

STATE OF MICHIGAN
IN THE 37th CIRCUIT COURT FOR THE COUNTY OF CALHOUN
161 East Michigan Avenue NW, Battle Creek, MI 49014 Ph. (269) 969-6518

RICHARD TEAGUE,

Plaintiff,

Case No. 12-1483-NO

v

Hon. James C. Kingsley

NARCONON FREEDOM CENTER, INC., a
Michigan Non Profit Corporation, **A FOREVER
RECOVERY, INC.,** a Michigan Profit Corporation
and **TIA CORPORATION,** a Michigan Profit
Corporation,

Defendants.

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**DEFENDANT, A FOREVER RECOVERY, INC.'S,
MOTION TO AMEND ITS WITNESS LIST TO ADD EXPERT WITNESS**

NOW COMES Defendant A Forever Recovery, Inc. ("AFR") by and through its
attorneys, KREIS, ENDERLE, HUDGINS & BORSOS, P.C., and for its Motion To Amend its
Witness List to Add Expert Witness, states as follows:

1. On February 3, 2014, this Court denied AFR's Motion to Strike Plaintiff's Expert
Witness.

2. A primary basis for the Court's ruling was the publication of a Michigan Court of Appeals decision dated January 28, 2014. *Albro v Drayer* (Michigan COA #309591, rel'd January 28, 2014).

3. As a result of this Court's ruling, AFR seeks to amend its witness list to add its own expert witness.

4. A scheduling order was entered in this matter stating witness lists should be exchanged 42 days before the end of discovery, August 13, 2013. However, both parties have been flexible in their adherence to the dates contained within the scheduling order.

5. By way of example, the scheduling order states that discovery shall be completed by September 24, 2013; however Plaintiff's expert witness was not deposed until November 4, 2013.

6. Case evaluation is not scheduled until February 20, 2014.

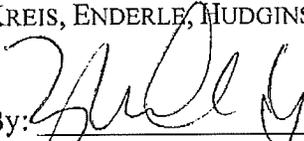
7. Trial in this matter has not yet been set in this matter.

8. Consequently, Plaintiff will not be prejudiced by this Court allowing Defendant to amend its witness list to add an expert witness.

WHEREFORE, for the reasons identified above, and as more fully set forth in the Brief in Support of Defendant AFR's Motion To Amend Witness List to Add Expert Witness, AFR respectfully requests that this Honorable Court grant its Motion.

Respectfully submitted,

KREIS, ENDERLE, HUDGINS & BORSOS, P.C.

By: 

Michael J. Toth (P36310)

Attorney for A Forever Recovery, Inc.

Dated: February 17, 2014

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**BRIEF IN SUPPORT OF DEFENDANT, A FOREVER RECOVERY, INC.'S,
MOTION TO AMEND ITS WITNESS LIST TO ADD EXPERT WITNESS**

I. INTRODUCTION:

Defendant A Forever Recovery, Inc. ("AFR") brings this Motion to Add an Expert Witness following this Court's denial of defendant's Motion to Strike Plaintiff's expert witness.

II. FACTUAL SUMMARY:

Plaintiff Richard Teague ("Plaintiff") initiated litigation against AFR and Narconon Freedom Center, Inc. ("Narconon") for self-inflicted burns occurring while Plaintiff was in the care of Narconon. During the pendency of the present litigation, Plaintiff reached a settlement

agreement with Narconon, leaving AFR as the sole remaining Defendant in the case. Of the original six counts against AFR, only two remain, both of which are negligence claims.

As required by law, Plaintiff has added an expert witness to his witness list. On December 30, 2013, AFR brought a motion to exclude Plaintiff's expert witness. On February 3, 2014, a hearing was held before this Honorable Court during which Plaintiff's witness testified to the basis for his opinion and his credentials for holding himself out as an expert.

In denying AFR's motion, this Court based its decision primarily on the January 28, 2014, ruling in *Albro v Drayer* (Michigan COA #309591, rel'd January 28, 2014). *Albro* involved a failed ankle surgery. The defendant's experts had considerable experience with ankle reconstruction, but they did not have significant experience with the particular procedure at issue in the case. The Court of Appeals held that the experts satisfied the requirements of MCL 600.2169(2) because they were experts in the same general field as the procedure at issue in the case. A lack of significant experience with the specific procedure would go towards the weight of their opinions, not the admissibility. Specifically, the Court held that an expert witness in a medical malpractice case does not need "identical experience and expertise" as the defendant in order to testify about whether the defendant complied with the standard of care. MCL 600.2169(2) instructs the Court to consider an expert's area of specialization when evaluating whether an expert is qualified to render an opinion.

