If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

TERRENCE PETER CALO, Personal Representative of the ESTATE OF CATHLEEN ALLEN,

Plaintiff-Appellee,

v

VIJAY K. DIXIT, M.D., and COSMETIC AND PLASTIC SURGERY CLINIC, PC,

Defendants,

and

HENRY FORD MACOMB HOSPITAL CORPORATION, doing business as HENRY FORD MACOMB HOSPITAL-CLINTON TOWNSHIP CAMPUS,

Defendant-Appellant.

UNPUBLISHED
October 23, 2026
9:10 AM

No. 369640
Macomb Circuit Court
LC No. 2019-004793-NH

Before: PATEL, P.J., and M. J. KELLY and GARRETT, JJ.

PER CURIAM.

In this medical-malpractice action, defendant Henry Ford Macomb Hospital Corporation, doing business as Henry Ford Macomb Hospital-Clinton Township Campus, appeals as of right from the order of judgment entered in favor of plaintiff, Terrence Calo, as personal representative of the Estate of Cathleen Allen.[1] Because there are no errors warranting reversal, we affirm.

[1] A satisfaction of judgment was entered as to defendants Dr. Dixit and Cosmetic and Plastic Surgery Clinic, PC. They are not parties to this appeal.

I. BASIC FACTS

This case arises from the death of Allen, a 41-year-old single mother of two children. On May 26, 2017, Vijay K. Dixit, M.D., a board-certified plastic surgeon, performed an abdominoplasty on Allen. Subsequent to Dr. Dixit's postoperative removal of an abdominal drain, Allen visited the emergency room at Henry Ford Macomb Hospital on June 2, 2017, complaining of chills, pain, not being able to eat, weakness, fatigue, and confusion. After being treated for five days in the hospital's intensive care unit (ICU), Allen went into cardiac arrest and was pronounced dead.

In his complaint, plaintiff alleged that Dr. Dixit breached the standard of care and was both negligent and had engaged in malpractice. Plaintiff brought negligence and malpractice claims against Henry Ford Macomb Hospital, alleging both vicarious and direct liability. As it relates to Henry Ford Macomb Hospital, plaintiff alleged that it had violated sections of the Public Health Code (PHC),MCL 333.1101 *et seq*., which allowed for an inference of negligence.[2] See *Zeni v Anderson*, 397 Mich 117, 128-129; 243 NW2d 270 (1976) (the violation of a safety or penal statute creates a rebuttable presumption of negligence). Further, plaintiff maintained that Henry Ford Macomb Hospital had breached its duty to ensure a "proper 'chain of command' type policy is implemented, practiced and enforced to protect patients from foreseeable and likely imminent harm at the hands of unsafe/substandard care."

Trial commenced on April 11, 2023. Scott Ronald Sipp, M.D.,[3] an emergency room physician who treated Allen, testified that when she presented to the emergency room she was in renal failure. Once she arrived at the emergency room, Dr. Dixit had been contacted not only as a professional courtesy, but also because the emergency room physicians deferred to Dr. Dixit regarding Allen's course of treatment. Allen was transferred to the ICU.

---

[2] Henry Ford Macomb Hospital moved for partial summary disposition, arguing that plaintiff's claims under the PHC were invalid because there is no private cause of action for the violations of the PHC. The trial court denied the motion as premature. Henry Ford Macomb Hospital sought leave to appeal in this Court, which granted the application. *Estate of Allen v Dixit*, unpublished order of the Court of Appeals, entered May 13, 2020 (Docket No. 352665). Thereafter, this Court issued an opinion, affirming in part and reversing in part the trial court's order and remanding for further proceedings. *Estate of Allen v Dixit*, unpublished per curiam opinion of the Court of Appeals, issued March 11, 2021 (Docket No. 352665). As relevant here, the *Allen* Court concluded that plaintiff's allegations under the PHC should have been dismissed because no private cause of action exists. *Id*. at 3. The *Allen* Court also concluded that Henry Ford Macomb Hospital had not addressed plaintiff's claim that the alleged statutory violations may nevertheless lead to a rebuttable presumption of negligence and that, as a result, the issue was abandoned on appeal. *Id*. at 3-4. On remand, the court entered a stipulated order of dismissal of some of the claims.

[3] Dr. Sipp's testimony was the first of several witnesses whose testimony was read into the record or the video of their deposition was played for the jury. See MRE 801(d)(2).

Ghada Mesleh, M.D. was Allen's attending physician during the first few days in the ICU. Dr. Mesleh recounted that when Allen presented to the emergency room she was diagnosed as being in septic shock. Dr. Mesleh's impression was that the source of the shock was "from the wound, from the surgery, abdominal infection." She testified that "source control intervention" when dealing with septic shock was important and a "corner stone in treating sepsis and septic shock[.]" Because Allen had undergone a recent abdominal surgery, Dr. Mesleh stated that, from the beginning, there was a concern that the infection had originated in Allen's abdomen. It was that concern that led Dr. Mesleh to consult with Dr. Dixit.

When Dr. Dixit evaluated Allen on June 3, 2017, he told Dr. Mesleh that she should look for another source for the infection. When Dr. Mesleh spoke again with Dr. Dixit on June 4, 2017, she shared her concern that Allen had an infection in her abdomen, but Dr. Dixit did not believe that there was "anything concerning that needed surgical intervention at that time." The reason Dr. Mesleh relayed her concern to Dr. Dixit was because she thought that Dr. Dixit, as a surgeon, would want to operate on Allen to obtain "source control" of the infection. When asked if, in her experience, hospital administration had ever reassigned the care of an individual to another surgeon, Dr. Mesleh responded in the negative and stated, "It's not their job."

Dr. Dixit testified that on June 3, 2017, "we didn't know where the infection [was]" and that the ICU doctors were evaluating several different sources of the infection in Allen's body. Dr. Dixit acknowledged that when informed on June 3, 2017, that ICU staff suspected that Allen's infection was intraabdominal, he had advised that they look at "[a]ll the different systems and locations." Dr. Dixit eventually performed surgery on Allen on June 6, 2017, but she did not survive.

Najia Huda, M.D., Allen's attending physician in the latter portion of Allen's time in the ICU, could not recall if she questioned Dr. Dixit regarding why he did not operate on Allen. When asked if that would have been a logical question to ask, Dr. Huda testified:

> I mean, yes and no. Sometimes you don't want to come off as brusque, or all knowing, or trying to tell the other person how to do their job. As you mentioned, I'm not a board certified plastic surgeon.

Like Dr. Mesleh, Dr. Huda admitted that "source control" of an infection is essential to the management of sepsis. She also testified that it was not readily apparent to her that Allen's abdomen was the source of the infection, but "it was one of the sources that they were concerned about." Dr. Huda did not know who she would call if inaction by another physician was causing a patient to be put at risk. But she also acknowledged that on June 6, 2017, she contacted a physician at Henry Ford's main campus to obtain a second opinion. Dr. Huda relayed to the unnamed physician her suspicion that Allen had a skin and soft tissue infection located in the area of her body where Dr. Dixit had previously performed an abdominoplasty. Dr. Huda acknowledged that the reason she called the attending surgical physician at the other campus was because she felt that Allen required surgery. Soon after that telephone conversation, Dr. Dixit performed surgery on Allen.

One of the main issues at trial relating to plaintiff's theory of administrative negligence was whether Henry Ford Macomb Hospital had implemented and enforced its own chain-of-

command policy during Allen's hospitalization.[4] Because of a delay in the disclosure of the policy, multiple witnesses had to be twice deposed to ascertain the full scope of their knowledge of the policy.

