ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

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

Plaintiff-Appellee,

S.C. No. 145773
COA No. 297066
LC No. 07-20602-NH

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.

____/

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

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

PROOF OF SERVICE

PLUNKETT COONEY

By: ROBERT G. KAMENEC (P35283)
KAREN E. BEACH (P75172)
Attorneys for Defendant-Appellant
Robert F. Kowalski, M.D.
38505 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES v

STATEMENT OF APPELLATE JURISDICTION ix

STATEMENT OF THE QUESTIONS PRESENTED x

STATEMENT OF FACTS 1

A. Introduction. 1

B. Statement of material facts and proceedings. 3

1. Drs. Kowalski and Urse attempt to treat and stabilize Ms. Johnson. 3

2. Dr. Urse's affidavit and the presuit correspondence. 6

3. Drs. Urse and Kowalski testify in their depositions that they were both present with Ms. Johnson before she went into respiratory arrest. 8

4. Plaintiff's subpoena and attempt to obtain testimony from Ms. Croze. 8

5. Plaintiff argues in opening statements that the affidavit shows Dr. Urse is lying. 9

6. Plaintiff uses the prior statements in Dr. Urse's affidavit to impeach his testimony, but the affidavit is not admitted as an exhibit. 11

7. The testimony at trial supports the jury's no-cause verdict. 13

8. The affidavit and correspondence are not admitted on rebuttal. 14

9. Plaintiff argues the affidavit's meaning to the jury, which is instructed on prior inconsistent statements and returns a no-cause verdict. 15

C. The Court of Appeals reverses the jury's no-cause verdict in a published opinion. 16

STANDARD OF REVIEW 18

ARGUMENT I 19

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. 19

A. Introduction. 19

B. Governing law. 19

C. Argument....20

1. Dr. Urse's affidavit was not admissible under MRE 613(b) for impeachment purposes because the statements contained within the affidavit did not conflict with his testimony at trial. 20

2. The affidavit itself was inadmissible as extrinsic evidence of Dr. Urse's prior statement where Dr. Urse admitted making the prior statement....22

3. Any error by the trial court in admitting or failing to admit the affidavit as impeachment evidence was necessarily harmless. 25

ARGUMENT II 25

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....25

A. Introduction. 25

B. Governing law. 26

C. Argument....26

1. The affidavit was not admissible as non-hearsay under MRE 801(c). 26

2. The affidavit was not admissible as a prior statement of a witness under MRE 801(d)(1)(A) or a party admission under MRE 801(d)(2). 27

3. The affidavit was not admissible under the catch-all exception of MRE 804(b)(7). 27

4. Any error by the trial court in failing to admit the affidavit as substantive evidence was necessarily harmless....27

ARGUMENT III....29

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....29

A. Introduction. 29

B. Governing law. 30

C. Argument....30

1. The requirement of personal knowledge under MRE 602 is not satisfied with respect to Dr. Urse and the correspondence between Mr. Weiner and Ms. Croze. 30

2. The correspondence was irrelevant and therefore inadmissible under MRE 401 for impeachment or substantive purposes because it did not tend to prove or disprove any disputed material fact. 31

a. Under MRE 104(b), no reasonable jury could find that Dr. Urse had knowledge of the correspondence. 31

b. Plaintiff did not argue, and no reasonable jury could conclude under MRE 104(b), that Dr. Urse was not a credible witness because he participated in a conspiracy to "sandbag" Plaintiff. 33

c. The correspondence was only relevant to show why Dr. Urse was not sued as a defendant—an issue which was not outcome-determinative and did not influence the jury's finding. 36

3. The correspondence was inadmissible under MRE 403. 37

4. The correspondence was inadmissible under 801(c) as non-hearsay. 39

5. The correspondence was inadmissible under MRE 801(d)(2)(C) or (D) as a party admission. 41

6. The correspondence was inadmissible because proper foundation for authenticating the correspondence could not be laid under MRE 901. 41

7. The trial court's failure to admit the correspondence as context for impeachment evidence was harmless error. 42

ARGUMENT IV 43

PUBLIC POLICY CONSIDERATIONS IN FAVOR OF PRESUIT SETTLEMENT DURING THE NOTICE OF INTENT PERIOD COUNSEL AGAINST ADMISSIBILITY OF PRESUIT AFFIDAVITS AND CORRESPONDENCE AT TRIAL. 43

A. Introduction. 43

B. Argument. 44

1. Admitting presuit affidavits of fact witnesses and correspondence between plaintiff counsel and insurance representatives at trial would have a chilling effect on the notice of intent statute's goal of encouraging presuit settlement. 44

2. Admitting correspondence at trial between a defendant's insurance claims representative and plaintiff counsel would risk introducing evidence of the defendant's insurance in violation of MRE 411. 48

3. The trial court properly excluded Ms. Croze as a rebuttal witness. 49

RELIEF 50

INDEX OF AUTHORITIES

Page

MICHIGAN CASES

Badiee v Brighton Area Schools,
265 Mich App 343; 695 NW2d 521 (2005) 25

Barnett v Hidalgo,
478 Mich 151; 732 NW2d 472 (2007) 20, 22, 25, 26, 27, 47

Bush v Shabahang,
484 Mich 156; 772 NW2d 272 (2009) 44

Diliberti v Essex,
Court of Appeals Docket No. 190260, *rel'd* Sept 15, 1998; 1998 WL 1989827 (unpublished) 20

Durbin v K-K-M Corp,
54 Mich App 38; 220 NW2d 110 (1974) 42

Gibson v Henkin,
141 Mich App 468; 367 NW2d 418 (1985) 49

Koster v June's Trucking, Inc,
244 Mich App 162; 625 NW2d 82 (2002) 47

Merrow v Bofferding,
458 Mich 617; 581 NW2d 696 (1998) 41

People v Alibeg,
Court of Appeals Docket No 284250, *rel'd* June 18, 2009; 2009 WL 1717373 (unpublished); *lv denied* 985 Mich 978; 774 NW2d 878 (2009) 25, 28

People v Allen,
429 Mich 558; 420 NW2d 499 (1988) 19, 20

People v Jenkins,
450 Mich 249; 537 NW2d 828 (1995) 20, 24

People v Johnson,
113 Mich App 575; 317 NW2d 689 (1982) 19

People v Krueger,
466 Mich 50; 643 NW2d 223 (2002) 18

People v Lucas,
Court of Appeals Docket No. 254521, *rel'd* June 23, 2005; 2005 WL 1490062 (unpublished); *lv denied* 474 Mich 946; 706 NW2d 200 (2005) 22

People v McDaniel,
469 Mich 409; 670 NW2d 659 (2003) 18

People v McGhee,
268 Mich App 600; 709 NW2d 595 (2005) 30, 31

People v Musser,
494 Mich 337; 835 NW2d 319 (2013) 18, 32, 37, 39, 40, 42, 49

People v Rodgers,
388 Mich 513; 201 NW2d 621 (1972) 26

People v Smith,
482 Mich 292; 754 NW2d 284 (2008) 18

People v Thames,
Court of Appeals Docket No 306313, *rel'd* Oct 17, 2013; 2013 WL 5663112 (unpublished) 32

People v VanderVliet,
444 Mich 52; 508 NW2d 114 (1993) 30

Sullivan Industries, Inc v Double Seal Glass Co, Inc,
192 Mich App 333; 480 NW2d 623 (1991) 50

FEDERAL CASES

Huddleston v United States,
485 US 681 (1988) 30, 38

Rush v Illinois Cent R Co,
399 F3d 705 (2005) 23

OUT-OF-STATE CASES

Cohen v Dauphinee,
739 So2d 68 (Fla 1999) 45

Grimshaw v Schwegel,
572 So2d 12 (Fla 2d DCA 1990) 46

RULES

FRE 411 48

FRE 613(b) 24

MCR 2.302(B)(3)(a) 47

MCR 2.613(A) 28

MCR 7.215(I)(1) ix

MCR 7.301(A)(2) ix

MCR 7.302(C)(2)(c) ix

MRE 104(a) 32

MRE 104(b) 16, 18, 29, 30, 31, 32, 33

MRE 401 .... 29, 31, 40

MRE 402 .... 27, 31

MRE 403 .... 10, 17, 24, 37, 38, 39, 49
MRE 411 .... 38, 43, 48, 49
MRE 501 46
MRE 602 .... 30, 40
MRE 613 19
MRE 613(a) 2, 23, 24
MRE 613(b) 2, 19, 20, 22, 23
MRE 801 24
MRE 801(c) 26, 39
MRE 801(d)(1) 26
MRE 801(d)(1)(A) 27
MRE 801(d)(2) 27
MRE 801(d)(2)(B) 27
MRE 801(d)(2)(C) 27, 41
MRE 801(d)(2)(D) 41
MRE 802 26
MRE 804 24
MRE 804(b)(7) 27
MRE 901 .... 1, 40, 41, 50

STATUTES

Fla Stat Ann § 766.106(5) 45
Fla Stat Ann § 766.205(4) 45
MCL 500.3030 48
MCL 600.2912b 10, 44
MCL 600.2912c 45
MCL 600.2912d 22
MCL 600.5855 48

OTHER AUTHORITIES

2 Mich Ct Rules Prac, Evid § 613.2 n 4 20
Black's Law Dictionary (8th ed) 23
Ch. 88-1, Committee Substitute for Senate Bill 6-E, Laws of Fla. (1988) 46
M Civ JI 3.15 .... 15, 23

Wikipedia, "Cricothyroidotomy."
http://en.wikipedia.org/wiki/Cricothyroidotomy 3

STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant Robert F. Kowalski, M.D. ("Defendant" or "Dr. Kowalski") appeals by leave granted from an order denying reconsideration of the Court of Appeals' opinions and orders granting appellate relief to Plaintiff-Appellee Estate of Barbara Johnson, Deceased, by Joedeanna Howard, Successor Personal Representative ("Plaintiff"). This Court has jurisdiction to consider and resolve this appeal pursuant to MCR 7.301(A)(2). This Court's jurisdiction has been timely and properly invoked, as demonstrated by the following:

- May 29, 2012 opinion of the Michigan Court of Appeals (**24a-34a**), as amended by the June 21, 2012 order (**35a**);
- June 19, 2012 motion for reconsideration, filed within the 21-day period set forth in MCR 7.215(I)(1);
- July 19, 2012 order denying reconsideration (**36a**);
- August 30, 2012 application for leave to appeal, filed within the 42-day period set forth in MCR 7.302(C)(2)(c); and
- October 2, 2013 order granting leave to appeal (**37a**).

STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER THE PRESUIT AFFIDAVIT OF DR. URSE WAS ADMISSIBLE AS EXTRINSIC EVIDENCE TO IMPEACH DR. URSE WHERE IT WAS NOT A PRIOR INCONSISTENT STATEMENT WHICH CONFLICTED WITH HIS TESTIMONY AT TRIAL, AND DR. URSE ADMITTED TO MAKING THE ALLEGEDLY CONFLICTING STATEMENT CONTAINED IN THE AFFIDAVIT?

Defendant-Appellant says "no."

Plaintiff-Appellee says "yes."

The trial court says "no."

The Michigan Court of Appeals says "yes."

II.

WHETHER THE TRIAL COURT CORRECTLY RULED THE PRESUIT AFFIDAVIT OF DR. URSE WAS INADMISSIBLE AS SUBSTANTIVE EVIDENCE BECAUSE IT DID NOT FALL WITHIN ANY EXCEPTION TO THE HEARSAY RULE AND WAS OTHERWISE SUBSTANTIVELY INADMISSIBLE?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court says "yes."

The Michigan Court of Appeals says "yes."

III.

WHETHER 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?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court says "yes."

The Michigan Court of Appeals says "no."

IV.

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

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court says "yes."

The Michigan Court of Appeals did not reach this issue.

STATEMENT OF FACTS

A. Introduction.

This Court has granted leave to appeal from a published decision of the Court of Appeals holding the exclusion of evidence providing context for the impeachment of a key witness was inconsistent with substantial justice, such that a jury's no-cause verdict from a six-day medical malpractice trial should be vacated. Plaintiff argued at trial that Dr. Kowalski, a board-certified emergency room physician, negligently left Plaintiff's decedent, Ms. Johnson, unattended by a doctor when he left her room to attend to another patient in cardiac arrest. However, this theory was contradicted by the eyewitness testimony of Dr. Kowalski and board-certified anesthesiologist Charles Urse, D.O. ("Dr. Urse"), who both testified they were present in Ms. Johnson's room and consulted together before Dr. Kowalski left Ms. Johnson in Dr. Urse's care. Plaintiff sought to impeach Dr. Urse at trial with his pretrial affidavit, which makes no mention of Dr. Urse's arrival in Ms. Johnson's room while Dr. Kowalski was present and before Ms. Johnson went into respiratory arrest. The Court of Appeals held that while the exclusion of the affidavit itself was harmless error, the exclusion of presuit correspondence between Plaintiff counsel and the insurance representative for Drs. Kowalski and Urse was not harmless because the correspondence provided "context" for the affidavit, arguably establishing that the affidavit was intended to mislead Plaintiff counsel as to Dr. Urse's involvement in Ms. Johnson's care.