The *Albro* decision was released after AFR's motion was filed but before the motion was heard and decided. Prior to the *Albro* decision, it is likely AFR's motion would have been granted.

III. LAW & ANALYSIS:

The decision whether to allow a party to add an expert witness is within the discretion of the trial court. *Levinson v Sklar* 181 Mich App 693; 449 NW2d 682 (1989), after remand sub nom *Levinson v Trotsky*, 199 Mich App 110; 500 NW2d 762 (1989). In determining whether the trial court abused its discretion, the appellate court considers whether the party seeking to add an expert has adequately explained its reason for delay, and whether the opposing party would be prejudiced. *Levinson, supra* at 699.

In determining prejudice, the appellate court considers a number of factors, including: (1) whether the party seeking to add the expert has caused repeated delays because of a lack of diligence, and (2) whether the failure to allow the addition of an expert will deny a party a determination on the merits of their claim. *Levinson, supra* at 699.

In this case, AFR first asserts that it has an adequate explanation for the absence of their expert witness.

Plaintiff's expert, Dr. Brooks', area of expertise was not known to AFR until Dr. Brooks' deposition was held November 4, 2013. Immediately following Dr. Brooks' deposition, AFR moved to strike Dr. Brooks as an expert witness. AFR reasonably believed it would be successful on the motion given that Dr. Brooks testified he had never been recognized as an expert witness, had never been consulted for detoxification of benzodiazepine, and never consulted with Plaintiff regarding the factual circumstances surrounding Plaintiff's experience at AFR or his subsequent injuries while at Narconon. In fact, Dr. Brooks testified he had never dealt with a case that contained the factual circumstances presented in this matter.

A hearing on AFR's motion was held February 3, 2014. This Court denied AFR's motion to strike, primarily due to the *Albro* opinion released by the Michigan Court of Appeals a few

short days before. *Albro v Drayer* (Michigan COA # 309591, rel'd January 28, 2014). In light of *Albro* and this Court's subsequent order allowing Plaintiff's expert, AFR is in the position of needing to present expert testimony as well. AFR asserts that Plaintiff will not in any way be prejudiced if AFR is allowed to add its expert witness.

Throughout the course of this litigation, the parties have been extremely flexible in their adherence to the requirements and timelines contained within this Court's scheduling order. By way of example, AFR stipulated to allowing Plaintiff to file an amended complaint without having complied with the requirement to file an affidavit of meritorious defense. Additionally, there is no indication on the record that the trial had been repeatedly postponed because of a lack of diligence on AFR's part. *See Levinson v. Sklar*, 181 Mich. App. 693, 699, 449 N.W.2d 682 (1989). In fact, trial is not yet set in this matter. Consequently, sufficient time exists for Plaintiff to investigate AFR's expert without any negative impact on Plaintiff's ability to prepare for trial.

Moreover, after hearing Dr. Brooks' testimony during the hearing on AFR's motion and this Court's subsequent order, it is likely that the merits of Plaintiff's claim will be based on the expert testimony of Dr. Brooks. In the absence of adding its own expert, AFR will be denied the opportunity to educate the jury on the merits of AFR's defense to Plaintiff's claim.

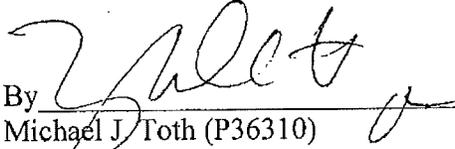
IV. CONCLUSION:

AFR has provided an adequate explanation for its delay in adding an expert and no prejudice will result to Plaintiff if the motion is granted. Accordingly, AFR respectfully requests that this Honorable Court grant its motion for leave to add an expert witness.

Respectfully submitted,

KREIS, ENDERLE, HUDGINS & BORSOS, P.C.

Dated: February 17, 2014

By 
Michael J. Toth (P36310)
Attorney for Defendant A Forever Recovery, Inc.