At his first deposition, Harold Gallick, M.D., the chief of surgery at Henry Ford Macomb Hospital at the time of Allen's hospitalization, was asked his understanding of what the "chain of command" means in the healthcare setting. Dr. Gallick responded: "I'm not sure it applies in the healthcare setting. I'm more familiar with it in a military setting." When asked if Henry Ford Macomb Hospital had any policies in place when Allen was treated at the hospital that required staff physicians to speak up if a patient was not receiving timely and necessary care, Dr. Gallick responded: "I don't know that there's a policy for that, but I think it's part of our culture. I think those of us who practice and work at Macomb Hospital, and in the health system for that matter, try and implement a so-called speak up policy." The following exchange also took place between Dr. Gallick and plaintiff's lawyer:

> *Q*. I'm asking is there a policy in place at Henry Ford Macomb Hospital in June 2017 where if Dr. A is saying the patient's condition is one thing, Dr. B is saying it's another, and they're complete opposites, which could affect the patient's treatment plan, was there a policy in place to address that?
>
> * * *
>
> *A*. I do not think that there was a written policy in place that would cover your set of circumstances.

Dr. Gallick instead explained that if two physicians disagreed regarding a patient's treatment, "they can agree to bring in a second opinion, or a third opinion, if you will." He further testified that physicians were expected to resolve issues among themselves, but if that was not possible they could go to their senior partner or one of the physician leaders. After reviewing Allen's medical records, Dr. Gallick acknowledged that Allen probably did not have surgery sooner "because of the difference of opinion" and because Dr. Dixit's notes "indicated that he did not believe that there was an infection in the area."

During his second deposition, Dr. Gallick admitted that the first time that he had reviewed the chain-of-command policy was "[s]ometime after my first deposition." Addressing the chain-of-command policy, Dr. Gallick explained that following review by the medical executive committee, the policy would have been sent out to staff by e-mail, referenced in the hospital newsletter, and discussed at departmental or section meetings. Dr. Gallick added that if there was an instance of delayed source control in Allen's treatment, this would, under the chain-of-command policy, equate to a safety event. He acknowledged that if a conflict arose in the ICU that could not be resolved, such as a conflict about whether to perform source control surgery on a

[4] A copy of the chain-of-command policy has been provided to this Court as a confidential document.

patient, the conflict would fall under a policy specific to the ICU.[5] As relevant here, the policy applicable to the ICU specified which physician would have authority in the event of patient-care conflicts. Dr. Gallick's opinion regarding why the issue of source-control surgery was not presented to the medical director was that "they didn't feel strongly enough that [Allen] needed surgery at an earlier date." Dr. Gallick confirmed that Dr. Huda and any of the other physicians treating Allen could have invoked the chain of command for Allen but did not do so.

In her second deposition, Dr. Mesleh was asked if she initiated the chain of command following her disagreement with Dr. Dixit, and she responded:

> There was no reason to initiate the chain of command at that point. We as physicians have disagreements on certain things and when we disagree, we communicate and one of the things that we can clarify disagreement is by, you know, testing, evaluations, imaging, and to support one way or the other.

Dr. Mesleh, however, conceded that she had only read the chain-of-command policy for the first time in the weeks leading up to her second deposition.

Similarly, during a second deposition, Dr. Huda stated that she had received a copy of the chain-of-command policy approximately one week earlier. Dr. Huda stated that was the first time, "recently," that she recalled receiving the chain-of-command policy. But Dr. Huda stated that it was "pretty standard" in all of the hospitals that she had worked in that staff physicians were required to speak up when another staff physician is ignoring the needs of a patient. Dr. Huda testified that she was aware that if she had a disagreement with Dr. Dixit regarding the location of Allen's infection, she could have taken her concern to a hospital administrator.

To establish that the failure to implement and enforce the chain-of-command policy was a proximate cause of Allen's death, plaintiff presented expert testimony.[6] First, James Attarian, M.D., was qualified as an expert in the field of internal medicine and hospital administration. Dr. Attarian explained that an implemented chain-of-command policy allows "for an expeditious and universally accepted process for resolving conflicts when it comes to differences of opinion and treatment plans that if not resolved it would lead to [an] adverse outcome [by placing] a patient's safety in jeopardy." Dr. Attarian testified that under the applicable standard of care:

---

[5] A copy of the ICU policy has been submitted to this Court as a confidential document.

[6] Prior to trial, Henry Ford Macomb Hospital unsuccessfully challenged the admissibility of the expert testimony. Although Henry Ford Macomb Hospital complains in the introduction to its appellate brief that the trial court should have granted its motion to preclude plaintiff's experts from testifying at trial and should have granted a judgment not based upon the fact that the plaintiff's experts' testimony amounted to speculation, it does not raise a challenge to the admissibility of their testimony in its statement of questions presented, nor has it presented any analysis in connection with that issue. As such, the issue is abandoned on appeal. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

> There has to be a policy of chain of command to resolve disputes and there has to be a speak out policy so that if you're involved or witnessing an error in patient care you can bring that forward and have it addressed without fear of retribution or consequences. And those have to be enforced and active policies.

He opined that unenforced chain-of-command policies were "meaningless." Dr. Attarian testified that Dr. Gallick's testimony during the first deposition suggested that, although a chain-of-command policy existed, it had not been implemented or enforced.

Dr. Attarian reviewed Henry Ford Macomb Hospital's chain-of-command and ICU policies. He explained that the role of the hospital administration in the enforcement of chain-of-command policies was to "set[] the cultural tone of the hospital." He testified that, from his review of the deposition transcripts, he was aware that there was a disagreement between Dr. Dixit and Dr. Mesleh regarding the location of the infection in Allen's body. Further, he explained that when a disagreement arises that causes a delay in treatment, it is a circumstance in which the chain-of-command policy should be invoked. Dr. Attarian stated that the infection in Allen's body was one that made "time of the essence" and that allowing a deadlock between physicians to persist meant that the medical problem was left to solve itself. Noting that necrotizing fasciitis, a condition that Allen had, was not a condition that could have "resolved" itself, Dr. Attarian opined: "You know, sometimes you can't just do something and stand there. You've got to act." In Dr. Attarian's opinion, the disagreement between Dr. Dixit and Dr. Mesleh was "the crux of the whole problem" because if Dr. Mesleh's thoughts on Allen's medical condition had been acted upon, "curative therapy could have been engaged but it wasn't." Dr. Attarian further testified that after reviewing the chain-of-command policy, the issue should have been taken up the chain of command.

Finally, Dr. Attarian opined that if Allen received a debridement of the infection in her body on the first, second, or third day of her hospital admission, within a reasonable degree of medical certainty, she would have survived. After having had surgery on her abdomen the week prior, Dr. Attarian explained that "we have to assume it's the wound that's infected," and described that conclusion as "kind of a slam dunk and as close as you get in medicine." Dr. Attarian described the fact that the chain-of-command policy was not invoked regarding Allen's medical care as a "[t]errible problem," because it led to "inaction in [Allen's] care." Specifically, Allen was experiencing a "surgical problem," and surgery was not performed until the afternoon of her death. Accordingly, the surgical problem that Allen was experiencing "wasn't effectively treated for a week." Dr. Attarian also testified that the failure to invoke the chain-of-command policy was a proximate and direct cause of the ongoing delay in treatment for Allen, which in turn was a proximate cause of Allen's death.

John Perrotti, M.D., testified as an expert in the field of plastic surgery. As relevant to the claims against Henry Ford Macomb Hospital, Dr. Perrotti observed that while Allen was hospitalized, there was "some disagreement" between Dr. Dixit and other physicians treating Allen regarding the source of the infection. According to Dr. Perrotti, the disagreement created a roadblock to Allen receiving a necessary debridement of her surgical wound. Dr. Perrotti noted that a delay in treatment or a difference of opinion regarding how a patient should be treated were reasons to invoke a hospital policy requiring someone to go to a higher level if the patient was not receiving the necessary treatment. Dr. Perrotti stated that it was important that chain-of-command

policies not only exist, but that they be implemented and enforced. He opined the chain-of-command and related policies were not followed here.

Thomas Bojko, M.D., was qualified as an expert in the field of healthcare administration. Dr. Bojko explained that it is important for a hospital to have patient-safety policies that are enforced. Dr. Bojko pointed out that it is a problem if a hospital has a chain-of-command policy that is not properly implemented and enforced. He testified that the applicable standard of care for hospital administration was what a prudent hospital would do in similar circumstances. In the context of this case, Dr. Bojko testified this meant that Henry Ford Macomb Hospital's healthcare administration would ensure that the chain-of-command policy "would be followed, and would be complied with." He explained that the onus to ensure that the chain-of-command policy was implemented and enforced would lie on the board of trustees and hospital leadership, but in specific situations, nurses and physicians also had their own chain of command of people to whom they reported.