The trial court correctly ruled that neither the affidavit nor the correspondence were admissible as exhibits at trial for any purpose. First, the statements in the affidavit establishing how long it took Dr. Urse to reach Ms. Johnson's room after being paged were not directly inconsistent with Dr. Urse's testimony at trial regarding his entire involvement in Ms. Johnson's care, including his arrival time in Ms. Johnson's room and his consultation with Dr. Kowalski before her condition deteriorated. Also, even if an inconsistency existed, the affidavit itself, as

extrinsic evidence of Dr. Urse's prior statements under MRE 613(b), was properly excluded because impeachment was permitted under MRE 613(a) with Dr. Urse's testimony alone. Second, the affidavit was hearsay not admissible as substantive evidence. Third, the presuit correspondence was not admissible as impeachment or substantive evidence because it lacked relevance—including conditional relevance—as to any material issue in the case, had minimal probative value, and no witness could lay a proper foundation for its admission. Fourth, the affidavit and correspondence were otherwise properly excluded because the use at trial of communications during the notice of intent period threatens to chill these communications in future suits, contrary to the Legislature's intent. The jury's no-cause verdict was not undermined by exclusion of this evidence in light of the strength of the other evidence at trial.

While Defendant focuses his briefing on the inadmissibility of the correspondence and affidavit, Defendant requests this Court bear in mind the limited significance of this impeachment evidence in the larger context of the trial. Defendant's argument that he complied with the standard of care and was not negligent was amply supported by eyewitness testimony, the medical records and expert testimony. Plaintiff made copious use of the affidavit's contents at trial to impeach Dr. Urse's testimony, arguing Dr. Urse should not be believed and Dr. Kowalski's "defense team" had created the affidavit as part of a "manufactured defense" to exonerate him. The jury heard and weighed the evidence and arguments, and found Dr. Kowalski non-negligent. The correspondence, if admissible at all, had no bearing on the medical proofs, and its exclusion was not inconsistent with substantial justice. The Court of Appeals, in finding it was possible for the jury to discredit Dr. Urse's testimony as an unwitting participant in a "conspiracy" by his insurance representative to keep him from being named as a defendant, exceeded the scope of its review of the trial court's discretionary decisions to admit or exclude

impeachment evidence. The Court of Appeals' opinion should be reversed by this Court because it is unsupported by the law and the evidence and because any error at trial was harmless error.

B. Statement of material facts and proceedings.

1. Drs. Kowalski and Urse attempt to treat and stabilize Ms. Johnson.

On April 4, 2005, Barbara Johnson was severely bitten in the face and in the jaw by her horse and was taken by ambulance to Mercy Hospital (Cadillac), where she was treated by Dr. Kowalski, a board-certified emergency medicine doctor (**848a-849a, 1111a**). The Emergency Department was originally contacted at 2:30 p.m. and Ms. Johnson arrived at the hospital at 2:38 p.m. (**38a; 865a-866a; 896a**). Dr. Kowalski was waiting in the hallway, received a verbal report from EMS, and then directed EMS and the patient to a treatment room (**863a-864a**).

Ms. Johnson had been transported upright to the emergency room and was alert and talking upon arrival (**867a-868a, 1112a**). Significant trauma to the right side of her face had caused bleeding from her mouth and face, and paramedics had applied a Kerlix wrap to contain the bleeding (**39a; 874a**). Physical examination revealed some blood in her mouth, but her airway was patent, i.e., open, and she could speak (**39a**).

At 2:45 p.m., Dr. Kowalski and Nurse Wiebenga examined and assessed Ms. Johnson, and Dr. Kowalski decided to call for an airway management expert with expertise in a cricothyroidotomy[1] because this was a unique facial injury with massive bleeding (**41a-42a; 897a, 1015a, 1111a**). Once this initial evaluation was completed at approximately 2:50-2:52 p.m., Dr. Kowalski asked the emergency room clerk to call ENT and anesthesia on a "STAT" basis (**872a, 886a, 897a; 46a**). Dr. Kowalski also called Aero Med at 2:52 p.m. to arrange

---

[1] A cricothyroidotomy is a procedure in which a clinician inserts a tracheostomy tube or modified endotracheal tube through an incision in the cricothyroid membrane to establish an airway. *Wikipedia,* "Cricothyroidotomy." http://en.wikipedia.org/wiki/Cricothyroidotomy.

helicopter transport to Spectrum Hospital in Grand Rapids (**886a-887a, 897a-898a**). This impending air transport was an additional reason why intubation was necessary (**84a** [pp 27-28]).

Drs. Kowalski and Urse testified that Dr. Urse arrived in Ms. Johnson's room shortly after he was paged, and both doctors were then present at Ms. Johnson's bedside (**972a-929a** (Kowalski); **615a, 676a-687a** (Urse)).[2] Both doctors testified that Ms. Johnson was relatively stable and maintaining an airway when Dr. Urse arrived (*Id.*; **887a-890a, 898a, 677a-678a**).

Drs. Kowalski and Urse spent several minutes discussing management of Ms. Johnson's airway (**677a-678a**; **928a-929a**). At approximately 3:00 p.m., Dr. Kowalski was suddenly called to assist another patient who was in cardiac arrest (**892a**). It was "very rare" that two critical situations occurred at the same time, each requiring Dr. Kowalski's presence as the attending emergency room physician (**1010a**). After Dr. Kowalski left Ms. Johnson in Dr. Urse's care, Dr. Urse spoke directly to Ms. Johnson, performed a physical examination on her head and neck to determine whether intubation would be difficult or easy, told her she was going to be transported, and explained the intubation process (**679a-681a**). Ms. Johnson began exhibiting signs of respiratory distress (**681a-682a**). Dr. Urse then started to summarize significant findings in his progress note, but did not summarize his pre-arrest findings (including his arrival time in Ms. Johnson's room and the details of his discussion with Dr. Kowalski) because he considered them clinically non-significant, and did not typically record non-significant findings (**682a**).

Dr. Urse positioned Ms. Johnson to lie down so he could intubate her, but this caused significant bleeding which prevented him from proceeding with the intubation as planned (**1117a-1118a**). He then performed the cricothyroidotomy and, with the assistance of Dr. Jacobson, an ENT who had since joined him in the room, tried to manage a surgical airway for approximately 30-40 minutes. The flight crew arrived, and a Dr. Greenwood was ultimately able

[2] Dr. Kowalski knew Dr. Urse arrived quickly because he did not have to be re-paged (**928a**).

to achieve an airway (**1118a-1119a**). Meanwhile, Ms. Johnson suffered cardiac arrest. Although she later stabilized, she sustained significant damage and never recovered from her injuries (*Id.*).

Dr. Kowalski's dictated emergency room report provides a summary of these events, excerpted in part below, which he testified was not intended to be sequential:

> While in the emergency room, the patient started to bleed more profusely from her wrap and she developed some difficulty breathing. ENT specialist and anesthesia were called STAT. They did arrive. A cricothyroidotomy was elected to be done because of massive facial injury and bleeding. This was attempted by Dr. Jacobson, ENT, with the assistance of anesthesias [sic], Dr. Urse. A cricothyroidotomy was done; however, the ventilation at the time was not adequate. The tracheostomy tube was replaced with an endotracheal tube and the patient was able to be ventilated....(**40a**; **905a, 927a-928a**).

At trial, Plaintiff's case centered on whether Dr. Urse and Dr. Kowalski were both present in the room with Ms. Johnson when Dr. Kowalski was summoned on an emergency basis to address a life-threatening event with another patient. Plaintiff, interpreting the medical records as if written chronologically, suggested that the medical records as summarized in Plaintiff's reconstructed timeline of events conflicted with the testimony of Drs. Kowalski and Urse. However, Dr. Urse testified that his hand-written progress notes reflected only the time period after the patient went into significant respiratory distress, and did not reflect prior, non-significant events (**622a, 626a-627a**). Dr. Kowalski testified that the first two sentences in his report were not intended to appear in chronological order (**905a**), but that his notes were intended for use by subsequent treaters, and were compiled when he was taking care of the patient (**905a, 927a-928a**). Defendant argued that the actual timeline of events based on the medical records and this testimony was that Dr. Urse arrived shortly after being paged while Ms. Johnson was

still stable and maintaining her airway, and she was not left unattended by a physician before the onset of significant respiratory distress.[3]

It is within this context that Plaintiff argued that the affidavit of Dr. Urse should have been admitted as impeachment evidence, and that the presuit correspondence between Cy Weiner and Nancy Croze should have been admitted to provide context for the affidavit.

2. Dr. Urse's affidavit and the presuit correspondence.

Dr. Urse was named as a potential defendant in the notice of intent sent by counsel for Plaintiff, Mr. Cy Weiner. A dialogue commenced between Mr. Weiner, and Nancy A. Croze, Senior Claims Representative of American Physicians Assurance Corporation, the liability insurer for Drs. Urse and Kowalski. On June 19, 2007, Ms. Croze sent an email to Mr. Weiner, thanking him for taking the time to speak about the matter, and indicating:

> As we discussed, your internal evaluation is leading you in the direction of pursuing the case against ER physicians for an alleged delay in evaluating or establishing a secure airway (**126a**).

In the same email, Ms. Croze states, "I plan to defer any further action on his [Dr. Urse's] behalf based on your representation in this regard." (*Id.*).

In response, Mr. Weiner sent a letter to Ms. Croze dated July 26, 2007, in which he indicated ***his own impression*** that Dr. Kowalski bore the responsibility for the outcome of Ms.

---

[3] 2:45 – 2:50 p.m. Dr. Kowalski assessed the patient, and correctly concluded that he should call for help in airway management expertise from anesthesia and ENT.

2:50 – 2:52 p.m. Dr. Kowalski orders a page for "STAT anesthesia and ENT" and calls Aero Med at 2:52 p.m. to arrange for transport via helicopter to Spectrum Health.

2:53 – 3:00 p.m. Anesthesiologist Dr. Urse arrived during this timeframe in response to the STAT page. Dr. Kowalski was present when he arrived. For the next several minutes, the two doctors spoke about her condition and a plan for intubation.

3:01 p.m. Dr. Kowalski was called to attend to a patient in cardiac arrest, leaving Ms. Johnson in the qualified hands of Dr. Urse, and knowing that an ENT physician (Dr. Jacobson) had been paged and would also soon arrive.

Johnson's immediate care and treatment, and further indicated that he was planning on filing a case only against Dr. Kowalski, assuming that his information was accurate (**48a-49a**). In that same letter, Mr. Weiner indicated that he needed "some kind of verification perhaps in the form of an affidavit by Dr. Urse" that confirmed his understanding, and offered to draft such an affidavit (*Id.*). Based on Mr. Weiner's letter, Ms. Croze sent a cover letter, dated August 15, 2007, forwarding the August 9, 2007 affidavit of Dr. Urse, and indicating:

> I am confident that this document will meet your needs as you assess your intentions for pursuit of the case.
>
> I am relying on your representations that you are not at this time planning on naming Dr. Urse in any suit that you may file. If your assessment changes, I would ask that I be notified so that I can act accordingly (**50a**).

Dr. Urse testified that his affidavit was intended to state how long it took for him to reach Ms. Johnson's room (**613a-14a, 650a**). It reads in pertinent part as follows:

> 4. That I hereby state, affirm and certify that I was contacted, by beeper or through the OR 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 PACU 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*. (**51a**) (emphasis supplied)

At trial, Plaintiff argued that the emphasized language was inconsistent and thus could be used to impeach Dr. Urse, a witness at trial, when compared to Dr. Urse's one-page, hand-written progress note of the medical records, in which no substantive pre-respiratory distress events are described and in which no specific time is delineated for his arrival in the emergency room (**47a**). From this sequence of events and documents, it is evident that Mr. Weiner had reached his own understanding of the timeline of events from the medical records, as reflected in his presuit correspondence, and that he made the decision to sue Dr. Kowalski, only, based on his own interpretation of the medical records and Dr. Urse's affidavit (**126a-128a**).

