ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

ESTATE OF BARBARA JOHNSON, Deceased, by JOEDEANNA HOWARD, Successor Personal Representative,

Plaintiff-Appellee,

v

ROBERT F. KOWALSKI, M.D.,

Defendant-Appellant,

and

TRINITY HEALTH-MICHIGAN, d/b/a MERCY HOSPITAL CADILLAC, a Michigan corporation, jointly and severally,

Defendant.

SC No. 145773
COA No. 297066
LC No. 07-20602-NH

DEFENDANT-APPELLANT ROBERT F. KOWALSKI, M.D.'S REPLY BRIEF ON APPEAL

*** **ORAL ARGUMENT REQUESTED** ***

PROOF OF SERVICE

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STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant Robert F. Kowalski, M.D. ("Defendant" or "Dr. Kowalski") refers this Court to the corresponding section in his Brief on Appeal dated November 27, 2013.

STATEMENT OF THE QUESTIONS PRESENTED

Defendant refers this Court to the corresponding section in his Brief on Appeal dated November 27, 2013.

STATEMENT OF FACTS

Rather than respond to Defendant's arguments on appeal with relevant authorities, Plaintiff denigrates them as "bumf" and strings together cases which either far predate the Michigan Rules of Evidence or apply the Federal Rules of Evidence.[1] In so doing, Plaintiff fails to meaningfully address the admissibility of the presuit affidavit and correspondence under Michigan law, summarized as follows: (1) the affidavit was properly excluded as hearsay and extrinsic evidence of Dr. Urse's prior statements which were not inconsistent with his testimony at trial (Arguments I and II); (2) the presuit correspondence was not admissible as "context" for the affidavit because it lacked relevance even under the relaxed standards of MRE 104(b) (Argument III); (3) the correspondence, even if arguably relevant, should not be admissible because such a ruling would threaten the candor and communication essential to the notice of intent process (Argument IV); and (4) the exclusion of both the affidavit and the correspondence was harmless error because the allegedly inhibited impeachment of Dr. Urse's eyewitness testimony did not undermine the reliability of the jury's no-cause verdict. Because Plaintiff was allowed to strenuously challenge Dr. Urse's credibility at trial with his prior statements, and the correspondence had no relevance to Dr. Urse's testimony regarding Ms. Johnson's care or the stated purpose behind his affidavit, the Court of Appeals opinion reversing for exclusion of the correspondence as context for impeachment should be reversed, and the jury verdict reinstated.

Plaintiff grossly misstates the nature and scope of the trial court's pretrial rulings in claiming that the "rug was pulled out from under Plaintiff" when the affidavit and

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[1] Plaintiff also falsely accuses Defendant of omitting a portion of Ms. Johnson's medical records from his Appendix, calls Defendant "biased" for adhering to MCR 7.307(A)(5) by not including every trial exhibit in the Appendix, and argues for the first time that someone attempted to falsify the records. See Plaintiff's Brief, p 3 fn 2; p 4; p 9, fn 5; **40a**.

correspondence were ruled inadmissible at trial. At the January 25, 2010 hearing, Plaintiff argued a motion in limine to preclude testimony from Drs. Urse and Kowalski that was inconsistent with Plaintiff's theory of the case—*not* to request an evidentiary ruling as to the admissibility of the affidavit or correspondence. Judge Fagerman noted the admissibility of the affidavit was not before him (**134a, 139a**), but helpfully suggested to Plaintiff counsel that the anticipated inconsistencies in Dr. Urse's testimony could potentially be explored at trial through admission of the affidavit for impeachment purposes as a prior inconsistent statement *if* Dr. Urse testified contrary to the affidavit (**134a-135a, 139a.**). Shortly before trial began on February 9, Plaintiff counsel—not defense counsel through a "last-minute motion"—asked the court for a ruling on the use of the affidavit and correspondence during his opening argument (**309a-310a**). Counsel "totally" understood the affidavit would be excluded as inadmissible hearsay unless and until he elicited inconsistent trial testimony from Dr. Urse (**322a**).