Dr. Bojko explained that Henry Ford Macomb Hospital had breached the standard of care in this case, explaining

> So, there were obviously some disagreements between the doctors who took care of Ms. Allen in the intensive care unit and the surgeon who operated on her previously, who was now the surgeon who was supposed to take care of the surgical infection that she had when she was admitted. And the chain of command policy was never invoked. It was allowed for Ms. Allen to remain in ICU four or five days without the appropriate care. And, unfortunately, when at the end, she was taken to surgery, it was too late, and she—she passed. So like I said, the standard of care, the administered [sic] standard of care here was breached because the surgery should have been done sooner, and it should've been done sooner through the mechanism of invoking the chain of command and allowing a different surgeon to come in and perform the surgery in a timely fashion.

He also opined that the chain-of-command policy was not implemented and enforced at the time that Allen was a patient. He testified that

> [T]o my understanding, nobody even knew of its existence, because—at the time, because following that hearing—the discovery part of the trial, and there were a number of employees of the hospital who said that they never heard about there being a chain of command policy even. Even though, you know, eventually we found out that there indeed was one. So, if nobody knew that there was a policy, you know, how could it have been—how could it have been followed and implemented.

Dr. Bojko was "frankly stunned" when he reviewed the initial deposition testimony of Dr. Gallick because "I wouldn't expect a hospital administrator who is also a physician to not be aware of the concept of chain of command in healthcare." He opined that Henry Ford Macomb Hospital's failure to comply with the standard of care of invoking the chain-of-command policies, within a reasonable degree of healthcare administrative certainty, proximately caused the death of Allen. Dr. Bojko also clarified that obtaining a second opinion is "very different" from following the

chain of command, because the "suggestion coming from a position of authority is of paramount importance." Dr. Bojko described the situation that arose between Dr. Mesleh and Dr. Dixit, in which they disagreed regarding the best course of action to treat Allen's infection, as a "classic example of when the chain of command needs to be invoked . . . ."

In the defense case, Dr. Mesleh testified that, as the attending physician for Allen in the ICU, she had the ability to call in any specialist that she determined necessary. Dr. Mesleh denied that certain things were not done for Allen because she did not want to "step on Dr. Dixit's toes . . . ." When asked if she believed that Dr. Dixit's treatment, or lack thereof, of Allen in any way jeopardized the safety of Allen, Dr. Mesleh stated, "I did not." She testified that she had the authority to bring in anyone necessary to treat a surgical problem, but she did not with Allen because "I did not feel that the patient needed to go to surgery and that wasn't my, you know, discussion with Dr. Dixit." In the course of treating Allen, Dr. Mesleh did not believe that the treatment and care of Allen by any other healthcare providers necessitated her invoking the chain of command. Dr. Mesleh added that she had known that she could call anyone for a second opinion and therefore "going up that chain of command would [not] have made any difference."

Dr. Mesleh acknowledged that she was aware of Henry Ford Macomb's policy mandating a "just culture," which she interpreted to mean that if she had any concerns about anything she could speak up without any fear of repercussions. She testified that she had never felt any resistance in speaking up for any reason at Henry Ford Macomb Hospital, and "[a]t the end of the day we are there for patient safety and patient care." She added that it was always clear to her that she should be comfortable in seeking a second opinion if necessary.

Similarly, Dr. Huda testified that if she believed that Dr. Dixit was doing or not doing something that jeopardized Allen's health, she would have obtained a second opinion from another plastic surgeon. Dr. Huda also stated that other options would be to speak to the ICU director or the chief of medicine, "who are all probably going to tell you the same thing, which is get a secondary consult." In securing a second opinion or consultation for Allen, Dr. Huda acknowledged that she was not at all concerned about "stepping on Dr. Dixit's toes." Dr. Huda confirmed that she was "quite familiar" with the chain of command and that such policies "[were] fairly standard" at the hospitals that she had worked at during her medical career. Dr. Huda also testified that she was also part of the Keystone Initiative from the Michigan Health and Hospital Administration, the purpose of which was to develop new safety protocols to mitigate harm to patients. Dr. Huda stated that she had "no doubt" that Henry Ford Macomb Hospital had the proper policies and procedures to facilitate a "speak up" culture and that such policies and procedures were implemented.

Michael Friedlander, M.D., a hospitalist trained in internal medicine, testified that Henry Ford Macomb Hospital's chain-of-command policy was similar to chain-of-command policies that he had seen before at other hospitals. Dr. Friedlander agreed that hospitals, acting through their administration, should take reasonable and prudent steps to implement policies and procedures, including chain-of-command policies and procedures. He stated that it was "extremely important" for hospital administration to create a culture within a hospital that encouraged staff to implement its policies and procedures and to "speak up" when necessary. Dr. Friedlander opined that the administration had taken reasonable and prudent steps to adopt a chain-of-command policy, including its ICU policy, and that it had taken reasonable and prudent steps to create a culture in

which everyone working in the hospital were encouraged to "speak up" and address situations in which a patient's safety was at risk. He believed that by implementing the chain-of-command and ICU policies, the hospital administration had complied with its standard of care.

After reviewing the ICU policy, Dr. Friedlander interpreted the policy as providing physicians with decision-making authority to manage patient care as providing "the final word" regarding how to resolve disputes arising from conflicting orders. And if an issue remained unresolved, a physician would be able to speak to the ICU's medical director. Dr. Friedlander stated that, because ICU physicians make "life and death" decisions on a daily basis, it was important for them to be able to make decisions without having to follow a chain of command. He testified that, under the circumstances of this case, it was not necessary for hospital staff to have invoked the chain-of-command policy because the ICU physicians had full authority to undertake any treatment they saw fit or to obtain a second opinion and following the chain of command would unnecessarily delay the process. Dr. Friedlander opined that he had not seen anything in his case review suggesting that Henry Ford Macomb Hospital had violated its standard of care. Yet, on cross examination, he agreed that if two staff physicians disagreed regarding the location of an individual's infection, allowing the unresolved disagreement to linger "can be" very harmful and could result in the death of the patient. He also conceded that a delay in treatment, such as the delayed source control, would be a safety event that triggered the chain-of-command policy.

Following the 11-day trial, the jury found that Dr. Dixit was professionally negligent and that Henry Ford Macomb Hospital was administratively negligent. It further found that Dr. Dixit's professional negligence and Henry Ford Macomb Hospital's administrative negligence were proximate causes of Allen's death. The jury's findings against Henry Ford Macomb Hospital were based upon its determination that Henry Ford Macomb Hospital directly committed administrative negligence, not that it was vicariously liable for Dr. Dixit's professional negligence. The jury awarded significant economic and noneconomic damages, including $4,336,988 for the future lost earning capacity of Allen. The trial court entered a stipulated judgment in favor of plaintiff. Henry Ford Macomb Hospital then unsuccessfully moved for a new trial. The court denied the motion. This appeal follows.

II. DAMAGES

A. STANDARD OF REVIEW

Henry Ford Macomb Hospital argues that, under *Daher v Prime Healthcare Servs-Garden City, LLC*, 515 Mich 254; 29 NW3d 136 (2024), lost-earning-capacity damages are not recoverable under the wrongful death act (WDA), MCL 600.2922. In response, plaintiff argues that the damages awarded were proper under the WDA as damages for the loss of financial support to Allen's beneficiaries. In its reply brief, Henry Ford Macomb Hospital concedes that lost-financial-support damages remain recoverable under the WDA, but argues that plaintiff's damages were not for lost financial support but instead were limited to lost-earning-capacity damages. As a result, it contends that the jury's damage award of $4,336,988 for the lost earning capacity of Allen must be vacated. Whether lost-earning-capacity damages that are demonstrated to be necessary for the financial support of Allen's family are recoverable presents a question of law, which we review de novo. See *Daher*, 515 Mich at 261.