3. Drs. Urse and Kowalski testify in their depositions that they were both present with Ms. Johnson before she went into respiratory arrest.

Plaintiff counsel Mr. Joel Sanfield deposed Drs. Kowalski and Urse on June 10, 2008 and July 21, 2008, respectively. Dr. Kowalski testified that he paged for anesthesia and ENT shortly after beginning his evaluation of Ms. Johnson's condition, that Dr. Urse arrived within minutes, and the two doctors consulted as to Ms. Johnson's condition and care before Dr. Kowalski was summoned to another patient's room at 3:01 p.m. (**77a-80a** [pp 55, 60, 75-77]). He clarified that the events in his dictated report did not appear in chronological order; specifically, that ENT and anesthesia were paged, and Dr. Urse arrived, before Ms. Johnson went into respiratory arrest (**78a** [pp 57, 59-60]). Dr. Urse testified that Dr. Kowalski was present when he arrived in Ms. Johnson's room, and that he spoke with both Dr. Kowalski and Ms. Johnson before she went into respiratory arrest (**83a-86a** [pp 22-29, 37-41]). Mr. Sanfield did not seem surprised by either doctor's testimony, and premised his questions to Dr. Urse upon the understanding that Dr. Kowalski was present when Dr. Urse arrived in the room. Discovery closed on May 25, 2009.

4. Plaintiff's subpoena and attempt to obtain testimony from Ms. Croze.

In January 2010, one month before trial, Plaintiff filed a motion in limine to bar testimony from Drs. Urse and Kowalski that they were present together in Ms. Johnson's room before she went into respiratory arrest, and consulted regarding her care (**52a-73a**). Plaintiff argued this testimony was inconsistent with Mr Weiner's prior understanding of the facts of the case based on his reading of Dr. Urse's affidavit and the medical records. Plaintiff also filed a subpoena directing Ms. Croze to appear and testify regarding the presuit investigation process, and to produce a copy of her claims and investigation files for inspection (**87a-88a**). Plaintiff alleged this information and testimony was necessary to show the defense in this case "willfully mislead and perpetuated a fraud," by which the defense "conspired to give Plaintiff's counsel a

reasonable and just expectation that the chronological events as set forth in the medical records were valid and accurate," under which plaintiff "proceeded with [this] lawsuit" (**68a-69a**).

The Honorable William M. Fagerman of the Wexford County Circuit Court denied Plaintiff's motions and issued a protective order regarding the claims file and Ms. Croze's testimony (**140a-141a**). He reasoned that a work product privilege protected the claims file and Ms. Croze's testimony thereupon, that Plaintiff did not show there was a "conspiracy" designed to mislead counsel, and that there had been adequate discovery regarding the eyewitnesses and their presuit representations to Plaintiff counsel (*Id.*). The case would be tried as to Dr. Kowalski's alleged negligence, and the jury would have to decide whether the doctors' testimony was inconsistent with the medical records (**138a-139a**). Mr. Weiner agreed that he had known about the doctors' testimony since June 2008, and could not satisfy the trial court that the exclusion of this testimony was the appropriate remedy for his failure to name Dr. Urse as a defendant (**132a-137a**). The trial court suggested, but did not rule, that Plaintiff could impeach Dr. Urse with his affidavit at trial, and "let the finder of fact decide if he's lying now or lying then" (**134a-135a, 139a**). The trial court did not rule as to the use of the correspondence at trial.

5. Plaintiff argues in opening statements that the affidavit shows Dr. Urse is lying.

Trial commenced on February 9, 2010. After voir dire, the swearing in of jurors, and preliminary instructions, Mr. Weiner requested a ruling from the trial court on the admissibility and use of Dr. Urse's affidavit and the correspondence (**309a-323a**). Counsel argued that "the whole case rests upon the medical records which contradict the testimony and story of Dr. Urse and Kowalski - - and Dr. Kowalski, and that there was a factual dispute on who was present in the emergency room" (**314a-315a**). At that point, the trial court asked and Plaintiff's counsel confirmed that the affidavit would be limited to impeaching anticipated inconsistent trial testimony from Dr. Urse and that the letters were intended only to put the affidavit in context:

> THE COURT: The only admissible purpose for Dr. Urse Affidavit will be to impeach his testimony which we anticipate to be consistent with his deposition testimony, you agree?
>
> MR. WEINER: Right, right.
>
> THE COURT: And the only purpose for referring either to your letter or to Ms. Croze' response letter is to put that affidavit into context.
>
> MR. WEINER: Exactly. (**315a**).

Defense counsel objected on several grounds, including that the affidavit was inadmissible because Dr. Urse was not a party (**317a**), and thus the affidavit could be used for impeachment purposes, only, but not as substantive evidence (**318a**); that counsel for Plaintiff had not built a proper foundation for the admission of either of the letters, which would likely require testimony from Mr. Weiner and/or Ms. Croze, neither of whom were listed as witnesses in the case (*Id.*); that the documents were otherwise hearsay (*Id.*); that allowing use of documents discussing such matters during the notice of intent stage would be contrary to the purpose behind the notice of intent statute, MCL 600.2912b (**318a-319a**); that the jury would infer that there was insurance coverage from the nature of Ms. Croze' job, as disclosed by the letters (**319a**); and that the prejudicial effect of such evidence would substantially outweigh their probative value under MRE 403 (**319a-320a**). Defense counsel specifically argued that the letters, as opposed to the affidavit, could not be used for impeachment because the facts revealed therein were not in dispute or dispositive of any specific issue in the case (**319a**).

The trial court determined that there was no reference to the correspondence in the affidavit, and that the trial court therefore would not allow Plaintiff to introduce the correspondence in his opening statement, with the understanding that Plaintiff could do so at trial if a proper foundation was laid upon cross examination of Dr. Urse that he had reviewed those letters and was endorsing the facts that were contained in those letters at the time he executed his affidavit (**322a**). The trial court further ruled that, with respect to the use of the affidavit in

opening statement, it was premature because Plaintiff simply anticipated Dr. Urse's testimony to be inconsistent given his earlier, arguably inconsistent deposition testimony, and therefore the affidavit at this juncture merely constituted a hearsay document "until such time that its overcome by his direct testimony that is contradictory to that" (**322a**). The trial court did allow counsel for Plaintiff to make reference that Dr. Urse had signed something which Plaintiff believed would be contrary to his testimony (**323a**).

Plaintiff's opening statement made multiple references to Dr. Urse signing a pretrial affidavit which would conflict with his testimony at trial (**338a, 340a-341a**). Counsel alleged the affidavit "didn't say anything about being on the scene with Dr. Kowalski," did not mention "this meeting that supposedly occurred between 2:45 and 3:00," and "indicates nothing about his being in the room with Dr. Kowalski. Nothing" (*Id.*). Plaintiff counsel told the jury that "Dr. Urse will change his testimony," and "such testimony of Kowalski and Urse must be false or the record and Nurse Joel and everything we know about this case is wrong" (**340a**).

6. Plaintiff uses the prior statements in Dr. Urse's affidavit to impeach his testimony, but the affidavit is not admitted as an exhibit.

Throughout the testimony of Dr. Urse, Plaintiff attempted to impeach him with the prior statements in his affidavit. Dr. Urse recalled signing an affidavit and brought a copy of his affidavit to trial (**602a**). He testified that his hand-written progress note (**47a**) was a summary of events that occurred starting only when the decedent started to have respiratory distress (**603a-604a**), and was a reflection of his findings and treatment that he elected to document at the time the note was created (**604a**). Dr. Urse was then asked to review his affidavit, at which time he read the entire affidavit to the jury (**605a**). After the trial court noted that it was not sure if all the jurors had been able to hear the text of that affidavit (**605a-606a**), the affidavit was marked as Plaintiff's proposed Exhibit No. 17, and counsel for Plaintiff asked a series of questions in an attempt to establish an inconsistency between that affidavit and prior evidence (**607a-608a**). Dr.

Urse testified that his affidavit indicated that his findings and treatment were summarized in his hand-written progress note contained in the medical record, as set forth in paragraph 5 of the affidavit (**608a**), that he did make an evaluation and findings ***before*** the decedent went into respiratory distress (**610a**), but that these pre-respiratory distress evaluations and findings were not reflected in his note, allegedly contrary to Plaintiff's counsel's reading of the affidavit that ***all*** of his findings and treatment were summarized in the hand-written note (**610a-611a**). Dr. Urse pointed out the obvious: his handwritten notes did not contain his evaluation and findings before the decedent went into respiratory distress because "at that point, there was no respiratory distress" (**611a**). Defense counsel continued to object to admission of the affidavit based on the absence of any inconsistent testimony, as well as hearsay and lack of foundation (**607a**).

Dr. Urse was then presented with the correspondence between Mr. Weiner and Ms. Croze, at which time he testified that he had never seen nor read the letters, and that the correspondence did not refresh his recollection of the circumstances surrounding the preparation of his affidavit, or the extent of his involvement in this case (**613a-614a**).

The jury was excused for arguments on the admissibility of the affidavit (**615a**). Although defense counsel maintained that Dr. Urse's testimony was not inconsistent with his affidavit, Judge Fagerman ruled that he was now satisfied as to the possibility of inconsistency between Dr. Urse's expected trial testimony and his affidavit (**615a-619a**). However, he disagreed that the affidavit was admissible as substantive evidence as non-hearsay or an exception to hearsay (**620a-623a**). Judge Fagerman ruled the affidavit would not be received as an exhibit, but Plaintiff could use the statements in the affidavit to impeach Dr. Urse's testimony:

> THE COURT: All right. To move this matter along, I'm going to rule that proposed 17 will not be received. I'm not precluding you from asking questions to the witness. I think you have done so, Mr. Sanfield. I do believe, however, that Dr. Urse read the portion that you referred him to somewhat meekly and it was difficult for me to hear and a couple of jurors were trying to get my attention

while he was doing so. So for that reason, I will allow you to ask that question again. But that's going to be the Court's ruling as to the admissibility of 17.

MR. SANFIELD: So I may ask him to read paragraph 5 - -

THE COURT: You may.

MR. SANFIELD: - - of his affidavit? I appreciate that, your Honor, and we will abide by that ruling. (**623a-624a**).

Dr. Urse reread paragraph 5 of the affidavit, containing the alleged inconsistency, to the jury (**624a-625a**). On cross examination, Dr. Urse explained it took about two or three minutes to reach Ms. Johnson's room after he was paged (**648a-650a**), and confirmed that when he walked into the room, Dr. Kowalski was there, and Ms. Johnson was not in respiratory distress (**654a**). Dr. Urse testified he had never seen the timeline defense counsel used at trial (**662a**).

7. The testimony at trial supports the jury's no-cause verdict.

Testimony from the other fact witnesses supported Dr. Urse's version of events. Nurse Wiebenga testified that he and other medical personnel were coming in and out of the room throughout Ms. Johnson's treatment, and he could not recall specifically whether Dr. Urse was present in the room before 3:05 p.m. (**496a-497a, 501a, 514a, 525a**). He did not document every event in his handwritten notes (**520a**). Dr. Jacobson, the ENT, testified she arrived when Dr. Urse was attempting intubation, which was difficult because laying Ms. Johnson down to intubate caused blood to obscure the surgical field (**563a, 576a, 583a**). Dr. Kowalski had "no doubt" he talked with Dr. Urse in Ms. Johnson's room before leaving at 3:00 p.m. (**928a-929a**).

More importantly, testimony from expert witnesses amply supported the jury's finding that Dr. Kowalski complied with the standard of care. Defense emergency room expert Dr. Nowak testified it was appropriate to wait 5-10 minutes for anesthesia to arrive to intubate a difficult patient when that patient had been upright and talking for an hour (**1051a-1052a**). He confirmed that not every event in a patient's care is documented minute-by-minute in a dictated

report or medical record, and only Dr. Kowalski could confirm whether his report was dictated in chronological order (**1038a, 1054a, 1057a, 1059a**). Dr. Nowak testified at length as to the standard of care, and opined Dr. Kowalski had not been negligent (**1013a-1029a**). Similarly, defense emergency room expert Dr. Walls testified Ms. Johnson had a unique injury, and Dr. Kowalski appropriately called promptly for help from airway management experts and waited for them to arrive before attempting intubation, consistent with the standard of care (**1111a, 1114a, 1124a-11261, 1132a, 1140a**). He would have criticized Dr. Kowalski had he simply rushed to perform the intubation himself instead of waiting for the right "team" to arrive, where the patient's condition did not require immediate intubation (**1127a, 1129a, 1184a-1187a**). Once Ms. Johnson was laid down, the blood obstructing her throat and mouth made successful intubation very difficult (**1136a-1137a, 1189a-1190a**). Plaintiff's emergency room expert Dr. Frankel, who has never performed a cricothyroidotomy, only criticized Dr. Kowalski for not intubating Ms. Johnson himself before Dr. Urse arrived (**738a** [pp 11-13], **740a** [pp 19-20], **744a** [p 34], **748a** [p 53]). He did not criticize Dr. Kowalski's decision to call for help from ENT and anesthesia, or to allow Dr. Urse to intubate Ms. Johnson after he left the room (**752a** [p 67]).

