting fault away from Dr. Urse and reinforcing plaintiff's counsel's interpretation of the relevant medical records. Without being able to impeach Dr. Urse about how the affidavit came to be, with the support of the "teeth" provided by impeaching his revisionary testimony with the communications between plaintiff's counsel and Ms. Croze that led to the creation of the affidavit, plaintiff was unable to present the jury with a clear picture of exactly how egregious and damning Dr. Urse's change of position actually was. The correspondence is relevant to Dr. Urse's credibility.

As with the affidavit, the subject matter of the correspondence between plaintiff's counsel and Ms. Croze was non-collateral to facts of consequence in this case, and thus admissible when used for impeachment purposes. Importantly, the correspondence is necessary to consider the Urse affidavit in the proper context. The only reason that Dr. Urse supplied the affidavit was to meet the "assurances" plaintiff's counsel demanded from Ms. Croze. Plaintiff's counsel's understanding of the relevant facts, and his express request for assurances that his understanding was correct, is clearly set forth in the correspondence at issue. Further, Ms. Croze's response to the demand for assurances was to provide plaintiff's counsel with the Urse affidavit, along with the express direction that "I am confident that this document will meet your needs as you assess your intentions for pursuit

of the case." The only interpretation of the Urse affidavit, given the context of the emails, is that the contents of the affidavit were meant to affirm plaintiff's counsel's interpretation of facts. Dr. Urse's sudden change in testimony at deposition and during trial can only be properly assessed by a jury in context with the subject correspondence.

The Urse affidavit was undeniably—and some will argue intentionally—rambling and ambiguous. The content of the affidavit does not directly address the issues raised by plaintiff's counsel in his correspondence with Ms. Croze, but indirectly, in a meandering fashion, does comport with counsel's understanding of the facts. Given the reassurance given to him by Ms. Croze, plaintiff's counsel had no reason to believe that the affidavit would ever be interpreted as—or held up to be—a contrary statement of facts. Defendants utilized the purposeful ambiguity in the affidavit to sandbag plaintiff. Despite clear evidence that the Urse affidavit was meant to assure plaintiff that Dr. Urse was not in attendance at the time that Ms. Johnson started suffering complications, Dr. Urse was able to reverse his earlier statement without plaintiff ever having the chance to properly impeach him. The purposeful ambiguity of the affidavit, without the benefit of the explanatory emails, crippled plaintiff's attempt to properly impeach Dr. Urse. Without the emails, plaintiff could not represent to the jury that Dr. Urse was presenting a diametrically opposite statement of events from his earlier purported position.

Plaintiff should have been permitted to lay the proper factual foundation and use the correspondence to impeach Dr. Urse's credibility. In order to lay the proper foundation, plaintiff would have to establish either that Dr. Urse knew about the content of the emails and deliberately attempted to misdirect plaintiff's counsel with his affidavit, or that Dr. Urse was kept in the dark about the emails but was asked to sign the affidavit by his insurance

representatives. As the Court of Appeals reasoned, either foundation of facts raises questions as to Dr. Urse's credibility at trial:

> Plaintiff contends that the credibility of Dr. Urse's testimony can only be properly judged by viewing it in context. In effect, plaintiff argues, the e-mail explains the affidavit's contents and why they are inconsistent with Dr. Urse's trial testimony. If Dr. Urse was aware of the substance of the e-mail exchanged between Croze and plaintiff's counsel, the jury might have concluded that the phrasing of the affidavit was a deliberate attempt to obfuscate the central issue of the case. Similarly, even if Dr. Urse was unaware of the e-mail exchange, if the affidavit was nonetheless prepared by his insurer and he signed it at his insurer's direction, his testimony, while honest, might nonetheless lack credibility because the witness himself was misled and therefore the accuracy of both his affidavit and his trial testimony are suspect.
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> *Kowalski*, 296 Mich App at 680-81.

The contents of the email correspondence are thus relevant and admissible contingent on plaintiff being able to establish the necessary factual foundation. Relevancy contingent on a factual predicate is controlled by MRE 104(b), which provides

> **(b) Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

As the Court of Appeals set forth, the trial court was obligated to allow the evidence in so long as a reasonable juror could find that plaintiff had established the foundational facts by a preponderance of evidence; the trial court did not have the authority to make findings of fact on the issue:

> Quoting *Huddleston* [*v United States,* 485 US 681, 688; 108 S Ct 1496, 1500; 99 L Ed 2d 771 (1988)], our Supreme Court held:
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> > "[Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b) ..., In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor

> makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.
>
> * * * *
>
> "We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. '[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.' *Bourjaily v. United States*, 483 U.S. 171, 179–180, [107 S.Ct. 2775, 97 L.Ed.2d 144] (1987)." [*VanderVliet*, 444 Mich. at 69 n. 20, 508 N.W.2d 114, quoting *Huddleston*, 485 U.S. at 688–691, 108 S.Ct. 1496.]
>
> As stated, as long as some rational jury could resolve the issue in favor of admissibility, the court must let the jury weigh the disputed facts. Specifically, the court must allow the jurors to assess the credibility of the evidence presented by the parties.

Kowalski, 296 Mich App at 682-83.

As plaintiff-appellee elucidates in her brief on appeal, and as set forth above, a reasonable juror could consider the facts of this case and conclude that Dr. Urse intentionally or unwittingly participated in an effort to misdirect the plaintiff. The evidence directly informs the question of Dr. Urse's credibility as a witness, is relevant and admissible for impeachment purposes. The Court of Appeals correctly determined that the trial court erred by refusing to admit evidence of the email correspondence for impeachment purposes. As the emails speak to the very heart of plaintiff's case, the failure to admit evidence of the emails crippled plaintiff's case. The Court of Appeals appropriately corrected this error, and this Court should allow such correction to stand, either by denying leave as improvidently granted, or in the alternative, by issuing a ruling affirming the Court of Appeals decision.

CONCLUSION

Accordingly, Amicus Curiae MAJ respectfully requests that this Honorable Court deny leave to appeal as improvidently granted, or in the alternative, issue a ruling affirming the Court of Appeals decision.

Respectfully submitted,

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