B. ANALYSIS

To properly analyze this issue, we must first consider our Supreme Court's decision in *Daher*. The issue on appeal in *Daher* was whether, under the WDA, recovery of damages for the decedent's lost future earning was permissible "absent a showing that a beneficiary is entitled to those earnings as financial support." *Id*. at 258. To resolve the issue, our Supreme Court conducted an extensive review of the history of the WDA. *Id*. at 264-274.

Our Supreme Court noted that, under Michigan's common law, a cause of action was not recognized for the death of a human being and survival actions for personal injuries were not allowed. *Id*. at 264. The Legislature eventually adopted two statutes—the survival act and the death act—that allowed causes of action to be pursued in cases of injury resulting in death. *Id*. Under the death act, an estate's recovery was limited to "to actual pecuniary loss suffered by one entitled to or receiving support from the deceased[.]" *Id*. at 265 (quotation marks and citation omitted). "In contrast to the survival act, the cause of action created by the death act was for the survivors whom the decedent was obligated to support and was limited to the losses they sustained due to the decedent's death." *Id*. Considering the difference between the two acts, the *Daher* Court acknowledged that the claims under each act were "mutually exclusive and the measure of damages was substantially different." *Id*. at 266 (quotation marks and citation omitted). Thus, "an estate could recover for future earnings under the survival act but was limited to a beneficiary's loss of support under the death act." *Id*.

In 1939, the Legislature combined the death act and the survival/al act, which resulted in numerous questions regarding the scope of damages available under the "newly combined" WDA. *Id*. at 267. By enacting the combined WDA, "the Legislature unequivocally repealed the statutory grounds for an estate to recover anything that was not specifically included in the damages provision of the post-1939 WDA." *Id*. at 268. Thus,

> the WDA's damages provision provided an exclusive list of the types of damages that could be recovered for injuries resulting in death, regardless of whether the decedent's death was instantaneous or sounded as a survival action. The newly combined WDA specifically divided the damages recoverable into three classes: (1) pecuniary injury; (2) reasonable medical, hospital, funeral and burial expenses;" and (3) the pain and suffering of the decedent before death. [*Id*. at 269 (quotation marks, citation, and alteration omitted).]

Regarding the decedent's lost future income, "only the damages associated with the pre-1939 death act were recoverable, i.e., *loss of financial support*." *Daher*, 515 Mich at 269 (emphasis added).

As relevant here, the *Daher* Court acknowledged that the Legislature amended the WDA in 1985, and "expressly including the language 'loss of financial support' " as a category of damages recoverable. *Id*. at 270. In reviewing the statutory history of the WDA, the *Daher* Court expressly observed that as early as 1848, a death action only allowed a plaintiff to recover for actual pecuniary loss incurred by an individual "entitled to or receiving support from the deceased . . . ." *Id*. at 273. Additionally, the *Daher* Court noted that when the Legislature removed the language "pecuniary injury" from the WDA, it did not intend to alter the relationship between survival actions and the WDA. *Id*. at 270, 276. Finally, the *Daher* Court acknowledged that the

Legislature was aware of how to speak with the requisite level of clarity when, in 1985, it expressly included within the ambit of permissible damages under the WDA damages " 'for the loss of financial support[.]' " *Id*. at 278-279, 280, quoting 1985 PA 93.

Accordingly, under *Daher*'s interpretation of the WDA, damages for loss of financial support remain recoverable under the WDA. *Id*. at 280; see also MCL 600.2922(6) (stating that damages in an action under the WDA include "damages for the loss of financial support."). This Court has defined damages for loss of financial support as damages "sought by one who depended on the decedent for financial support." *Denney v Kent Co Rd Comm'n*, 317 Mich App 727, 737; 896 NW2d 808 (2016), overruled in part on other grounds by *Daher*, 515 Mich at 282. Moreover, a plaintiff's claim for lost-financial-support damages "is not the same as a claim for lost earnings." *Denney*, 317 Mich App at 737. This is because lost earnings are damages that the plaintiff's decedent could have pursued on his own behalf, while damages for lost financial support are pursued by the beneficiaries of the plaintiff's decedent who relied on the decedent for their support. *Id*.[7]

Henry Ford Macomb Hospital's main contention on appeal is that post-*Daher*, lost-earning-capacity damages are not recoverable, and to the extent that plaintiff claims that he sought damages for the lost financial support that Allen's beneficiaries incurred, plaintiff did not pursue lost-financial-support damages in the trial court and is attempting to "retroactively re-characterize" his claim for damages. A close review of the record belies its second contention.

Plaintiff's lawyer stated in his opening statement that, when considering damages, the jury would need to consider the losses of Allen's children, who were 19 years old and 15 years old, respectively, at the time of Allen's death. Plaintiff's lawyer addressed the financial impact losing their mother had on the children. Subsequently, during the trial, plaintiff's lawyer presented extensive evidence to support his contention that Allen's beneficiaries, i.e., her children, had incurred a significant loss in financial support arising from the death of their mother, who was the only parent who had provided them with financial support. Testimony from numerous witnesses confirmed that Allen had provided her children with substantial financial support and that she intended to continue doing so. The issue of loss of financial support was also addressed by plaintiff's lawyer during closing argument, where he urged the jury to award damages for the loss of financial support. Lastly, the trial court instructed the jury that, if it decided that plaintiff was entitled to damages, the damages could include the loss of financial support suffered by Allen's beneficiaries. Based upon the foregoing, it is clear that plaintiff was not only pursuing future lost-earning-capacity damages, which at the time of trial were permissible,[8] but was also seeking

[7] To the extent that this Court in *Denney* clearly determined that "damages for lost earnings are allowed under the wrongful-death statute," our Supreme Court overruled this holding in *Daher*, 515 Mich at 282.

[8] At the time of trial, *Denney* was binding precedent which the trial court was obligated to follow it. See *Zehel v Nugent*, 344 Mich App 490, 502; 1 NW3d 387 (2022), vacated in part 515 Mich 1008 (2024).

damages to compensate Allen's children for their significant financial losses arising from her death.

On appeal, Henry Ford Macomb Hospital notably does not challenge the amount of the jury's damage award or whether Allen had any obligation to financially support her children. Instead, it limits its challenge to its claim that plaintiff should not have been able to recover lost-earning-capacity damages under the WDA. In an effort to place the jury's award solely under the umbrella of lost-earning-capacity damages, Henry Ford Macomb Hospital points to the fact that the jury's total verdict for lost-earning-capacity damages was identical to the amount that plaintiff's expert identified in his calculation of Allen's total lost-earnings capacity. In our view, however, the mere fact that the jury accepted those calculations does not give rise to the conclusion that the jury award was solely limited to lost-earning-capacity damages.

Regardless, under Michigan's legal system, the amount of damages is left to the discretion of the jury. *Daher*, 515 Mich at 279. As explained above, Henry Ford Macomb Hospital's argument that plaintiff only sought lost-earning-capacity damages in the trial court, as opposed to loss-of-support damages, is completely undermined by a thorough review of the record. Plaintiff made it abundantly clear that he was seeking damages for Allen's beneficiaries for lost financial support. And, although that plaintiff may not have always used the specific term, "loss-of-financial-support" damages, it is apparent that plaintiff referred to lost-earning-capacity damages with the intention that loss-of-financial support were subsumed in this language.

Finally, while Henry Ford Macomb Hospital raised several objections to the jury verdict form and the proposed jury instructions, it did not argue below that plaintiff's categorization of its damages was improper or that plaintiff was not seeking loss-of-support damages. Consequently, it waived its challenge to plaintiff's damages on this basis. See *LeFever v Matthews*, 336 Mich App 651, 670 n 3; 971 NW2d 672 (2021).

In sum, although lost-earning-capacity damages that are not for financial support are impermissible post-*Daher*, damages for loss of financial support remain recoverable. Contrary to Henry Ford Macomb Hospital's argument on appeal, plaintiff sought damages for loss of financial support. There is, therefore, no basis upon which to vacate the damages award, which is supported by the record and not prohibited by as a matter of law.

III. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

Henry Ford Macomb Hospital next argues that the trial court improperly instructed the jury that if it found it had violated subsections of the PHC, then it could find that it was negligent. This Court reviews claims of instructional error de novo. *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 507 Mich 272, 283; 968 NW2d 367 (2021). To the extent that this issue involves statutory interpretation, our review is also de novo, *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 620; 692 NW2d 388 (2004), as are questions involving the application of the doctrine of res judicata, *Garrett v Washington*, 314 Mich App 436, 440-441; 886 NW2d 762 (2016). The trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *Estate of Carlsen v Southwestern Mich Emergency Servs*, 338 Mich App 678, 693; 980 NW2d 785

(2021). An abuse of discretion occurs if the trial court's decision falls outside of the range of reasonable and principled outcomes. *Id*.

B. ANALYSIS

Before the trial court's final instructions to the jury, Henry Ford Macomb Hospital objected to the trial court instructing the jury in compliance with M Civ JI 12.01. It argued that MCL 333.20201(1)(e) referred to a hospital being required to have a bill of rights and "[t]here's been no testimony that we didn't have a bill of rights." It further argued that to the extent that MCL 333.20201(1)(e) raised issues of informed consent, "the case law is clear that informed consent is not a hospital issue, it's a physician issue." Further, Henry Ford Macomb Hospital claimed that reading MCL 333.21513(a) to the jury would allow it to find Henry Ford Macomb Hospital strictly liable for the actions of its staff. After hearing argument from both parties, the court stated that it would read M Civ JI 12.01, MCL 333.20201(1)(e), and MCL 333.21513(a) to the jury.

In its motion for new trial, Henry Ford Macomb Hospital raised the issue again, arguing that it was entitled to a new trial on the basis of instructional error. It maintained that MCL 333.21513(a) was not intended to protect patients from a violation of this statutory subsection and therefore did not fall within the category of statutes to which M Civ JI 12.01 applied. It also argued that MCL 333.20201(1)(e) should not have been read to the jury because another provision of the PHC, MCL 333.20203(2), provided that the PHC could not be used to expand a patient's remedies under statutory or common law. Following the hearing on the motion for new trial, the trial court rejected Henry Ford Macomb Hospital's claim that it was entitled to a new trial on the basis of instructional error.

Plaintiff first argues that Henry Ford Macomb Hospital's argument is barred by res judicata because of this Court's prior opinion. See *Estate of Allen v Dixit*, unpublished per curiam opinion of the Court of Appeals, issued March 11, 2021 (Docket No. 352665). As noted in footnote 2 of this opinion, the *Allen* Court concluded that Henry Ford Macomb Hospital had abandoned any challenge to plaintiff's claim that the alleged statutory violations could lead to a rebuttable presumption of negligence. *Id*. at 3.

In support of the argument that res judicata applies, plaintiff directs this Court to *Vanderwall v Midkiff*, 186 Mich App 191, 201; 463 NW2d 219 (1990), which held that "principles of res judicata require that a party bring in the initial appeal all issues which were then present and could have and should have been raised." *Vanderwall*, however, is distinguishable both legally and factually. One of the key aspects of the *Vanderwall* Court's holding was its conclusion that the trial court, in addressing issues of prejudgment and postjudgment interest, had exceeded its authority on remand. *Id*. at 201. This was because the *Vanderwall* Court had remanded with specific instructions that only issues pertaining to attorney fees be addressed on remand and the *Vanderwall* Court had expressly directed the trial court to reinstate the original judgment on the jury's verdict. *Id*. at 194.

In contrast, the issue on appeal in *Estate of Allen* was whether plaintiff's claims based upon the PHC should have been dismissed because a private cause of action did not exist under the PHC. *Estate of Allen*, unpub op at 3.Unlike the trial court in *Vanderwall*, the trial court's action in considering this issue on remand was not inconsistent with the holding of this Court. *Id*. More

specifically, the trial court was not placed in a position in which it was modifying a judgment that this Court had expressly ordered to be reinstated. Therefore, given its distinguishable procedural posture, we are not persuaded that *Vanderwall* prohibited Henry Ford Macomb Hospital from challenging jury instructions in the trial court or in the instant appeal.

Turning to the merits of this challenge to the jury instructions, M Civ JI 12.01, which was read to the jury, provides:

> We have a state statute which provides that [here quote or paraphrase the applicable part of the statute as construed by the courts].
>
> If you find that the [defendant / plaintiff] violated this statute before or at the time of the occurrence, you may infer that the [defendant / plaintiff] was negligent. (You must then decide whether such negligence was a proximate cause of the occurrence.)

Under Michigan law, violation of a safety or penal statute creates a rebuttable presumption of negligence. *Zeni*, 397 Mich at 128-129. The presumption of negligence may be rebutted if "evidence of a legally sufficient excuse for the statutory violation" is provided. *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 86; 393 NW2d 356 (1986). In *Klanseck*, our Supreme Court held that an instruction should only be given under M Civ JI 12.01 if:

> 1. the statute is intended to protect against the result of the violation;
>
> 2. the plaintiff is within the class intended to be protected by the statute; and
>
> 3. the evidence will support a finding that the violation was a proximate contributing cause of the occurrence. [Id. at 87 (quotation marks omitted.]

Reference to these requirements are "necessary to a determination of relevance." *Klanseck*, 426 Mich at 87. The rebuttable presumption is not restricted to specific statutes. *Zeni*, 397 Mich at 133.

MCL 333.21513 imposes on the owner of a hospital the obligation to ensure that staff members have their proper licensure, are properly trained, review professional practices, and follow medical protocols. Similarly, MCL 333.20201(1) mandates that a hospital licensed under the PHC adopt a patient's bill of rights. Subsection (e) specifically provides that a patient is entitled "to receive adequate and appropriate care," and to be kept informed regarding his or her medical condition and prospects for recovery "in terms that the patient . . . can understand . . . ." MCL 333.20201(1)(e). Therefore, both statutes clearly have as their purpose to protect individuals like Allen, who was admitted to defendant's ICU, against violations of both statutory provisions. See *Klanseck*, 426 Mich at 87.

Next, Allen was definitely within the class intended to be protected by the statutes, as she was an admitted patient subject to the patient bill of rights under MCL 333.20201(1)(e) and protected by the licensing, training, and supervision requirements imposed on defendant under MCL 333.21513(a). See *Klanseck*, 426 Mich at 87.

Third and finally, the evidence at trial established that Henry Ford Macomb Hospital's violations of these statutory provisions proximately caused Allen's death. *Id*. Dr. Attarian testified that the failure to invoke the chain-of-command policy was a proximate and direct cause of the ongoing delay in treatment for Allen, which in turn was a proximate cause of Allen's death. Dr. Bojko also testified that Henry Ford Macomb Hospital's failure to comply with the standard of care of invoking the chain-of-command policies, within a reasonable degree of healthcare administrative certainty, proximately caused Allen's death. See *Klanseck*, 426 Mich at 87. Because all three requirements stated in *Klanseck* are applicable, reading M Civ JI 12.01 was not improper.

Henry Ford Macomb Hospital's claim that reading MCL 333.20201(1)(e) to the jury contravened MCL 333.20203(2) is also without merit. A review of the record reflects this statutory subsection was read to the jury verbatim to inform the jury that, under MCL 333.20201(1)(e), Henry Ford Macomb Hospital was required to adopt a patient bill of rights. The jury was similarly instructed, under MCL 333.20201(1)(e), of the specific rights of patients, under the bill of rights, to receive adequate and appropriate care and for patients to be informed of their medical condition. The jury was also instructed, under M Civ JI 12.01, that if it determined that a violation of MCL 333.20201(e) occurred, the jury "may infer that the defendant was negligent." Accordingly, the jury was simply informed of a well-settled legal principle in Michigan that violation of a statute can give rise *to an inference* of negligence. Consistent with the dictates of MCL 333.20203(1), the jury was *not* instructed that Henry Ford Macomb Hospital could be found negligent for failing to comply with MCL 333.20201.