8. The affidavit and correspondence are not admitted on rebuttal.

Shortly before the defense rested, Plaintiff made an offer of proof as to the correspondence, requested admission of the affidavit and the correspondence, and requested rebuttal testimony from several witnesses, including Ms. Croze and Mr. Weiner (**1201a-1212a**). Mr. Weiner agreed with the trial court's finding that Dr. Urse denied any knowledge of the correspondence (**1204a**). Still, he insisted the affidavit, in the context of the correspondence, would contradict Dr. Urse's position that he met with Dr. Kowalski in advance of the intubation (**1207a**). Defense counsel argued that the trial court had already ruled on the admissibility of the affidavit; that the evidence, if admissible, did not qualify as rebuttal evidence because Dr. Urse

had already been examined at length as to the alleged inconsistency; and that Mr. Weiner's proposal to testify as a witness about his letter would disqualify him as counsel of record, which could cause a mistrial (**1209a-1210a**). The trial court retained its prior ruling on the affidavit:

> The statement has been used for the extent that it was able to for purposes of impeachment. MRE 613 permits that and I permitted you to do that.
>
> As it relates to the request that Mr. Weiner either be a witness or that his correspondence with Nancy Kroes [sic] or her letter back to Mr. Weiner, those have been argued in the past in a pretrial motion. The Court denied that request and denied request for further disclosure of her file. The witness, in particular, Dr. Urse, indicated that he didn't have knowledge of that. He denied any knowledge of that being the foundation for his statement in the affidavit that's been referred to.
>
> The plaintiffs have had an adequate opportunity to cross examine Dr. Urse, to lead him as it was put, because he was adverse to them, and the Court was lenient with that, as well as Mr. Fatum did not object frequently as it relates to that. That was all part of the plaintiff's case in chief, and I'm not going to permit that testimony to be offered, and I will deny that request. Anything else, Mr. Weiner? (**1210a-1211a**).

9. Plaintiff argues the affidavit's meaning to the jury, which is instructed on prior inconsistent statements and returns a no-cause verdict.

In closing argument, Mr. Weiner argued that the defense in this case was fabricated by a "powerful, sophisticated and wealthy legal team" (**1224a**); that Dr. Urse's affidavit indicated there was no meeting between he and Dr. Kowalski; that Dr. Urse did not enter the room between 2:53 and 3:00 p.m. (**1231a**); and questioned rhetorically why Dr. Urse signed an affidavit (**1234a-1235a**). Defense counsel argued Dr. Kowalski acted appropriately by timely summoning Dr. Urse, an airway management expert, to assist with Ms. Johnson (**1250a-1251a**).

The trial court instructed the jury under M Civ JI 3.15, including that provision of the instruction by which the jury could consider earlier inconsistent statements of a witness as proof of the facts of the case (**1301a-1302a**). It took the jury just over two hours to return with a unanimous verdict of no professional negligence at 11:41 a.m. (**1315a, 1318a-1319a**). Post-trial relief was denied, and Plaintiff timely appealed from the Judgment of No Cause (**22a**).

C. The Court of Appeals reverses the jury's no-cause verdict in a published opinion.

The Court of Appeals waited almost six months from the date of oral argument to issue its published May 29, 2012 opinion (**24a-34a**), amended by its June 21, 2012 order (**35a**) (collectively, "opinion"). The Court used a de novo standard of review, finding "questions of law underlying a trial court's evidentiary decision" (**29a**). The Court ruled that the affidavit was admissible as impeachment evidence to challenge Dr. Urse's credibility, and should have been admitted as an exhibit for that purpose, but its exclusion was harmless error because Dr. Urse read the content of the affidavit into evidence, Mr. Weiner discussed its contents during closing argument, and the jury was instructed to consider whether the affidavit contradicted Dr. Urse's testimony (**30a-31a**). The Court regarded the admission of the presuit correspondence as a "simple" question of logical relevance, with the correspondence being relevant to explain the affidavit's contents and why they are inconsistent with Dr. Urse's trial testimony (**32a**). While acknowledging Plaintiff's failure to establish the conditional fact of Dr. Urse's knowledge of the correspondence under MRE 104(b), the Court proposed another conditional fact which, if fulfilled, could show the correspondence was relevant to challenge Dr. Urse's credibility: if he was "kept in the dark" about the correspondence as "context" for the affidavit, then "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" (**32a**). Thus, the operative ruling was the correspondence was admissible as context for the affidavit because "the sum of the evidentiary presentation could lead a rational jury to find that Dr. Urse, either wittingly or unwittingly, participated in an effort to 'sandbag' the plaintiff" (**33a**).

Despite the trial court's explicit finding that there had been no "conspiracy" by the defense or Ms. Croze during the presuit period (**140a**), the Court of Appeals *sua sponte* concluded that "[i]t is impossible to ignore the timing and substance of the email between

plaintiff's counsel and Croze," calling Ms. Croze's statements "disarming" (**33a-34a**). The Court found reversible error in the trial court's exclusion of the correspondence because the evidence "may have affected the jury's determination regarding the credibility of Dr. Urse, a critical witness" (**34a**). There was no weighing of the evidence's probative value under MRE 403, nor any mention of Defendant's privilege and policy arguments regarding the admissibility of notice of intent correspondence.

The Court of Appeals' opinion reversing, on the basis of impeachment evidence, a no-cause verdict from a six-day trial can only be characterized as result-oriented. The Court improperly used a de novo standard of review to sit as the trial judge in determining whether impeachment evidence should have been admitted. Unperturbed by the fact that the most obvious (and only asserted) fact establishing the relevance of the presuit correspondence—Dr. Urse's knowledge of the communications—could not be established, the Court proceeded to *sua sponte* conclude the correspondence appeared to show Plaintiff counsel had been "sandbagged" by Ms. Croze into not naming Dr. Urse as a defendant, and elevated this unbridled speculation to the level of a conditional fact which the jury supposedly could have found. There was simply no evidence at trial to support the finding of "conspiracy" as a conditional fact, nor could any reasonable jury conclude that the mere existence of the correspondence, unbeknownst to Dr. Urse, had any bearing on his credibility as an eyewitness to Ms. Johnson's care. The Court's opinion ignores the substantial weight of proofs and expert testimony in favor of Dr. Kowalski, and instead reverses the jury's verdict on the basis of evidence which merely provides context for the affidavit as impeachment evidence.

This Court granted leave to appeal on October 2, 2013 on two questions: (1) whether the affidavit is admissible; and (2) whether the presuit correspondence is admissible (**37a**).

STANDARD OF REVIEW

This Court recently announced its standard of review for nonconstitutional preserved evidentiary errors in *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013):

> A trial court's decision to admit evidence "will not be disturbed absent an abuse of ... discretion." *People v McDaniel,* 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes. *People v Smith,* 482 Mich 292, 300; 754 NW2d 284 (2008). However, if an evidentiary error is a nonconstitutional, preserved error, then it "is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative." *People v Krueger,* 466 Mich 50, 54; 643 NW2d 223 (2002). An error is "outcome determinative if it undermined the reliability of the verdict" and, in making this determination, a court should "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id.* (quotation marks and citations omitted).

The Court of Appeals did not have the benefit of this most recent statement of the applicable standard of review when it issued its opinion in 2012. Instead, the Court of Appeals incorrectly used a de novo standard of review applicable to evidentiary rulings based on errors of law in the construction of a rule of evidence (**29a**). Here, there is no evidence that the trial court misunderstood or misconstrued the rules of evidence when ruling on the admissibility of the presuit affidavit and correspondence. Rather, the trial court demonstrated a sophisticated and thorough understanding of the rules of evidence and applied them within its discretion to exclude the proffered evidence. There is no basis for applying a de novo standard of review in the instant case based on errors of law in the trial court's construction of a rule of evidence.

The Court of Appeals improperly used the de novo standard of review to create a second, unasserted conditional fact when it became apparent that the trial court correctly exercised its discretion under MRE 104(b) as to the existence of the original conditional fact raised at trial. This standard also caused the Court to improperly overturn the jury's verdict based on exclusion of impeachment evidence, where the alleged error was harmless because it did not undermine the reliability of the verdict in light of the overwhelming weight of the medical evidence.

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.

A. Introduction.

At trial, Plaintiff attempted to use statements contained in Dr. Urse's presuit affidavit to impeach his testimony that he was present in Ms. Johnson's room and consulted with Dr. Kowalski regarding her care before Dr. Kowalski left to attend to another patient. The statements in that affidavit were inadmissible to impeach Dr. Urse because they were not inconsistent with his testimony at trial. Moreover, the affidavit itself was inadmissible under MRE 613(b) as extrinsic evidence of the allegedly inconsistent prior statements because Dr. Urse did not deny making the statements when he testified at trial. To the extent the trial court erred by failing to admit the affidavit itself as an impeachment exhibit, the error was harmless as the jury heard the affidavit read verbatim, considered its contents and Plaintiff counsel's argument that the affidavit damaged Dr. Urse's credibility, and still found in Dr. Kowalski's favor.

B. Governing law.

A witness may be impeached using a prior statement of the witness which is inconsistent with his or her testimony at trial. MRE 613. Under Michigan law, the question of inconsistency between a witness' prior statement and his testimony at trial is one within the discretion of the trial judge, and a statement is only inconsistent where it "directly tends to disprove the exact testimony of the witness." *People v Allen*, 429 Mich 558, 650; 420 NW2d 499 (1988) (Riley, C.J., dissenting); *People v Johnson*, 113 Mich App 575, 579; 317 NW2d 689 (1982); *Diliberti v Essex*, Court of Appeals Docket No. 190260, *rel'd* Sept 15, 1998; 1998 WL 1989827, *3

(unpublished) (**1327a**). This is stricter than the "prevailing view" cited by the Court of Appeals which allows courts in other jurisdictions to find inconsistency where "any material variance" exists (**30a**). See 2 Mich Ct Rules Prac, Evid § 613.2 n 4 (characterizing Michigan's rule as "far more restrictive than the federal approach" and noting Court of Appeals' departure from this rule in the instant case).

MRE 613(b) allows extrinsic evidence of a witness' prior inconsistent statement to be used to impeach that witness when the witness denies or claims not to remember making the prior inconsistent statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).

C. Argument.

1. Dr. Urse's affidavit was not admissible under MRE 613(b) for impeachment purposes because the statements contained within the affidavit did not conflict with his testimony at trial.

Before and during trial, defense counsel maintained that Dr. Urse's affidavit was not inconsistent with any of his anticipated trial testimony (**314a, 618a-620a**). The trial court noted that it was Plaintiff's position that Dr. Urse would testify at trial in a way that counsel believed was inconsistent with the affidavit, but ruled that Plaintiff could not use the prior inconsistent statement allegedly contained within the affidavit to impeach Dr. Urse until Dr. Urse had in fact offered contradictory testimony (**322a**). This was proper because the existence of conflicting testimony at trial is a foundational requirement for impeachment by a prior inconsistent statement. *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007).

However, the trial court erred by eventually allowing Plaintiff to impeach Dr. Urse using the statements contained within his affidavit because those statements did not "directly tend to disprove the exact testimony of the witness." *Allen*, 429 Mich at 650. Dr. Urse testified at trial that he believed the purpose of the affidavit was simply to set forth the sequence and timing of events between the STAT page summoning him to the ER and his arrival in Ms. Johnson's room

minutes later (**613a-614a, 650a**). Although counsel questioned Dr. Urse repeatedly about whether the correspondence between Ms. Croze and Mr. Weiner refreshed his recollection as to the purpose of the affidavit, Dr. Urse denied knowledge of that correspondence and did not testify that the affidavit reflected, or was intended to reflect, whether he consulted with Dr. Kowalski in Ms. Johnson's room before she went into respiratory arrest. However, Plaintiff counsel stated that his interpretation of the statements contained in the affidavit was dependent upon the context in which he elicited the affidavit: to satisfy himself that Dr. Urse was not summoned to or present in the room with Ms. Johnson until after she went into respiratory distress, and therefore Dr. Urse should not be named in the lawsuit (**1203a-1206a**).