Attempting to manufacture support for her theory of the case, Plaintiff points to Dr. Urse's retrieval of the PACU airway box on his way to Ms. Johnson's room as proof that Dr. Urse must have known Ms. Johnson was in respiratory distress before he arrived in her room. This ignores that the airway box is an indispensable tool of his trade as an airway management expert in the ER setting—showing up to any ER patient's room without it would be akin to a plumber arriving to a service call without a wrench (**1115a-1116a**).

STANDARD OF REVIEW

The dispositive evidentiary questions in this case are reviewed for an abuse of discretion, as confirmed by this Court in *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). In *Musser*, the trial court abused its discretion by admitting out-of-court statements constituting hearsay, under the guise that they were non-hearsay because they were offered only to place the defendant's statements "in context," where the proponent could not establish the statements'

relevance. The same analysis applies here, where the trial court is alleged to have reversibly erred by not admitting the correspondence between Mr. Weiner and Ms. Croze as "context" for Dr. Urse's affidavit, where the trial court ruled that Plaintiff had failed to establish the relevance of the correspondence. Indeed, the Court's ultimate holding was that the trial court had "abused its discretion and that the error was not harmless" (**24a**). Determinations of relevance under MRE 401, 403 and 104(b) are all reviewed for an abuse of discretion, as are foundational questions of personal knowledge under MRE 602 and authentication under MRE 901. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004); *People v Moscara*, 140 Mich App 316, 320 n 1; 364 NW2d 318 (1985).

Even assuming *arguendo* this Court finds the trial court abused its discretion by not admitting either the affidavit or the correspondence, this finding "does not end the inquiry, however, because nonconstitutional, preserved evidentiary errors are not grounds for reversal unless they undermined the reliability of the verdict." *Musser*, 494 Mich at 363. This analysis occurs even if the Court does not specifically grant leave to appeal on the issue of harmless error. See *People v Musser*, 493 Mich 860; 820 NW2d 907 (2012).

ARGUMENT I

DR. URSE'S PRESUIT AFFIDAVIT WAS INADMISSIBLE AS EXTRINSIC EVIDENCE TO IMPEACH HIM WHERE IT WAS NOT A PRIOR INCONSISTENT STATEMENT WHICH CONFLICTED WITH HIS TESTIMONY AT TRIAL, AND HE ADMITTED TO MAKING THE ALLEGEDLY CONFLICTING STATEMENT CONTAINED IN THE AFFIDAVIT.

This Court must determine whether the statements in Dr. Urse's affidavit were inconsistent with his trial testimony to decide whether the affidavit was improperly excluded under MRE 613(b) as extrinsic evidence of a prior inconsistent statement. Defendant maintained throughout trial that the affidavit did not contain *any* prior inconsistent statements, and the

threshold determination of inconsistency was a question for the trial court (**314a, 618a-620a**);[2] *People v Graham*, 386 Mich 452, 457; 192 NW2d 255 (1971). Plaintiff's citations to legal treatises and cases from other jurisdictions interpreting the Federal Rules of Evidence fail to refute Defendant's argument that Michigan holds a more stringent view requiring a direct contradiction between a witness' trial testimony and his allegedly inconsistent prior statement under MRE 613(b). *People v Allen*, 429 Mich 558, 650; 420 NW2d 299 (1988) (Riley, C.J., dissenting) (citing to *People v Johnson*, 113 Mich App 575, 579; 317 NW2d 689 (1982); *People v McGillen #1*, 392 Mich 251, 268; 220 NW2d 667 (1974); and *Graham*, 386 Mich at 458); see also *Diliberti v Essex*, Court of Appeals Docket No. 190260, *rel'd* Sept 15, 1998; 1998 WL 1989827, *3 (unpublished) (**1327a**); 2 Mich Ct Rules Prac, Evid § 613.2 n 4. Ironically, Plaintiff's citation to *Graham* confirms this view in finding that a defendant's prior statement to a police detective was admissible under MRE 613(b) because it was "wholly inconsistent" with his testimony at trial. 386 Mich at 458. At trial, Mr. Weiner recognized and admitted that the affidavit was not directly inconsistent with Dr. Urse's testimony, arguing that "one fair reading of the note" was that Dr. Urse arrived in Ms. Johnson's room after she was experiencing respiratory distress (**1208a**).