Moreover, there is nothing in the instruction to the jury that "*expand[ed] . . . other remedies at law* available to a patient . . . ." in contravention of the dictates of MCL 333.20203(2) (emphasis added). The dictionary definition[9] of "expand" is "to increase the extent, number, volume, or scope of[.]" *Merriam-Webster's Collegiate Dictionary* (12th ed). The dictionary definition of "remedy" is "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." *Black's Law Dictionary* (12th ed). *Black's Law Dictionary* further provides:

> A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged. *The two most common remedies are judgments that plaintiffs are entitled to collect sums of money from defendants (damages)* and orders to defendants to refrain from their wrongful conduct or to undo its consequences (injunctions). The court decides whether the litigant has been wronged under the substantive law that governs primary rights and duties; it conducts its inquiry in accordance with the procedural law. The law of remedies falls somewhere in between procedure and primary substantive rights. Remedies are substantive, but they are distinct from the rest of the substantive law, and sometimes their details blur into procedure. For long periods in our past, remedies were casually equated with procedure. Douglas Laycock, *Modern American Remedies* 1 (4th ed. 2010). [Emphasis added; quotation marks omitted.]

[9] In determining legislative intent, this Court may consult dictionary definitions. *Schafer v Kent Co*, 515 Mich 1, 21; 29 NW3d 25 (2024).

Here, the jury was made aware that evidence of the violation of the statute could only give rise to an *inference* of negligence. There was no language provided to the jury to suggest that the right of plaintiff to pursue or recover damages in a wrongful death action, was in any way "expand[ed]." Accordingly, the argument that the trial court's reading of MCL 333.20201(1)(e) to the jury contravened MCL 333.20203(2) is without merit.

IV. DISCOVERY

A. STANDARD OF REVIEW

Henry Ford Macomb Hospital next argues that the trial court abused its discretion by entering an order granting plaintiff's motion to enforce its May 25, 2021 notice of deposition of its corporate designee and by awarding monetary sanctions against it as a result of its delayed disclosure of the chain-of-command policies. This Court reviews the trial court's decision on a discovery motion for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). This Court also reviews for an abuse of discretion the trial court's decision regarding discovery sanctions. *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012). Whether the trial court properly applied the law is a question that is reviewed de novo. *Tolas Oil & Gas Exploration Co*, 347 Mich App at 301.

B. ANALYSIS

Plaintiff served Henry Ford Macomb Hospital with a notice of deposition duces tecum pursuant to MCR 2.306(B)(3). The notice stated that the deposition of Henry Ford Macomb Hospital's corporate designee would be taken regarding the following topics:

- Ensuring patients were provided safe, appropriate and needed care in a timely manner during the five-day hospital admission detailed [in] the Complaint;

- Supervision of medical care provided to hospital patient Cathleen Allen during her five (5) day hospital admission described in the Complaint[.]

The notice of deposition also required Henry Ford Macomb Hospital to produce the following documentation in compliance with MCR 2.306(B)(1), stating:

> 1. All documents relative to ensuring that patients are provided safe and needed care in a timely manner for the time period identified in the Complaint.
>
> 2. All documents relative to the reporting of potential imminent threats to the wellbeing of a patient to an administrative supervisor for the period identified in the Complaint.

Subsequently, plaintiff moved to enforce the notice of deposition, arguing that it was very clear that Henry Ford Macomb Hospital's administrative policies and procedures were at issue. In response, Henry Ford Macomb Hospital argued that plaintiff had not described, with sufficient particularity, the information that it sought in the notice of deposition. Following a hearing on the motion, the court granting plaintiff's motion to compel.

Henry Ford Macomb Hospital subsequently filed a motion for revision of the trial court's opinion and order, arguing that its predecessor lawyer had retired and that conversations with plaintiff's lawyer confirmed that "additional guidance from [the trial court was] necessary to proceed with further discovery on the claim of administrative negligence." Henry Ford Macomb Hospital further claimed that plaintiff's lawyer had stated to its lawyer that the deposition of a corporate representative would necessarily involve questioning regarding Henry Ford Macomb Hospital's policies and procedures, and the trial court had not yet ruled whether such policies and procedures were subject to discovery.

In response, plaintiff contended that discovery regarding the direct claims of administrative negligence against Henry Ford Macomb Hospital should be provided "as it had already been requested on multiple occasions." Plaintiff also asserted that Henry Ford Macomb Hospital had continually refused "to produce discovery at the administrative level" even though this Court had concluded that plaintiff's direct claims of administrative negligence were valid. Plaintiff argued that the failure to name and produce a corporate designee was consistent with Henry Ford Macomb Hospital's continued attempts to make inappropriate objections to otherwise relevant discovery.

Following a hearing, the trial court entered an order granting Henry Ford Macomb Hospital's motion, stating:

> IT IS FURTHER ORDERED that prior to the deposition(s) [of defendant's corporate designee], Defendant shall produce policies and procedures related to:
>
> 1) Ensuring patients were provided safe, appropriate, and needed care in a timely manner during the time period identified in Plaintiff's Complaint; and
>
> 2) Supervision of medical care provided to hospital patient Cathleen Allen during the time period identified in Plaintiff's Complaint.

Later in the proceedings, plaintiff filed an emergency motion to default and otherwise sanction Henry Ford Macomb Hospital for violating a court order, providing false testimony from a corporate designee, and misleading plaintiff's lawyer and the court regarding the existence of important evidence at issue over the 2½ years of litigation. Plaintiff claimed that Henry Ford Macomb Hospital had represented, over the 2½ years of litigation, that no chain-of-command or related policies were in existence. Then, "[o]ut of the blue, on August 20, 2022," defense counsel emailed to plaintiff's counsel the "exact" policy that Henry Ford Macomb Hospital's designee had testified under oath, and regarding which defense had argued before the court, did not exist. Plaintiff accused Henry Ford Macomb Hospital of engaging in a pattern of obstructing discovery. Plaintiff further argued that it incurred prejudice as a result of Henry Ford Macomb Hospital's misconduct because he had to file multiple motions to compel discovery, hire out-of-state healthcare administration experts, and pursue extended discovery to establish the mere existence of chain-of-command policies.

In its response, Henry Ford Macomb Hospital asserted that it had been unable to properly respond to discovery requests because plaintiff's claim of hospital administration negligence was unclear and plaintiff would not respond to requests to clarify the nature of his claim in discovery. It also claimed that plaintiff did not request a copy of a chain-of-command policy in his notice of

deposition duces tecum of its corporate designee and that the trial court's discovery order did not require it to produce a chain-of-command policy. Lastly, it argued that the chain-of-command policy it had produced was not a policy that plaintiff had requested in its subpoena duces tecum. Finally, Ford Macomb Hospital also filed a countermotion seeking sanctions against plaintiff under MCR 2.313, arguing that plaintiff's claims of hospital administrative negligence were "vague and unambiguous," and the affidavit supporting the claims was deficient because the expert did not have education, training, or experience in the practice of medicine. Further, it argued that plaintiff's claim of hospital administrative negligence was "nebulous" and that it had been unsuccessful in attempting to compel plaintiff to identify with specificity the nature of its claim of administrative negligence. Finally, it argued that plaintiff's vague claim relating to its policies and procedures had left it "to guess" whether such policies and procedures were in existence.

The trial court held a hearing on plaintiff's motion for sanctions and default. At the conclusion of the hearing, the trial court stated that it would take the matter under advisement and issue a written opinion. The court also held a hearing on the countermotion for sanctions and the trial court took the matter under advisement. On November 15, 2022, the trial court entered its opinion and order regarding plaintiff's emergency motion to default and otherwise sanction Henry Macomb Hospital for violating a court order, providing false testimony from a corporate designee, and misleading counsel and the court regarding the existence of important evidence at issue for over 2½ years of litigation. The order also addressed defendant's countermotion for sanctions. Ultimately, the trial court also concluded that in failing to provide a copy of the chain-of-command policy, Henry Ford Macomb Hospital had violated the terms of both its July 30, 2021 opinion and order and its November 22, 2021 amended opinion and order. Based upon the violation, the court found Henry Ford Macomb Hospital to be in contempt. And, after considering the facts related to the violation, the court concluded that although the sanction of default was not warranted, monetary sanctions were appropriate. The court also permitted the reopening of discovery to correct the prejudice to plaintiff arising from the discovery violation.

