

Aardema Whitelaw, PLLC

Attorneys at Law

5360 Cascade Road SE Grand Rapids, Michigan 49546 t | 616.575.2060 f | 616.575.2080 www.aardemawhitelaw.com



May 27, 2014

Larry Royster, Clerk
Michigan Supreme Court
925 W. Ottawa St.
Lansing, MI 48913

Re: ADM File No. 2012-02
3.26.14 Order, MCR 2.302 amendment (discovery-only expert depositions)

Dear Mr. Royster:

We are writing as spokespersons for the group of defense attorneys who opposed the original proposal to amend **MCR 2.302(B)(4)**. That sub-section of the "General Rules Governing Discovery" is aptly called: "**Trial Preparation; Experts.**" Our specific interest is preserving discovery-only expert deposition practice. If a party is able to use a discovery-only deposition at trial, instead of calling an expert live or in a trial deposition, the court rule's intent to provide tools for "trial preparation" is subverted. **A discovery deposition that is used at trial is not preparation for trial; it is trial.**

Our group is the source of "Alternative B," as set out in this Court's March 26, 2014 order. We attach our original September 11, 2013 letter explaining our opposition to what is now Alternative "A," as well as our October 29, 2013 discussion of "B."

Four points bear emphasis:

First: Alternative "B" will incorporate current practice into the court rules, causing no disruption to trial courts and no additional expense to litigants. Alternative "A," by contrast, will increase motion practice because discovery-only stipulations will often be withheld. If "B" is adopted, there will be no increase in motions seeking more specific answers to expert interrogatories. This is so because parties will continue to probe the expert's opinions in the relative safety of discovery-only depositions.

Second: "Alternative B," though it is proposed by defense practitioners active in medical malpractice litigation, is a balanced proposal that will be available on both sides of the "v" and in all types of litigation. The current practice encourages both sides to prepare properly for trial, to try only the cases that merit trial, and to settle the cases that should settle. Further, this proposal furthers our profession's universally-held aversion to "Trial by Surprise" by allowing all parties to adequately examine and test

the integrity of their opponents' allegations or defenses during discovery, instead of at trial for the first time.

Third: Scheduling discovery-only depositions is a practice that seems to be used primarily, though not exclusively, in medical malpractice cases. In such cases, expert reports are typically unavailable. And, unlike in other types of tort cases, expert opinions are critically important on core negligence issues, not just on damages or causation. For example, a medical expert in an auto negligence case will testify about a plaintiff's injury. That expert does not also testify that the defendant drove negligently. But a medical expert in a malpractice case typically testifies about negligence and medical damages.

Fourth: At a discovery-only deposition, medical experts typically produce, on demand, medical literature the expert finds supportive of breach of the standard of care or causation/damages. A proper trial cross-examination of that expert requires knowledge of literature supporting a countervailing view. And acquiring that knowledge takes time, research, and consultation with a party's own experts. Anything other than respecting the role of discovery-only expert depositions is trial by surprise, the antithesis of the trial preparation that MCR 2.302(B)(4) encourages and promises.

There is nothing "broken" in the current practice under *Petto v Raymond*, 171 Mich App 688 (1988). But grounding the current practice by adopting Alternative "B" as a court rule is a step that we support.

We are very appreciative of the opportunity to engage with the Court on this issue and of the Court's openness to considering an alternative to the original proposed revision.

Very truly yours,



BRIAN W. WHITELAW
RANDALL A. JUIP

cc: Brett J. Bean, Esq.
Carol D. Carlson, Esq.
Wilson A. Copeland, Esq.
James L. Dalton, Esq.
Mark E. Fatum, Esq.
Keith P. Felty, Esq.
Charles H. Gano, Esq.
Richard A. Joslin, Esq.
Randall A. Juip, Esq.
John M. Kruis, Esq.
Paul J. Manion, Esq.
Marcy R. Matson, Esq.
David M. Ottenwess, Esq.
Stephanie P. Ottenwess, Esq.
Noreen L. Slank, Esq.
Laurie M. Strong, Esq.
John M. Toth, Esq.