Even if a direct inconsistency could be found, Plaintiff has still failed to show the affidavit itself was admissible as extrinsic impeachment evidence under MRE 613(b) where Dr. Urse admitted to making the allegedly inconsistent statements, rendering extrinsic "proof" of the statements unnecessary and cumulative of his testimony. See Def's Brief, pp 22-25; *Rush v Illinois Cent R Co*, 399 F3d 705, 723 (CA 6, 2005). Plaintiff's citation to *Bradbury v Ford*

[2] Plaintiff incorrectly cites to **111a**, discussing the foundation for Drs. Urse and Kowalski's eyewitness testimony, as a concession by Defendant that inconsistency was a jury question.

Motor Co, 123 Mich App 179; 333 NW2d 214 (1983) does not support her position, because the witness in that case denied making the inconsistent statement contained in his hospital record. Here, unlike in *Bradbury*, there is no issue for the jury to resolve regarding whether the witness made the allegedly inconsistent statement—Dr. Urse admitted making the statements in his affidavit, and read those statements to the jury verbatim. Nor is Plaintiff's citation to *Gordon v United States*, 344 US 414 (1953) helpful, because the narrow holding of that case addressed whether the government is obligated to *produce*, upon defense counsel's demand documents containing the accused's allegedly inconsistent prior statement.[3] The trial court did not abuse its discretion by permitting impeachment of Dr. Urse under MRE 613(a) without admitting his affidavit as extrinsic evidence of a prior inconsistent statement (**1210a**).

ARGUMENT II

DR. URSE'S PRESUIT AFFIDAVIT WAS INADMISSIBLE AS SUBSTANTIVE EVIDENCE BECAUSE IT DID NOT FALL WITHIN ANY EXCEPTION TO THE RULE AGAINST HEARSAY AND WAS OTHERWISE SUBSTANTIVELY INADMISSIBLE.

Despite Plaintiff's extensive discussion of MRE 801(d)(1)(A), she fails to address or distinguish this Court's superseding holding in *Barnett v Hidalgo*, 478 Mich 151, 160; 732 NW2d 472 (2007) that presuit affidavits are inadmissible as substantive evidence under MRE 801(d)(1)(A) because they do not qualify as given under oath "at a trial, hearing or other proceeding, or in a deposition." Plaintiff's citation to 21 Am Jur 2d Proof of Facts 101, § 13, reinforces *Barnett's* rule that prior inconsistent statements are inadmissible as substantive evidence "unless such statement also happened to satisfy a hearsay exception." Plaintiff does not

[3] See 21 Am Jur 2d Proof of Facts 101, § 7 ("no consensus" among courts or treatises regarding whether a party may offer extrinsic evidence where the witness admits making prior statement).

appear to contest Defendant's and the Court of Appeals' conclusion that the affidavit was otherwise inadmissible as hearsay, or that the trial court's failure to admit the affidavit alone would not constitute reversible error (**31a**).[4]

ARGUMENT III

THE TRIAL COURT CORRECTLY RULED THE PRESUIT CORRESPONDENCE BETWEEN MR. WEINER AND MS. CROZE WAS INADMISSIBLE FOR ANY PURPOSE WHERE DR. URSE LACKED PERSONAL KNOWLEDGE OF THE CORRESPONDENCE, THE CORRESPONDENCE WAS HEARSAY, AND THE CORRESPONDENCE WAS NOT RELEVANT IN DECIDING ANY MATERIAL ISSUE.

Plaintiff glosses over the Court of Appeals' flawed relevance analysis with respect to the correspondence because she cannot defend it as jurisprudentially sound. The Court of Appeals did not, as Plaintiff contends, make a finding of logical relevance by simply "quoting" MRE 402 (p 44). Rather, the heart of the Court of Appeals opinion is its *sua sponte* invention of a defense "conspiracy" as a conditional basis for the correspondence's relevance as necessary context for the affidavit as impeachment evidence. The Court's extensive attempt to apply MRE 104(b) was, contrary to Plaintiff's assertion, to support admission of the correspondence by satisfying MRE 402 "as enforced through [MRE] 104(b)." *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). "Here, the relevancy of [sic] the email exchanged between Ms. Croze and plaintiff's counsel are relevant for the reasons set forth above, but only if Dr. Urse was aware of the emails, or if not, was he [sic] kept in the dark by his insurer" (**32a**). Thus, the correspondence's purported relevance as context for impeachment was conditioned upon fulfillment of one of two conditional facts, neither of which was supported by the proofs at trial: either Dr. Urse knew about the correspondence (he did not); or Ms. Croze used Dr. Urse and his