With that procedural background in mind, we turn to the merits of Henry Ford Macomb Hospital's argument. Henry Ford Macomb Hospital first argues that the trial court abused its discretion by granting plaintiff's motion to enforce its May 25, 2021 notice of deposition for its corporate designee. In support, it asserts that the language of plaintiff's notice of deposition was "impossibly broad" and did not describe with the requisite level of particularity the matters on which plaintiff sought to depose its corporate designee. We disagree.

MCR 2.306(B)(3) specifies the requirements for a notice of deposition pertaining to a corporate designee. Specifically, MCR 2.306(B)(3) provides, in pertinent part, "In a notice, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe *with reasonable particularity* the matters on which examination is requested." (Emphasis added). In *Edward v Scripps Media, Inc*, 331 FRD 116, 120-121 (ED Mich, 2019), the federal district court reasoned that any topics on which a corporate designee was sought to be deposed "must be stated with enough specificity to allow the corporation to designate and prepare a representative to testify." *Id*. at 121. Here, plaintiff stated that he intended to question the corporate designee regarding information ensuring that patients were "provided safe, appropriate, and needed care in a timely manner" during Allen's hospitalization. Plaintiff also intended to question the corporate designee regarding matters of "[s]upervision of medical care" provided to Allen as described in the complaint.

Citing *Edwards*, 331 FRD at 117, 122, Henry Ford Macomb Hospital asserts that the topics of plaintiff's deposition were overbroad, touching on every conceivable policy related to patient care and contact without limiting the scope of the topics to the care Allen received or the relationship of such policies to her death. In *Edwards*, *id*. at 122, the federal district court accepted the defendant's argument that the plaintiff's notice of deposition pertaining to a corporate designee were "vague, overbroad, irrelevant and not proportional to the needs of the case . . . ." In that case, the plaintiff did not limit its request to the application of various policies to a 2015 investigation at issue but also inquired about the "general application" of the policies at issue over a five-year period. *Id*. The *Edwards* Court noted that the plaintiff's discovery requests were duplicative and that the plaintiff had been given the opportunity to obtain the sought-after information. *Id*.

In contrast, plaintiff narrowed the scope of the matters on which it sought to depose the corporate designee by referencing the complaint, which alleged that Henry Ford Macomb Hospital had failed to implement and enforce policies that were intended to make sure that patients were provided safe and necessary care in a timely manner. Plaintiff also alleged that Henry Ford Macomb Hospital breached the standard of care by failing to implement and enforce policies aimed at reporting unsafe or substandard care resulting in an imminent threat to a patient's safety. The complaint included allegations that Henry Ford Macomb Hospital did not take necessary action to ensure that a chain-of-command policy was implemented and enforced. Given that the complaint specifically detailed the nature of the policies that were alleged to have been violated, plaintiff's notice of deposition was phrased in a manner that provided specific enough information for Henry Ford Macomb Hospital to designate and prepare its corporate representative. See *id*. at 121.

Henry Ford Macomb Hospital suggests that the requests for documents were also vague and overbroad. However, plaintiff requested that the corporate designee produce "[a]ll documents" that were related to ensuring that patients were provided safe, timely, and necessary care "for the time period identified in the Complaint." Plaintiff also sought "[a]ll documents" related to "the reporting of potential imminent threats to the wellbeing of a patient to an administrative supervisor for the time period identified in the Complaint." In light of the allegations in the complaint specifically referencing the chain-of-command policy, this request for production of documents was not vague. And given that plaintiff limited the scope of its document-production request to the five-day period when Allen was hospitalized, the request was not overbroad.

Henry Ford Macomb Hospital's next argues that the trial court erred by concluding that it failed to produce its chain-of-command policy, arguing that it could not be held responsible for failing to produce documents that were not requested in plaintiff's notice of deposition of the corporate designee. As stated above, however, the request for documents clearly encompassed the chain-of-command policies in effect during the time that Allen was hospitalized.

Henry Ford Macomb Hospital also faults the trial court's reasoning in its opinion and order as focusing on whether it should have been aware of what plaintiff was seeking, rather than the specific language of the discovery request. A review of the trial court's ruling confirms that the court considered the procedural history of the lower court proceedings in determining whether the failure to respond to the request extended over a substantial period of time. That information reveals that the language of the request led to Henry Ford Macomb Hospital's knowledge of what was at issue.

Henry Ford Macomb Hospital next asserts that the trial court did not give it the opportunity to challenge the portion of plaintiff's notice of deposition requiring the production of documents. Yet, there is simply no indication in the record that the trial court precluded Henry Ford Macomb Hospital from pursuing its challenge to the document-production portion of plaintiff's notice of deposition of defendant's corporate designee. Rather, the record reflects that Henry Ford Macomb Hospital raised some unrelated objections to the notice of deposition. It was free to raise other objections but did not do so. Because it was Henry Ford Macomb Hospital's omission that led to the issue not being canvassed in the trial court, its contention that it was precluded from challenging the document-production request in plaintiff's notice of deposition of the corporate designee is without merit.

Lastly, Henry Ford Macomb Hospital argues that the trial court abused its discretion by awarding sanctions against it because of its delayed production of its chain-of-command policies. MCR 2.313(B)(2)(d) states that in relevant part that, while an action is pending, sanctions may include a requirement that "the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure . . ." Further, as this Court recognized in *Tolas Oil & Gas Exploration Co*, 347 Mich App at 304, the trial court's authority to impose sanctions against parties that do not comply with discovery orders is broad and may include an award of attorney fees that were incurred because of the party's failure to obey a discovery order entered under MCR 2.313(A). Before the trial court may impose a discovery sanction it should consider the following nonexhaustive list of factors:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Id*. at 306-307, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Having reviewed the trial court's reasoning, we are not persuaded that it resulted in an abuse of discretion. The trial court considered the appropriate factors from *Dean* in fashioning what it determined to be a fair and just award of sanctions against Henry Ford Macomb Hospital for its repeated failure throughout the lower court proceedings to produce the chain-of-command and related policies requested by the plaintiff and ordered by the trial court.

In discerning whether the discovery violations were intentional or the result of an oversight, the trial court noted that Henry Ford Macomb Hospital was put on notice very early in the litigation that its adherence to its own chain-of-command policy was going to be at issue. As early as November 2019, when plaintiff filed his complaint, it was apparent that plaintiff was pursuing a direct cause of action against Henry Ford Macomb Hospital under a theory of administrative negligence on the basis of Henry Ford Macomb Hospital's failure to comply with its own chain-of-command policies. Additionally, the trial court considered Henry Ford Macomb Hospital's history of not complying with discovery orders, observing that both its July 30, 2021 opinion and order and its November 22, 2021 order clearly ordered it to produce the relevant policies, but there

was no compliance until over a year after the first discovery order was entered. The trial court weighed the prejudice to Henry Ford Macomb Hospital if sanctions were imposed, but reiterated that the failure to produce its chain-of-command policy extended throughout the lower court litigation. The trial court determined that the sanction of default requested by plaintiff would be too onerous for Henry Ford Macomb Hospital and would "effectively end [its] ability to argue that it was not liable in this case." Next, based upon evidence submitted by the defense, the trial court also concluded that the delayed production of the chain-of-command and related policies was not intentional. The court ultimately determined that an award of attorney fees for plaintiff having to take additional depositions would better compensate plaintiff for the wasted time incurred in taking the depositions of Henry Ford Macomb Hospital's corporate designee and physicians without being provided with a copy of the chain-of-command policy.

In sum, given that the trial court properly considered MCR 2.313(B)(2) and the factors from *Dean*, 182 Mich App at 32-33, in crafting an award of sanctions, the award of sanctions in this case was not an abuse of discretion.