The inconsistency in Plaintiff counsel's eyes, therefore, was that the affidavit, read in conjunction with Dr. Urse's progress note, appeared *to him* to confirm that Dr. Urse was not present in the patient's room with Dr. Kowalski before her condition deteriorated, and Dr. Urse testified inconsistently at trial that he was in fact present at that time. As the trial court pointed out, however, this testimony about a meeting with Dr. Kowalski was not inconsistent with the statements in the affidavit made by Dr. Urse as to the amount of time it took him to reach Ms. Johnson's room (**1204a-1205a, 1207a**). The affidavit does not address whether, after his arrival in Ms. Johnson's room, Dr. Urse then consulted with Dr. Kowalski before she went into respiratory arrest. Thus, the prior statement in the affidavit was not inconsistent because it did not "directly tend to disprove" Dr. Urse's testimony that the affidavit reflects only his memory of how long it took him to reach the patient's room after he was paged. Stated otherwise, Dr. Urse made no prior inconsistent statement regarding his consultation with Dr. Kowalski or Ms. Johnson's condition which could have been used at trial to impeach his testimony that he was paged to, and arrived at, Ms. Johnson's room before she went into respiratory arrest.

Dr. Urse's presuit affidavit is distinguishable from the affidavits of merit from plaintiff experts found to constitute prior inconsistent statements in *Barnett*. In *Barnett*, the affidavits of merit were inconsistent with the experts' testimony at trial because the affidavits did not include violations of the standard of care which the experts later testified to at trial. 478 Mich at 166. These omissions were significant because the affidavit of merit of a plaintiff's expert is *required* to contain verified, sworn statements setting forth precise allegations of standard of care violations. MCL 600.2912d. In contrast, Dr. Urse's affidavit was not in any way required to contain precise statements of all of his activities and interactions regarding his treatment of Ms. Johnson. Nor did anyone besides Mr. Weiner believe that the affidavit was required to contain precise statements regarding Dr. Urse's consultation with Dr. Kowalski before Dr. Kowalski left Ms. Johnson's room. A finding of direct, material inconsistency sufficient to invoke MRE 613(b) must be premised upon more than the mere omission of information which was not reasonably expected to be included in the prior statement. See *People v Lucas*, Court of Appeals Docket No. 254521, *rel'd* June 23, 2005; 2005 WL 1490062, *5 (unpublished); *lv denied* 474 Mich 946; 706 NW2d 200 (2005) (**1333a-1334a**) (opining that trial testimony providing greater detail in response to questioning was not inconsistent with preliminary examination testimony).

As the Court of Appeals recognized, if this Court finds the statements in the affidavit were not inconsistent with Dr. Urse's testimony at trial, then the affidavit, as hearsay, is inadmissible for any purpose including impeachment (**30a**). This conclusion ends the appeal, as the admission of the correspondence relies upon admission of the affidavit.

2. The affidavit itself was inadmissible as extrinsic evidence of Dr. Urse's prior statement where Dr. Urse admitted making the prior statement.

The trial court allowed Plaintiff to cross examine Dr. Urse regarding what counsel perceived to be an inconsistent prior statement by Dr. Urse in his affidavit, and instructed the jury that to the extent the jury believed Dr. Urse's prior statement was inconsistent with his

testimony at trial, they were entitled to use that information in their assessment of Dr. Urse's credibility as a witness (**1301a-1302a**), M Civ JI 3.15. The Court of Appeals, in finding that this course of action evidenced an "implicit" ruling that the affidavit contained a prior inconsistent statement, and that the affidavit itself should have therefore been admitted as an exhibit, misses the fine but fundamental distinction between the statement of Dr. Urse, and the affidavit as extrinsic evidence of that statement. Even assuming *arguendo* that the trial court had found (or thought a reasonable jury could find) an inconsistency between Dr. Urse's testimony and his prior statement contained in the affidavit, the rules of impeachment do not automatically allow for the admission of the affidavit itself as extrinsic evidence of that statement.

Dr. Urse admitted at trial to making the prior statements contained in his affidavit regarding how long it took to arrive in Ms. Johnson's room, and his findings being summarized in his progress note (**608a-609a, 649a-650a**). Even if those statements were inconsistent with his testimony, the affidavit itself was inadmissible, even for impeachment, because the attempted impeachment was allowed under MRE 613(a) by eliciting an admission of the prior statement.

MRE 613(b) allows for "extrinsic evidence of a prior inconsistent statement by a witness" "Extrinsic evidence" is defined as "[e]vidence that is calculated to impeach a witness's credibility, adduced by means other than cross-examination of the witness. The means may include evidence in documents and recordings and the testimony of other witnesses." Black's Law Dictionary (8th ed), p 597. Where a witness' prior inconsistent statement was made in a writing rather than verbally, courts have had to distinguish between the statement itself, as testified to or denied by the witness on cross examination, and the writing containing the statement, which necessarily constitutes extrinsic (non-testimonial) evidence of that statement. The Sixth Circuit, in *Rush v Illinois Cent R Co*, 399 F3d 705, 723 (CA 6, 2005), reaffirmed its longstanding position that "when a witness admits to making a prior inconsistent statement,

extrinsic proof of the statement is inadmissible." The *Rush* court held that where a witness admitted to having made a prior inconsistent statement that conflicted with his trial testimony, an audio recording of his prior statement was inadmissible as extrinsic evidence under FRE 613(b). Only where a witness denies having made a prior inconsistent statement can extrinsic evidence of that statement then be used to impeach his credibility.[4] This serves to prevent introduction of documentary evidence which is merely cumulative of testimonial evidence. MRE 403.

This Court has taken the same position, stating that "[w]hen a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement. The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement-not to prove the contents of the statement." *Jenkins*, 450 Mich at 256. In other words, impeachment based on a prior inconsistent statement is accomplished under MRE 613(a) without reference to extrinsic proof of that statement so long as the witness testifies to having made the statement. Under that circumstance, the extrinsic evidence is inadmissible unless it falls under an exception to the hearsay rule. MRE 801-804.

The Court of Appeals overlooked the distinction between the prior statement and the affidavit as extrinsic evidence of that statement by reasoning that because the affidavit was read verbatim by Dr. Urse to the jury, this was the functional equivalent of admitting the affidavit as impeachment evidence (**30a**). This was not the result of the trial court's tacit admission of the affidavit as impeachment evidence, but rather of Plaintiff counsel's overzealous and procedurally misguided attempts to have the affidavit admitted into evidence. While the distinction here is somewhat blurred because the allegedly inconsistent statement was actually contained within the

[4] For example, where a witness denies at trial that he previously told the police he saw the defendant in a gold car on the day of the shooting, the testimony of the police officer who transcribed the witness' statement to police that he had seen the defendant in a gold car was admissible as extrinsic evidence of a prior inconsistent statement to impeach the witness' credibility. *Jenkins*, 450 Mich at 256-258.

affidavit, the trial court still properly drew a line between eliciting testimony of Dr. Urse's allegedly inconsistent statement and receiving the affidavit into evidence as an exhibit.

3. Any error by the trial court in admitting or failing to admit the affidavit as impeachment evidence was necessarily harmless.

As set forth on page 8 of the Court of Appeals' opinion (**31a**), any failure to admit the affidavit as impeachment evidence "would be harmless inasmuch as the trial judge allowed the contents of the affidavit into evidence, allowed plaintiff counsel to discuss its contents during closing argument, and instructed the jury to consider whether the affidavit contradicted Dr. Urse's testimony." See *People v Alibeg*, Court of Appeals Docket No 284250, *rel'd* June 18, 2009; 2009 WL 1717373, *3 (unpublished) (**154a-155a**); *lv denied* 985 Mich 978; 774 NW2d 878 (2009) (failure to admit transcript of prior inconsistent statement made by child sexual assault victim in preliminary examination was harmless error where child witness was actually impeached with prior statement and jury was instructed on use of inconsistent statements to assess witness credibility). The erroneous exclusion of cumulative evidence is harmless. *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005).

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.

A. Introduction.

As confirmed by this Court in *Barnett*, there must be an independent evidentiary basis for the substantive admission of evidence used for impeachment purposes. Assuming *arguendo* that Dr. Urse's affidavit was admissible for impeachment purposes, the affidavit was still properly excluded as substantive evidence because it was an out-of-court statement constituting hearsay

and no exception to MRE 802, the rule against hearsay, existed for its admission into evidence. Moreover, as the Court of Appeals acknowledged, any error in its exclusion was harmless.

B. Governing law.

Evidence used for impeachment purposes is not admissible as substantive evidence unless there is an independent basis for its admission under the rules of evidence. *Barnett*, 478 Mich at 164; *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972).

C. Argument.

1. The affidavit was not admissible as non-hearsay under MRE 801(c).

At the close of defense proofs, Mr. Weiner attempted to convince the trial court that Dr. Urse's affidavit should be admitted as substantive evidence on rebuttal because he was not offering the affidavit for the truth of the matter asserted therein (**1203a, 1207a**). He suggested that the affidavit would not be hearsay under MRE 801(c) because he was offering it "to show that the story had changed" (**1203a**), and more particularly, "as rebuttal to contradict [Dr. Urse's] position that he met with Dr. Kowalski in advance of the intubation" (**1207a**). However, there was no factual foundation for this use of the affidavit because, as the trial court observed, there was no evidence showing that Dr. Urse had written the affidavit in an effort to mislead Mr. Weiner on this point, only to "change his story" at his deposition and at trial (**1204a-1205a**). On a more fundamental level, the trial court also observed no discernable change in Dr. Urse's "story" between the affidavit and his testimony on this point, because the affidavit makes no mention of his contact with Dr. Kowalski either before or after the attempted intubation (**1207a**).

The argument that the affidavit is admissible as non-hearsay because it is offered to show the inconsistency or "change" in Dr. Urse's "story" between his affidavit and his trial testimony is an end-run around MRE 801(d)(1), which limits the substantive admission of prior inconsistent statements to statements by a party to the lawsuit. See section 2, *infra*. To the extent Plaintiff believed the affidavit to be inconsistent with Dr. Urse's testimony at trial

regarding his interaction with Dr. Kowalski, Mr. Sanfield was allowed to use the allegedly inconsistent prior statement in the affidavit to impeach Dr. Urse's credibility. In other words, absent testimony that Dr. Urse had an improper motive for making different statements in his affidavit than he did at his deposition and at trial, the affidavit was simply irrelevant for any purpose other than impeachment of Dr. Urse's credibility as a witness. MRE 402.

2. The affidavit was not admissible as a prior statement of a witness under MRE 801(d)(1)(A) or a party admission under MRE 801(d)(2).

The affidavit was inadmissible under MRE 801(d)(1)(A) as a prior inconsistent witness statement because the affidavit was not given under oath "at a trial, hearing, or other proceeding, or in a deposition." *Barnett*, 478 Mich at 160. In *Barnett*, this Court found the plaintiff's experts' affidavits of merit otherwise substantively admissible under MRE 801(d)(2)(B) and (C) because they were party admissions made by experts authorized to speak on the plaintiff's behalf as to the validity of the asserted malpractice claims, and adopted by the plaintiff in its pleadings. *Id.* at 161-164. This rule does not apply to Dr. Urse's affidavit because Dr. Kowalski, the party to the lawsuit, neither authorized Dr. Urse to write the affidavit nor manifested an adoption or belief in its truth. Plaintiff did not request admission of the affidavit on this basis at trial.

3. The affidavit was not admissible under the catch-all exception of MRE 804(b)(7).

The trial court correctly ruled that the affidavit was not admissible under MRE 804(b)(7), the "catch-all" hearsay exception, because Dr. Urse was not unavailable to testify (**622a**).