[4] Defendant's citation to MRE 801(d)(1) on page 26 should cite to MRE 801(d)(2).

affidavit to "sandbag" Plaintiff counsel into not naming Dr. Urse as a defendant in her complaint (based solely on the Court's interpretation of the letters' "timing" and "substance") (**33a**).

This second conditional fact was neither raised nor proven at trial as a basis for finding relevance, and even if provable, would not assist the jury in evaluating Dr. Urse's credibility or any of the outcome-determinative issues in the case. Plaintiff does not address Judge Fagerman's conclusion that evidence of a "conspiracy" by Dr. Urse's insurer was relevant only to show why he was not sued along with Dr. Kowalski. Instead, Plaintiff attempts to substitute conjecture for record evidence by asserting Ms. Croze "must have laid out" Dr. Urse's affidavit in order to "extricate" him from the malpractice suit, and in so doing informed Dr. Urse of the contents and focus of the correspondence between herself and Mr. Weiner (p 21). If there is any danger of a *Badalamenti*-type error in this case, it is from Plaintiff's unsupported contradiction of Dr. Urse's testimony that he did not know about the correspondence and thought his affidavit was intended to show his transit time to Ms. Johnson's room (**613a-614a, 650a**). See pp 33-34.[5]

Defendant objected to admission of the correspondence on the bases of relevance, hearsay, privilege, and foundation (**311a-312a, 318a**). Plaintiff's strange attempt to shift the evidentiary burden to Defendant ignores Defendant's primary argument that Plaintiff failed to meet her initial burden, as proponent of the correspondence, to establish its relevance. "Even if an out-of-court statement is not offered for the truth of the matter asserted, the proponent of the evidence must still establish that it is 'relevant' under MRE 401." *Musser*, 494 Mich at 355. Plaintiff ignores Dr. Urse's lack of personal knowledge of the correspondence in citing numerous cases which all involve impeachment of a witness by his own correspondence or written

[5] Plaintiff's citation to *Badalamenti v Wm Beaumont Hosp-Troy*, 237 Mich App 278, 286-289; 602 NW2d 854 (1999) is inapposite because Dr. Urse testified as a fact eyewitness, not as an expert who must take the facts as established by fact witnesses and documentary evidence.

statement under MRE 613(b), where the witness-writer denies making the inconsistent statements contained in the writing. See, e.g., *Krolik v Graham*, 64 Mich 226; 31 NW 307 (1887) and other cases cited at pp 23-25 of Plaintiff's brief. Plaintiff's citation to *Bradbury*, 123 Mich App at 187-188, is distinguishable because in that case, the conditional fact of personal knowledge necessary to admit a patient history record for impeachment purposes <u>was</u> provable because the hospital employee's testimony that the patient history was derived from statements made to an intern was sufficient to support a finding that the plaintiff made the inconsistent statement in the medical report, contrary to his testimony. Likewise, Plaintiff's assertion that the correspondence was admissible under 801(c) as non-hearsay to show its effect on Dr. Urse is also wrong because Dr. Urse never read the correspondence. Finally, while admitting the correspondence is not probative of Dr. Kowalski's liability (p 49), Plaintiff makes no effort to assist this Court in the mandatory weighing of the correspondence's probative value under MRE 403, and does not contest Defendant's assertion that admission of the correspondence would waste the jury's time, mislead the jury in its determination of Dr. Kowalski's liability, and prejudice the jury based on the perceived "sandbagging" of Plaintiff counsel.