V. NEW CORPORATE DESIGNEE

A. STANDARD OF REVIEW

Henry Ford Macomb Hospital next argues that the trial court abused its discretion by denying its request to substitute a new corporate designee to address issues related to its chain-of-command and related policies. We review the trial court's decision on a discovery motion for an abuse of discretion. *Augustine*, 292 Mich App at 419.

B. ANALYSIS

We first consider the procedural background related to this issue. On December 19, 2022, plaintiff moved to compel the second deposition of Henry Ford Macomb Hospital's corporate designee, Dr. Gallick. Plaintiff argued that a second deposition was necessary because Dr. Gallick had previously denied the existence of a chain-of-command policy or that it was possible to create such a policy. Plaintiff contended that the second deposition was necessary to alleviate the prejudice caused by the withholding of the policies and to "explore how [Dr. Gallick's] testimony will change based on the untimely provided policies." In response, Henry Ford Macomb Hospital claimed that it had already provided all discovery that plaintiff requested. It also filed its own motion seeking to substitute Joanne Pease, M.D., the chief medical officer of Henry Ford Macomb Hospital at the time of Allen's admission, as its corporate designee.

Henry Ford Macomb Hospital argued that Dr. Pease was "directly involved" in the drafting and implementation of its policies and procedures, including the chain-of-command policy. It also informed the trial court that Dr. Gallick had retired since his initial deposition and was living in another state. Finally, it claimed it had a duty to substitute Dr. Pease as its corporate designee given that Dr. Gallick's knowledge base regarding its policies and procedures was deficient. Plaintiff opposed the motion, arguing that Henry Ford Macomb Hospital should not be permitted to use its withholding of discovery to attempt to rehabilitate the testimony of its corporate designee. Plaintiff argued that any deficiencies in Dr. Gallick's testimony regarding the chain-of-command policies could be addressed by having Dr. Gallick review the chain-of-command policies that were

eventually disclosed. Henry Ford Macomb Hospital countered that substitution of Dr. Pease would be appropriate because she was the chief medical officer at Henry Ford Macomb Hospital when Allen was admitted, she was named as a witness in a supplemental witness list, and she was disclosed in the deposition of one of Henry Ford Macomb Hospital's physicians.

Following a hearing on the motions, the court granted plaintiff's motion to compel the second deposition of Gallick and denied Henry Ford Macomb Hospital's motion to substitute a new corporate designee.

Henry Ford Macomb Hospital subsequently filed a motion to add Dr. Pease as a corporate designee, citing federal precedent for the legal principle that if it becomes apparent during the course of a deposition that the designee is deficient, then a corporation has an obligation to produce a substitute. It claimed that plaintiff's request for documents in his notice of deposition duces tecum for Dr. Gallick was "intentionally vague and ambiguous . . . ." and that because the notice did not require Dr. Gallick to prepare for the issue of a chain-of-command policy, Dr. Gallick's lack of knowledge regarding the policy could not be imputed to it.

In his response, plaintiff contended that Henry Ford Macomb Hospital's contention that it did not have knowledge of the information plaintiff sought to question its corporate designee regarding what was a "blatant and improper attempt" to reargue motions that it had already lost. Plaintiff also argued that granting the motion to add Dr. Pease as a corporate designee would reward Henry Ford Macomb Hospital for discovery violations that had led to a finding of contempt. Following argument on the motion, the trial court denied Henry Ford Macomb Hospital's request to add Dr. Pease as a corporate designee. After another motion, the court, however, allowed Henry Ford Macomb Hospital to add Dr. Pease as a witness.

With that procedural background in mind, we turn to the merits of Henry Ford Macomb Hospital's claim on appeal. MCR 2.306 provides, in relevant part:

> **(B) Notice of Examination; Production of Documents and Things**.
>
> * * *
>
> (3) In a notice [of the time and place for taking the deposition], a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The notice shall be served at least 14 days prior to the scheduled deposition. No later than 10 days after being served with the notice, the noticed entity may serve objections or file a motion for protective order, upon which the party seeking discovery may either proceed on topics as to which there was no objection or motion, or move to enforce the notice. *The organization named must designate one or more officers, directors, or managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify*. [Emphasis added.]

MCR 2.306(B)(6) has a federal counterpart. Specifically, FR Civ P 30(b) provides, in pertinent part:

> (6) **Notice or Subpoena Directed to an Organization**. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization.

In *QBE Ins Corp v Jorda Enterprises, Inc*, 277 FRD 676, 687-691 (SD Fla, 2012), the United States District Court for the Southern District of Florida reviewed the law applicable to depositions taken under FR Civ P 30(b). As relevant here, the federal district court in *QBE Ins Corp*, 277 FRD at 690, discussed two principles of law:

> 28. When a corporation's designee legitimately lacks the ability to answer relevant questions on listed topics and the corporation cannot better prepare that witness or obtain an adequate substitute, then the "we-don't-know" response can be binding on the corporation and prohibit it from offering evidence at trial on those points. Phrased differently, the lack of knowledge answer is itself an answer which will bind the corporation at trial.
>
> 29. Similarly, a corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the questions will not be allowed effectively to change its answer by introducing evidence at trial. [Some quotation marks and citations omitted.]

Further, the testimony given by a deponent at the FR Civ P 30(b) deposition "represents the knowledge" of the corporate entity, rather than that of the individual deponents. *United States v Taylor*, 166 FRD 356, 361 (MD NC, 1996), aff'd 166 FRD 367 (MD NC, 1996). If an individual that is to testify for the corporate entity does not have personal knowledge of the matters set forth in the deposition notice, the onus lies on the corporation to prepare its designees so that they may sufficiently provide "knowledgeable and binding answers" on behalf of the corporation. *Id*. The designee presented in response to a FR Civ P 30(b)(6) notice of deposition, through his or her testimony, presents the position of the corporation on the relevant topics. *Id*.

In *QBE Ins Corp*, 277 FRD at 690, the federal district court opined that the rule holding a corporation to be bound at trial by a legitimate response asserting lack of knowledge at the FR Civ P 30(b) deposition is a corollary to the rule that parties may not engage in trial by ambush. In *Calzaturficio SCARPA SPA v Fabiano Shoe Co, Inc*, 201 FRD 33, 38 (D Mass, 2001), the federal district court stated that when a corporate designee gives an evasive and therefore "insufficient" answer under FR Civ P 30(b)(6), the opposing party is placed in an "untenable position" of not having the necessary and relevant facts. Accordingly, the federal district court in *Calzaturficio*

SCARPA SPA, *id*., acknowledged that an important purpose of FR Civ P 30(b)(6) is "prevent[ing] this type of 'sandbagging' of a party."

Here, in support of its contention that the trial court erred in disallowing it from substituting a new corporate designee, Henry Ford Macomb Hospital asserts that Dr. Gallick had retired from employment and had moved out of state. That fact is of little consequence. During his deposition, Dr. Gallick clearly testified that he was unaware of Henry Ford Macomb Hospital's chain of command and stated that such a policy was not even applicable in the healthcare setting. Likewise, Dr. Gallick did not have knowledge of the existing chain-of-command policies or whether Henry Ford Macomb Hospital had created and implemented such policies. Federal law makes clear that once a corporate representative testifies about his or her lack of knowledge regarding the requested information, the corporation is bound by those statements. *QBE Ins Corp*, 277 FRD at 691. Moreover, the corporation cannot seek to give new answers by introducing additional evidence at trial. *Id*.

Here, rather than completely foreclosing Henry Ford Macomb Hospital from calling Dr. Pease as a witness at trial, the court allowed Henry Ford Macomb Hospital the opportunity to call Dr. Pease in an attempt to rehabilitate the damaging testimony already given by Dr. Gallick regarding the lack of chain-of-command policies. It did not avail itself of that opportunity. Under these circumstances, the trial court's decision to deny Henry Ford Macomb Hospital's motion to substitute a new corporate designee under MRE 2.306(B)(6) fell within the range of reasonable and principled outcomes.

Affirmed. Plaintiff may tax costs as the prevailing party. MCR 7.219(A).

/s/ Sima G. Patel
/s/ Michael J. Kelly
/s/ Kristina Robinson Garrett