4. Any error by the trial court in failing to admit the affidavit as substantive evidence was necessarily harmless.

Again, the Court of Appeals recognized on page 8 of its opinion (**31a**) that any error concerning admission of the affidavit was harmless because Plaintiff counsel was fully able to argue the contents and his interpretation of the affidavit to the jury to advance Plaintiff's theory of the case; specifically, that Drs. Urse and Kowalski had manufactured the story that they

consulted with one another before Dr. Kowalski left Ms. Johnson to attend to another patient (**1228a-1232a, 1234a-1235a**). In fact, without being constrained by the actual contents of the affidavit as an exhibit in evidence, Mr. Weiner had even greater liberty to characterize Dr. Urse's allegedly conflicting testimony as part of the "manufactured or fabricated defense" that Dr. Kowalski's "dream team" of lawyers and hired experts invented (**1224a-1225a**). Here, as in *Alibeg*, even if the affidavit of Dr. Urse was substantively admissible, its exclusion was harmless because the jury chose to believe the allegedly inconsistent witness:

> At trial, defendant impeached the victims with their preliminary examination testimony, raising the question of their credibility for the jury. We fail to see how admitting the victims' preliminary examination statements as substantive evidence would have furthered defendant's goal of showcasing the victims' alleged shaky credibility. Despite defense counsel's questions, the jury chose to believe the victims. Defendant has not shown that it is more probable than not that the error was outcome determinative

Alibeg, supra, at *3 (**154a**). It is obvious that while Plaintiff counsel did not believe the testimony of Drs. Urse and Kowalski regarding their consultation prior to attempts to intubate Ms. Johnson, the jury certainly did, and accordingly returned a no-cause verdict upon full knowledge of the content of the affidavit and the significance placed on it by Plaintiff. The jury's verdict is not inconsistent with substantial justice, MCR 2.613(A), nor can it be said that the failure to admit the affidavit as substantive evidence was outcome-determinative.

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.

A. Introduction.

The Court of Appeals' use of an improper de novo standard of review caused it to sidestep the trial court's findings on several important issues and instead invent new grounds for overturning the jury's verdict on the basis of improperly excluded impeachment evidence, which is normally subject to review for an abuse of discretion. The Court of Appeals implicitly accepted the trial court's conclusion that the correspondence was irrelevant and inadmissible under MRE 104(b) because Plaintiff could not show that Dr. Urse had knowledge of the correspondence, but then took the liberty of creating a new, additional conditional fact for admission: the correspondence may be relevant if a jury could conclude that Dr. Urse, "either wittingly or unwittingly, participated in an effort to 'sandbag' the plaintiff." The Court rejected the trial court's finding that Defendant and Ms. Croze had not engaged in a "conspiracy" or otherwise acted to mislead Plaintiff counsel (**140a**), ignored Plaintiff counsel's failure to update his theory of the case as discovery progressed, and overturned the jury verdict from a six-day trial because Plaintiff was allegedly unable to place impeachment evidence in the proper context. In reaching its desired result, the Court applied the rules of evidence in a manner completely unbeholden to the actual facts and arguments in the trial court. The trial court correctly applied the rules of evidence, namely MRE 104(b) and 401, to exclude the correspondence between Ms. Croze and Mr. Weiner, and did not in any way deprive Plaintiff of a full and fair opportunity to try the case on the merits and attack Dr. Urse's credibility as a fact witness.

B. Governing law.

A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). Under MRE 104(b), the trial court must determine whether a jury could reasonably find the conditional fact establishing relevance by a preponderance of the evidence. *People v VanderVliet,* 444 Mich 52, 68-69 n 20; 508 NW2d 114 (1993), amended on other grounds, 445 Mich 1205 (1994), citing *Huddleston v United States*, 485 US 681, 688-691 (1988). In making this determination, the trial court is to consider all of the evidence presented. *Id.*

C. Argument.

1. The requirement of personal knowledge under MRE 602 is not satisfied with respect to Dr. Urse and the correspondence between Mr. Weiner and Ms. Croze.

MRE 602 provides in relevant part that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Here, Plaintiff sought to admit the presuit correspondence between Mr. Weiner and Ms. Croze as impeachment and/or substantive evidence to challenge Dr. Urse's testimony that he did not know that the purpose of his affidavit, as stated in Mr. Weiner's letter, was to confirm that he was not present in Ms. Johnson's room before she went into respiratory arrest. However, Dr. Urse denied having knowledge of the correspondence, and denied it refreshed his recollection of the circumstances of the creation of his affidavit (**613a-614a**). Thus, the correspondence was properly excluded from admission for substantive or impeachment purposes because Dr. Urse lacked the personal knowledge required to testify regarding the correspondence, and the correspondence was not sought to be used with respect to any other witness called at trial.

2. The correspondence was irrelevant and therefore inadmissible under MRE 401 for impeachment or substantive purposes because it did not tend to prove or disprove any disputed material fact.

MRE 401 and 402 provide for the admission of all relevant evidence, and exclusion of all irrelevant evidence. Evidence is relevant when it has a tendency to make a material fact more or less probable. There are two elements of relevance: materiality and probative value. *McGhee*, 268 Mich App at 610. Materiality refers to whether the fact was truly at issue, while probative value asks "whether the proffered evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.*; MRE 401. Even where evidence is offered as non-hearsay, including as context for other admissible evidence, the proponent of the non-hearsay must still show both the material and probative aspects of relevance under MRE 401.

When the relevance of a piece of evidence is conditioned upon the fulfillment or existence of a particular fact, conditional relevancy is examined under MRE 104(b). Here, the Court of Appeals posited the correspondence was only relevant as context for the affidavit if one of two conditional facts could be shown: (1) that Dr. Urse was aware of the correspondence; or (2) he was "kept in the dark" about the correspondence by his insurer, with the intent to mislead Plaintiff as to the timeline of events (**32a**). The first condition goes to the correspondence's probative relevance, while the second condition goes to both probative and material relevance.

a. Under MRE 104(b), no reasonable jury could find that Dr. Urse had knowledge of the correspondence.

With respect to the first conditional fact, Dr. Urse's knowledge of the correspondence, Mr. Weiner admitted at trial that Dr. Urse's testimony did not provide the necessary "nexus" between his affidavit and the correspondence (**1206a**). Dr. Urse's testimony that he did not see or know about the correspondence, and the correspondence did not influence him in executing his affidavit, makes the letters less—not more—relevant to the jury's determination of Dr. Urse's

credibility, and more specifically, Plaintiff's theory that Dr. Urse "changed his story" between his affidavit and his testimony. No other witness testimony or evidence, including the correspondence itself, offered a basis to support a finding of the fulfillment of the condition that Dr. Urse read or knew of the correspondence, meaning that the trial court correctly excluded the correspondence because it lacked probative relevance. Here, as in *Musser*, the correspondence is inadmissible as context because it fails to actually ***provide*** context for the affidavit. 494 Mich at 355-356. The jury would not have been assisted in assessing Dr. Urse's credibility by reference to correspondence Dr. Urse did not know about and which did not influence his conduct.

The correspondence was properly excluded under MRE 104(b) based on Plaintiff's failure to establish, as a factual condition precedent to admissibility, that Dr. Urse was aware of the correspondence. There is no evidence to support the Court of Appeals' conclusion that the trial court erroneously decided the question under MRE 104(a) rather than MRE 104(b) (**32a**).

This conditional relevancy analysis is similar to that recently reviewed by the Court of Appeals in *People v Thames*, Court of Appeals Docket No 306313, *rel'd* Oct 17, 2013; 2013 WL 5663112, *7-8 (unpublished) (**1341a-1342a**). In *Thames*, the defendant alleged the trial court erred by excluding the admission of testimony regarding a fictional book whose contents were similar to the victim's allegations of criminal sexual conduct against the defendant, and thus could have formed the basis for the victim's allegedly fabricated allegations. The Court found the relevancy of the testimony about the book's contents was conditioned on whether the victim read the book. At trial, the defendant presented circumstantial evidence suggesting the victim read the book, but the victim denied reading the book or telling another witness she had read the book. The Court ruled there was a "close call" as to whether the jury could reasonably find by a preponderance of the evidence that the probative conditional fact was fulfilled, and the trial court's decision on such a close evidentiary question could not constitute an abuse of discretion.

b. Plaintiff did not argue, and no reasonable jury could conclude under MRE 104(b), that Dr. Urse was not a credible witness because he participated in a conspiracy to "sandbag" Plaintiff.

After citing the general proposition that "the sum of an evidentiary presentation may well be greater than its constituent parts," the Court of Appeals leapt to the conclusion that "the sum of the evidentiary presentation in this case could lead a rational jury to find that Dr. Urse, either wittingly or unwittingly, participated in an effort to 'sandbag' the plaintiff" (**33a**). Noticeably absent from this analysis is the identification of the particular evidence which could lead the jury to make this conclusion. The Court mentioned only that the "timing and substance" of the correspondence was "impossible to ignore," without explaining how this "sandbagging" conclusion could logically follow from a reading of the correspondence and the affidavit, where Dr. Urse testified that he had no knowledge of the correspondence, and there was no evidence to show otherwise (**33a**). Instead, the Court hangs its ruling on the speculative, illogical conclusion that the jury could find Dr. Urse's credibility was damaged by his unknowing participation in a conspiracy by his insurer to avoid having Dr. Urse named as a defendant. The fact that the Court of Appeals was the first to articulate this "conspiracy" basis for finding conditional relevancy speaks volumes about the evidentiary basis for this "fact," and how far the Court was willing to bend the rules of evidence in order to obtain a plaintiff-favorable outcome.

There is simply no logical connection between the evidence in this case and the Court's "conspiracy" conclusion, or the notion that the exclusion of the correspondence was inconsistent with substantial justice. Although the threshold of sufficient evidence to prove a factual proposition is low under MRE 104(b), it is still a threshold which must be crossed by *some* evidence which a reasonable jury could find, without speculating, supports that proposition. None of the evidence in this case would lead a jury to conclude that Dr. Urse's testimony should not be believed because of the alleged presuit actions of his insurance representative.

The argument that Ms. Croze and/or Dr. Urse plotted during the notice of intent period to have Dr. Urse dismissed from the case, only to have him change his testimony years later in his deposition and at trial, is based on pure, unadulterated supposition and makes no logical sense. Assume for a moment that, based on the correspondence, Ms. Croze and/or Dr. Urse viewed Dr. Urse's affidavit as an opportunity to excise him from the case by averring that he was not involved in Ms. Johnson's care until after Dr. Kowalski had left her room and she went into respiratory arrest. Why would his affidavit not be more specific in establishing that he did not reach Ms. Johnson until after it was too late to intubate her, or that he did not consult with Dr. Kowalski before she entered respiratory distress?

A fair reading of Dr. Urse's affidavit with the correspondence does not compel the conclusion that the affidavit was intended to confirm Mr. Weiner's theory that Drs. Urse and Jacobson were not paged to the ER until after Dr. Kowalski left Ms. Johnson to attend to another patient. Even Mr. Weiner acknowledged that the affidavit was not as specific as he had hoped it would be as to Dr. Urse's non-involvement, but he still did not seek further clarification or assurances regarding his version of events (**97a**). In other words, the Court of Appeals assigned error based on Mr. Weiner's failure to follow up on the "very vague" affidavit with a direct question to verify his theory of the case: was Dr. Urse present with Ms. Johnson before she went into respiratory arrest? (*Id.*). Moreover, any misunderstanding as to the nature of Dr. Urse's involvement in Ms. Johnson's care, even if perpetrated by a defense "conspiracy," was corrected at least a year and a half before trial, when Mr. Sanfield deposed Drs. Urse and Kowalski. The trial court found this significant in rejecting Plaintiff's argument that the doctors' testimony was directly contrary to the medical records—in fact, the testimony was only contrary to Mr. Weiner's pre-deposition understanding of the medical records, which counsel had failed to reconcile with the doctors' deposition testimony (**135a-136a**). Yet Plaintiff counsel elected not

to add Dr. Urse as a defendant, and still proceeded to try the case against Dr. Kowalski—a case which, according to Mr. Weiner, would never have been filed if he had realized that both doctors consulted with each other regarding Ms. Johnson's care (**131a**). The Court of Appeals' opinion ignores all of this, instead setting aside a jury verdict and giving Plaintiff a second bite at the apple based on proofs which will be no different on remand.

In creating the "conspiracy theory" basis for conditional relevance, the Court of Appeals incorrectly assumed that Dr. Urse's presence in the room with Dr. Kowalski was the "central issue of the case" back during the notice of intent period when the affidavit was signed. However, the depositions of Drs. Urse and Kowalski indicate that Plaintiff counsel Mr. Sanfield was utterly unfazed by the doctors' testimony that they consulted in Ms. Johnson's room together before Dr. Kowalski left to attend to another patient. Indeed, Mr. Sanfield premised his questions to Dr. Urse *upon the understanding* that Dr. Urse had been in the room with Dr. Kowalski prior to Ms. Johnson's respiratory arrest (**81a-87a**). It was not until just before trial that Plaintiff counsel, left with a relatively weak case on Dr. Kowalski's alleged negligence in treating Ms. Johnson, resorted to making the alleged inconsistency in Dr. Urse's affidavit and testimony the central issue of the case. The Court of Appeals, which had not been involved in the entirety of the case as Judge Fagerman had been, *sua sponte* characterized the affidavit as a "deliberate attempt to obfuscate the central issue of the case" in an effort to attach some material relevance to the correspondence as contextual evidence for impeaching Dr. Urse (**32a**).