In arguing that the exclusion of the affidavit and the correspondence was not harmless error, Plaintiff completely ignores the extensive cross examination and argument which took place regarding the allegedly inconsistent testimony of Dr. Urse regarding Ms. Johnson's care. Even the Court of Appeals was forced to admit that exclusion of the affidavit was harmless error because the contents of the affidavit were allowed into evidence, plaintiff counsel discussed its contents in closing argument, and the jury was instructed to consider whether it contradicted Dr. Urse's testimony (**31a**). Plaintiff's contention that "efforts to impeach...were thwarted by the

trial court" and "the jury was unaware that the defense position represented a complete reversal of prior sworn statements" is revisionist history completely at odds with the trial record (p 4).

Although the Court of Appeals labels Dr. Urse as a "critical witness," the comparison to *Powell v St John Hosp*, 241 Mich App 64, 72-75; 614 NW2d 666 (2000) is inapt here because the jury's finding of non-liability in this case simply did not rest on Dr. Urse's eyewitness testimony in the same way that the jury's finding of liability rested in *Powell* upon the "scandalous charges, not corroborated by any other witness" made by the witness Tiernan. Here, Dr. Urse's testimony was corroborated by the other fact witnesses, including Nurse Wiebenga and Dr. Kowalski, and the medical records. Moreover, impeachment of Dr. Urse as an *inconsistent* witness was unquestionably permitted using his prior statements, whereas defense counsel in *Powell* was entirely prohibited from exposing Tiernan as an extremely *biased* witness against the defendant. The jury here was well aware of Plaintiff's contention that Dr. Urse could not be believed, heard the contents of the affidavit and the cross examination thereon, and still chose to find Dr. Kowalski non-negligent with or without crediting Dr. Urse's testimony. The Court of Appeal's conclusion that the jury's determination of Dr. Urse's credibility may have been affected by exclusion of the correspondence does not equal a determination, under the standards in *Powell*, MRE 103 and MCR 2.613(A), that the alleged error was not harmless because it may well have affected the outcome of the trial (**34a**). This Court should not allow the Court of Appeals published opinion to stand as the only case applying *Powell* to reverse a jury verdict because the trial court excluded impeachment evidence for a "critical" witness.

ARGUMENT IV

PUBLIC POLICY CONSIDERATIONS IN FAVOR OF PRESUIT SETTLEMENT DURING THE NOTICE OF INTENT PERIOD COUNSEL AGAINST ADMISSIBILITY OF PRESUIT AFFIDAVITS AND CORRESPONDENCE AT TRIAL.

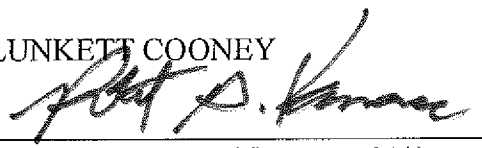
Plaintiff misses the point entirely by likening the allegedly inconsistent testimony of Dr. Urse to "perjury" which can only be prevented by allowing presuit communications between plaintiff and defense representatives to be used against parties and witnesses at trial (pp 49-50). Mr. Weiner refuses to take any responsibility for his mistaken assumptions throughout the pretrial process regarding Ms. Johnson's medical records and care, and now complains that his lack of due diligence should be rewarded with a new trial using evidence which threatens to chill the notice of intent process for all litigants. When faced with future requests for clarification by plaintiff counsel, defense representatives like Ms. Croze, knowing their responses could be used against the defendants at trial, will either not respond or make responses so circumscribed that they are entirely unhelpful in determining whether and against whom suit should be filed. Plaintiff has not, and cannot, explain why the proper remedy for being allegedly "hoodwinked" into not naming Dr. Urse in the complaint is not a motion seeking to add him as a defendant.

RELIEF

WHEREFORE Defendant requests this Court reverse the Court of Appeals' opinion as amended, reinstate the trial court's Judgment of No Cause, vacate the costs awarded to Plaintiff as the prevailing party, and direct Defendant be reimbursed for costs and attorney fees so wrongfully sustained on appeal.

Respectfully submitted,

PLUNKETT COONEY

BY: 

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Dated: January 20, 2014

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PROOF OF SERVICE

MONIQUE M. VANDERHOFF, being first duly sworn, deposes and says that she is an employee with the firm of Plunkett Cooney, and that on January 20, 2014, she caused to be served two copies of the Defendant-Appellant Robert F. Kowalski, M.D.'s Reply Brief on Appeal, Oral Argument Requested, and Proof of Service upon each of the following:

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