In so doing, the Court of Appeals overlooked where the correspondence and the "sandbag" argument fit into the larger context of the issues at trial. Mr. Weiner maintained throughout trial that Plaintiff would use the correspondence at trial to verify whether Dr. Urse had knowledge of the alleged context for creating the affidavit (**312a-313a**). At no time during this preliminary hearing or at trial did he or Mr. Sanfield ever suggest that Plaintiff could use the

correspondence to show that Dr. Urse was not credible because he was an unwitting participant in a scheme against Plaintiff. Yet this unasserted conditional fact is the basis upon which the Court of Appeals found the correspondence could be relevant and admissible, and further found that the failure to admit the correspondence was reversible error because it bore upon the credibility of a key witness. The effect of this published decision is to absolve plaintiff counsel from the consequences of failing to adequately work up a jury-submissible case, while discouraging defendants and their representatives from participating in the notice of intent process, lest the failure to "properly" answer obscure and indirect questions from plaintiff counsel lead to accusations of "sandbagging" and conspiracy. See Argument IV, section B-1.

c. The correspondence was only relevant to show why Dr. Urse was not sued as a defendant—an issue which was not outcome-determinative and did not influence the jury's finding.

The trial court recognized that Plaintiff's problem with the alleged inconsistency in the affidavit had everything to do with counsel's decision to not name Dr. Urse in the notice of intent, and very little to do with Plaintiff's proofs against Dr. Kowalski at trial or Dr. Urse's credibility as a fact witness (**139a-140a**). The only context the correspondence provides for the affidavit is to show why, in Plaintiff's view, Dr. Urse's affidavit caused Plaintiff not to name him as a defendant along with Dr. Kowalski. The jury was not asked to determine whether Dr. Urse should have been named as a defendant, and that consideration had no bearing on Dr. Urse's credibility as a fact witness. Even if, as the Court of Appeals imagines, the correspondence suggested a "conspiracy" by Dr. Urse's insurer existed, the jury still could—and did—credit Dr. Urse's eyewitness testimony that he consulted with Dr. Kowalski before Dr. Kowalski left Ms. Johnson to attend to another patient. A jury simply could not have concluded Dr. Urse was "misled" by his insurer as to what he saw in Ms. Johnson's room. This was the subject of his

testimony and the issue to be decided by the jury at trial, not whether Dr. Urse's insurer maneuvered by means of the affidavit to have him not named as a defendant in the case.

Thus, even assuming *arguendo* that it could be shown that Dr. Urse's insurer attempted to "sandbag" the Plaintiff, this would not be a conditional fact which could render the correspondence materially or probatively relevant as context for the affidavit. Deference should be given to the trial court's determination, based on knowledge of the entire case, that the correspondence was not relevant to the jury's determination of any material issue, including the veracity of Dr. Urse's eyewitness testimony. To the extent the affidavit was at all inconsistent with Dr. Urse's testimony, Plaintiff was fully able to explore and argue the significance of this inconsistency to the jury without the correspondence. However, even if reference to the correspondence is necessary in order to show the alleged inconsistency in Dr. Urse's affidavit, the overwhelming testimony and proofs on the medical issues in this case, combined with Plaintiff's extensive arguments as to Dr. Urse's supposedly damaged credibility at trial, cannot be said to have produced a defense verdict which was inconsistent with substantial justice, where the jury decided the case on its medical merits rather than on a conspiracy theory.

3. The correspondence was inadmissible under MRE 403.

MRE 403 permits the exclusion of evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This Court has held that a trial court has a historic responsibility to always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced before admitting such evidence. *Musser*, 494 Mich at 356-357. In finding the correspondence admissible for impeachment purposes, the Court of Appeals failed to perform any weighing under MRE 403.

There are several reasons why the Court of Appeals should have affirmed by determining the correspondence was inadmissible under MRE 403. First, as explained above, the correspondence had marginal probative value as to the outcome-determinative issues in the case. Rather, it served only to explain why Dr. Urse was not named as a co-defendant. Second, admission of the correspondence, even as impeachment evidence, would create a number of irrelevant and misleading questions in the jury's mind: Who is on trial, Dr. Urse or Dr. Kowalski? Who is Nancy Croze, and why is she not a witness? Should Dr. Urse be on trial? Why did Dr. Kowalski not write an affidavit attesting that he was not negligent? Third, the correspondence would lead to the impermissible consideration of Dr. Kowalski's insurance coverage, as the correspondence identifies American Physicians Assurance Corporation as the insurer of both Drs. Urse and Kowalski (**48a**). MRE 411. Any attempt at explaining the notice of intent process to the jury as the context for this presuit cooperation between adverse parties would inevitably reveal too much about the existence of Dr. Kowalski's insurance coverage.

In *Huddleston*, the United States Supreme Court stated that the strength of the evidence establishing a conditional fact for purposes of conditional relevancy is one factor the court may consider when conducting 403 balancing. 485 US at 689 n 6. Here, the strength of the evidence proffered to show Plaintiff's conditional facts was quite weak. Plaintiff did not and could not rebut Dr. Urse's unequivocal testimony that he had never seen the correspondence and believed that the affidavit was intended to state how long it took him to get to Ms. Johnson's room after he was paged. Introducing the correspondence, only to have Dr. Urse deny that it had any bearing on his affidavit, would waste the jury's time and would not aid in the jury's assessment of Dr. Urse's credibility. The correspondence itself, plus conjecture, was the only evidence proffered to show that Dr. Urse had unwittingly participated in "sandbagging" Plaintiff. The

minimal probative value of the correspondence to assessing Dr. Urse's credibility is far outweighed by the potential for prejudice, waste of time, and jury confusion under MRE 403.

In *Musser*, this Court cautioned that "a trial court should be particularly mindful that when a statement is not being offered for the truth of the matter asserted and would otherwise be inadmissible if a witness testified to the same at trial, there is a danger that the jury might have difficulty limiting its consideration of the material to [its] proper purpose." 494 Mich at 357 (internal citations and quotation marks omitted). Here, this heightened risk of improper prejudice was present with respect to the correspondence proffered as non-hearsay, because the jury would have had difficulty using the correspondence only as context for the affidavit, and not considering whether the correspondence meant that Dr. Kowalski's own liability insurer believed he was negligent because she was cooperating with Mr. Weiner and did not contest his allegations. If Plaintiff counsel was allowed to use the correspondence to show that the affidavit was intended to address Dr. Urse's involvement in Ms. Johnson's care, the jury could also have improperly punished Dr. Kowalski with a finding of liability for the perceived "sandbagging" of Plaintiff counsel—an issue completely extraneous to the merits of the case. The probative value of the correspondence is substantially outweighed by the danger that the jury would not have limited its consideration of the correspondence to its proper purpose.

4. The correspondence was inadmissible under 801(c) as non-hearsay.

At the beginning of trial, and again before the close defense proofs, Mr. Weiner requested substantive admission of the correspondence (**333a, 1201a-1202a**). Alternatively, he suggested the correspondence could be used to refresh his recollection as a witness regarding the circumstances surrounding his request for Dr. Urse's affidavit (**1203a**). He agreed that the only purpose for the correspondence was to put the affidavit into context (**338a**). Defense counsel raised hearsay, relevancy, privilege and foundation objections to the admission of the

correspondence for any purpose (**311a-312a, 318a**). As stated previously in section 2, the correspondence was not admissible as non-hearsay for the purpose of providing context for the affidavit because the affidavit itself was inadmissible (see Arguments I and II), and the correspondence lacks probative value with respect to the affidavit. Defendant would also note that the correspondence was not admissible as non-hearsay to show its effect on the reader because here the reader, Dr. Urse, testified that he neither read nor knew of the correspondence, and it accordingly had no effect on him. Additionally, there was not a proper foundation laid for the admission of the correspondence under both MRE 602 and 901. See sections 1 and 6.

Even if the correspondence can properly be characterized as non-hearsay offered to provide context for the affidavit rather than for the truth of its contents, the correspondence would still be inadmissible because material and probative relevance were not shown. In *Musser*, this Court declined to admit an interrogator's statements as "context" for a defendant's responses under any exception to the hearsay rule when the proffering party failed to establish the relevance of the statements under MRE 401. 494 Mich at 355-356. The Court specifically held that where an out-of-court statement is offered to provide context to a statement that is not "in issue," it is inadmissible because both statements are immaterial, and thus not relevant. *Id.* at 355. Likewise, the context-providing statement has no probative value and is also inadmissible where that statement, when considered in relationship to the other statement, does not actually provide context to that statement. *Id.* at 355-356. Here, as set forth in section 2, Plaintiff did not and cannot establish the material and probative relevance of the correspondence, even as context for the affidavit. Dr. Urse's statements in his affidavit are relevant only to the amount of time it took for him to reach Ms. Johnson's room after he was paged, an issue which is not in dispute. There was no evidence to substantiate Plaintiff counsel's theory that the correspondence put the

affidavit in context as a sworn statement intended by the affiant to confirm that Dr. Urse did not consult with Dr. Kowalski prior to Ms. Johnson suffering respiratory arrest.

5. The correspondence was inadmissible under MRE 801(d)(2)(C) or (D) as a party admission.

Plaintiff did not request admission of the correspondence under MRE 801(d)(2)(C) or (D) as a statement by a person authorized by the party to make a statement concerning the subject, or a statement by the party's agent concerning a matter within the scope of the agency. The party here is Dr. Kowalski, not Dr. Urse. Assuming *arguendo* that a claims representative for a litigant's insurer could be considered an agent of the litigant (as opposed to the agent of the insurer), the correspondence shows that when Ms. Croze made the statements contained in her correspondence, she was acting as the agent of Dr. Urse, a nonparty. Her correspondence had nothing to do with her activities on behalf of Dr. Kowalski, another insured. Nor is there any evidence to suggest that Dr. Kowalski authorized Ms. Croze to make a statement concerning Dr. Urse's involvement or non-involvement in Ms. Johnson's care.

6. The correspondence was inadmissible because proper foundation for authenticating the correspondence could not be laid under MRE 901.

At trial, defense counsel objected to the admission of the correspondence because Plaintiff was unable to call a witness to provide authentication testimony pursuant to MRE 901. The authentication or identification of evidence is a condition precedent to its admissibility, and is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. MRE 901; see *Merrow v Bofferding*, 458 Mich 617, 633; 581 NW2d 696 (1998) (statements in medical records inadmissible for impeachment because no witness could testify that defendant made those statements). Dr. Urse could not provide this foundational testimony because he had no knowledge of the correspondence, and neither of the parties to the correspondence, Ms. Croze and Mr. Weiner, was included on Plaintiff's witness list or testified

at trial. Mr. Weiner's testimony as a witness would have disqualified him as trial counsel, possibly causing a mistrial at the end of a six-day trial. Therefore, the trial court did not err by failing to admit evidence for which Plaintiff could not lay a proper foundation of authentication.

7. The trial court's failure to admit the correspondence as context for impeachment evidence was harmless error.

A review of the entire case is necessary to determine whether an evidentiary error has resulted in substantial injustice, such that a jury's verdict must be reversed for a new trial. *Durbin v K-K-M Corp*, 54 Mich App 38, 51-52; 220 NW2d 110 (1974). As a nonconstitutional, preserved evidentiary error, the alleged error in the exclusion of the correspondence "is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative." *Musser*, 494 Mich at 348. Here, the error was not outcome-determinative and does not warrant reversal because it did not undermine the reliability of the no-cause verdict in light of the weight and strength of the untainted evidence at trial. *Id.* The trial court envisioned that the case would be tried on its medical merits, and the jury would be free to decide the facts at issue relating to Ms. Johnson's care and whether those facts support a finding that Dr. Kowalski violated the applicable standard of care and proximately caused her injuries (**139a**). No witness testified that Drs. Urse and Kowalski were not together in Ms. Johnson's room consulting as to her care before Dr. Kowalski left to attend to another patient and Ms. Johnson went into respiratory arrest. Plaintiff was fully permitted to impeach Dr. Urse's credibility with his prior statements in the presuit affidavit, and the jury was instructed to consider any inconsistency as bearing on Dr. Urse's credibility. Mr. Weiner argued extensively to the jury that the testimony regarding the doctors' meeting was fabricated as part of Dr. Kowalski's "dream team" defense. Plaintiff and Defendant both argued their competing interpretations of the medical records to the jury. Ultimately, the jury found Dr. Kowalski non-negligent, and this finding was not undermined by the exclusion of the correspondence. The trial

court's alleged error does not warrant reversal, and the Court of Appeals erred in reversing on this basis.

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.

A. Introduction.

The notice of intent period in medical malpractice cases represents a legislative judgment that potential litigants should attempt to resolve, or at least properly frame, their disputes before commencing formal litigation. The candor and mutuality of disclosure inherent in this process are threatened by the published Court of Appeals decision holding correspondence between plaintiff counsel and insurance representatives and presuit affidavits of non-parties or potential defendants are admissible against the parties at trial. This Court should note the concerns voiced by the Florida Legislature in its ban on the admission of presuit correspondence and affidavits, and overturn the Court of Appeals' decision which threatens to chill presuit investigation and communication by defendants and their representatives, contrary to the Michigan Legislature's purpose in enacting the notice of intent scheme. Admission of presuit correspondence by a potential defendant threatens to improperly disclose information regarding the existence of liability insurance, violating MRE 411. If a potential defendant does mislead a claimant as to the nature of his involvement in a medical incident, then the proper remedy is to seek addition of that party as a defendant to the filed suit, not to impeach his credibility as an eyewitness at trial.

B. Argument.

1. Admitting presuit affidavits of fact witnesses and correspondence between plaintiff counsel and insurance representatives at trial would have a chilling effect on the notice of intent statute's goal of encouraging presuit settlement.

Public policy underlying the notice of intent period is violated if a party can obtain and use at trial the investigative file material triggered by the notice of intent. In a medical malpractice action, notice of intent to sue is mandatory pursuant to MCL 600.2912b. The stated purpose of section 2912b is to provide a mechanism for "promoting settlement without the need for formal litigation" and "reducing the costs of medical malpractice litigation." *Bush v Shabahang*, 484 Mich 156, 174; 772 NW2d 272 (2009), citing Senate Legislative Analysis SB 270, August 11, 1993; House Legislative Analysis HB 4403-4406, March 22, 1993. This statute envisions that a doctor's receipt of a notice of intent will trigger an initial investigation into the facts and circumstances surrounding an alleged incident of malpractice. The potential defendant and his or her representative are expected to share medical records with the plaintiff's counsel, and based on the results of the parties' preliminary investigations, attempt to resolve the dispute short of formal litigation. This is precisely what occurred in the instant case, where Mr. Weiner and Ms. Croze shared the results of their preliminary investigations as to Dr. Urse's involvement in Ms. Johnson's care, and resolved the issue of his potential liability short of formal litigation.

The notice of intent process encourages candor between parties in an effort to avoid needless litigation and properly frame those cases which are meritoriously filed. However, allowing either party to disclose the parties' communications during the notice of intent period, and compel testimony at trial regarding those communications, chills participation in the notice of intent process contrary to this legislative purpose. If the investigative information of the parties is admissible, the prudent potential party and prudent attorney are discouraged from conducting any presuit investigation, lest facts and circumstances learned are disclosed to the

opposition and used against them at trial. Admission of presuit correspondence would also discourage parties and their representatives from communicating before the complaint is filed in an attempt to resolve the dispute. The Court of Appeals' opinion does nothing to encourage or promote better presuit communication between plaintiffs and defendants regarding interpretation of medical records. Rather, its rulings would chill presuit communication between counsel and leave future plaintiff counsel's queries during the notice of intent period unanswered. For example, potential defendants who view themselves as not involved in the incident will not respond to queries from plaintiff counsel, but will simply wait until after suit is filed against them to file an affidavit of non-involvement, forcing plaintiffs to needlessly retain experts to file affidavits of merit against those non-involved defendants. MCL 600.2912c. This is directly contrary to the Legislature's intention to avoid needless litigation.

The state of Florida has recognized these concerns and enacted broad legislation barring the admissibility at trial of any materials generated during the presuit "screening period" and subsequent presuit investigation process for medical malpractice claims:

> **(5) Discovery and admissibility.**--A statement, discussion, written document, report, or other work product generated by the presuit screening process is not discoverable or admissible in any civil action for any purpose by the opposing party.

Fla Stat Ann § 766.106(5) (**158a**);

> (4) No statement, discussion, written document, report, or other work product generated solely by the presuit investigation process is discoverable or admissible in any civil action for any purpose by the opposing party.

Fla Stat Ann § 766.205(4) (**161a**).

In *Cohen v Dauphinee*, 739 So2d 68 (Fla 1999), the Florida Supreme Court interpreted these statutes to bar impeachment of a witness at trial using his presuit affidavit. The Court made the following observations, all of which apply to the use of Dr. Urse's affidavit:

> The courts of this state, including this Court, have uniformly found that the legislature enacted chapter 766 to "promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding
>
> * * *
>
> It is apparent that the legislature considered that the exchange of information during the presuit screening process would be greater if confidentiality were assured. Obviously, the legislature determined that this policy outweighed the need for civil litigants to obtain certain discovery generated by the presuit screening process.
>
> * * *
>
> This policy is best served by the free and open exchange of information during the presuit screening process. Likewise, the free and open exchange of information will more likely occur if the parties are assured of the confidentiality of the information at trial.

Id. at 71-72 (**163a-164a**), citing *Grimshaw v Schwegel*, 572 So2d 12, 13 (Fla 2d DCA 1990) (**170a-171a**). Florida has recognized that for the presuit screening process to work as intended to promote pretrial settlement of medical malpractice claims, the exchange of information during that process must be protected from use against the disclosing party at trial. In essence, Florida has created a discovery and evidentiary privilege to safeguard traditional legal protections for presuit work product and communications in the face of the expanded informal discovery required by law in medical malpractice cases. See excerpts from legislative staff analyses of Ch. 88-1, Committee Substitute for Senate Bill 6-E, Laws of Fla. (1988) (adding presuit discovery protections of Fla Stat Ann §§ 766.106(5) and 766.205(4) to original tort reform statute) (**1344a, 1346a-1347a**).

This Court should provide a similar evidentiary privilege against admission of presuit correspondence, as Defendant argued to the trial court (**117a-118a, 129a-130a**). MRE 501 provides "privilege is governed by the common law, except as modified by statute or court rule." The work product privilege should be applied to bar admission of the correspondence because it encompasses the conclusions and opinions of an insurance representative concerning imminent litigation, and was prepared as part of Ms. Croze's file in anticipation of litigation against Dr.

Urse pursuant to Plaintiff's notice of intent. MCR 2.302(B)(3)(a). See *Koster v June's Trucking, Inc*, 244 Mich App 162, 171; 625 NW2d 82 (2002). Dr. Urse invoked the attorney-client and work product privileges against discovery of the claims file and his communications with Ms. Croze (**1348a**).

Although this Court has already ruled in *Barnett* that affidavits of merit are admissible to impeach expert witnesses for plaintiffs at trial, a distinction can and should be drawn between use of the affidavits of merit, which are a required component of the litigation process, and the type of voluntary presuit affidavit executed by a fact witness or potential party like Dr. Urse. If parties know that communication generated during the notice of intent process can be used against them at trial, then the exchange of information during that period will be limited to the statutorily required affidavits of merit and meritorious defense. Even if this Court finds some merit in the Court of Appeals' position that exclusion of the affidavit and correspondence may have prejudiced Plaintiff's case, this harmless error should be weighed against the systemic consequences of ruling that presuit affidavits and correspondence are admissible in medical malpractice actions.

Such an interpretation of the rules of evidence in service of Michigan's medical malpractice laws would not leave Plaintiff or others similarly situated without an adequate remedy. Assuming *arguendo* a party orchestrates a presuit affidavit as a means of misleading the opposing party regarding the events in an effort to avoid having a potential defendant named as a defendant, there is a more appropriate remedy which the plaintiff could seek. For example, here the trial court noted in the preliminary hearing weeks before trial was scheduled to begin that Plaintiff counsel had been aware for a year and a half, since July 2008, that the testimony of Drs. Urse and Kowalski would not comport with Mr. Weiner's understanding of the timeline of events leading up to Ms. Johnson's death (**135a-136a**). During the two years after those

depositions were taken, Plaintiff could have filed a motion seeking to amend his complaint to add Dr. Urse as a defendant (and asserted, if necessary, "fraudulent concealment" under MCL 600.5855). In fact, Plaintiff filed a motion to file an amended complaint in March 2009 which did not raise the issue of Dr. Urse's allegedly conflicting testimony and did not seek to add Dr. Urse as a defendant or otherwise amend the complaint based on the defense "conspiracy." Plaintiff instead filed a motion to have Drs. Urse and Kowalski's eyewitness testimony excluded on the basis that it did not comply with Mr. Weiner's understanding of Dr. Urse's presuit affidavit, waiting until two weeks before trial to bring this allegedly pressing concern to the trial court's attention (**52a-73a**). Viewed in this light, the Court of Appeals' decision has the incredible effect of rewarding Plaintiff counsel's failure to obtain adequate assurances of non-involvement from Dr. Urse, and to act promptly when he discovered that his initial interpretation of the medical records was incorrect.

The trial court properly recognized Plaintiff counsel was not seeking the appropriate remedy for his alleged injury, and the time for seeking that remedy had long since passed (**132a**). The Court of Appeals, acting to remedy a perceived "trick" of the defense, ignored this distinction and thus concluded exclusion of evidence providing context for impeachment evidence was reversible error based on a defense conspiracy to "sandbag" Plaintiff counsel.

2. Admitting correspondence at trial between a defendant's insurance claims representative and plaintiff counsel would risk introducing evidence of the defendant's insurance in violation of MRE 411.

MRE 411, modeled after FRE 411, bars evidence that a person was or was not insured against liability for purposes of determining negligence. The Michigan Legislature provided an additional, broader ground for exclusion of insurance evidence in personal injury cases by enacting MCL 500.3030, which provides that, in an action by an injured person, "except as otherwise provided by law," there shall not be "any reference whatever...to such insurer or to the

question of carrying such insurance during the course of trial." In *Gibson v Henkin*, 141 Mich App 468, 472; 367 NW2d 418 (1985), the Court of Appeals upheld the trial court's decision to forbid cross examination of a defense expert regarding his affiliation with the insurer of both that expert and the defendant doctor, even though the plaintiffs were not referring to the company as the defendant doctor's insurer. The Court applied MCL 500.3030, MRE 403 and MRE 411 to bar reference to the insurer because the prejudice caused by the reference would not be outweighed by the limited probative value of the affiliation. *Id.*

In the June 21, 2012 amendment of its Opinion, the Court of Appeals opined that MRE 411 "plays no part in this decision" because the rule does not "preclude evidence of liability insurance if introduced for relevant reasons other than proving a person acted negligently or otherwise wrongfully" (**35a**). However, as recognized by this Court in *Musser*, statements offered as non-hearsay pose a heightened danger of being misused by the jury for improper purposes. 494 Mich at 357. Moreover, the letter from Mr. Weiner to Ms. Croze specifically states that both Dr. Urse and Dr. Kowalski are "Your Insureds," thus making the existence of liability insurance for Dr. Kowalski crystal clear (**48a**). Because the correspondence has little to no relevance as to the outcome-determinative issues in the case, the danger of prejudice posed by its admission greatly outweighs its limited relevancy, and presents an unnecessary risk that the jury would consider the evidence of Dr. Kowalski's insurance for an improper purpose (**319a**).

3. The trial court properly excluded Ms. Croze as a rebuttal witness.

The Court of Appeals did not address whether the trial court erred by refusing to allow Plaintiff to call Ms. Croze as a rebuttal witness. As the Court did not include this question within

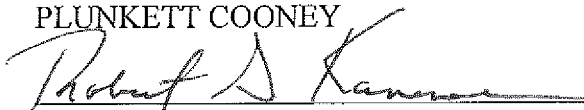
the scope of its grant of leave to appeal, Defendant will leave the matter unaddressed absent further instruction from the Court.[5]

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: 

ROBERT G. KAMENEC (P35283)
KAREN E. BEACH (P75172)
Attorneys for Defendant-Appellant
Robert F. Kowalski, M.D.
38505 Woodward Ave, Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

Dated: November 27, 2013

[5] Briefly, Ms. Croze would not have been an appropriate rebuttal witness because her testimony would have been to bolster Plaintiff's case challenging Dr. Urse's credibility, not to "cut down" Defendant's case, which did not include Dr. Urse's testimony. See *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 348-349; 480 NW2d 623 (1991).