IN THE SUPREME COURT OF IOWA

NO. 24-0205

JAHN PATRIC KIRLIN AND SARA LOUISE KIRLIN,
County Plaintiffs-Appellants

Pottawattamie
No. LACV 1221621

vs.

Dr. Barclay A. Monaster, M.D., and Dr. Christian William Jones, MD, and Physicians Clinic, Inc., d.b.a. Methodist Physicians Clinic – Council Bluffs.
Defendants- Appellees

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POTTAWATTAMIE COUNTY

HONORABLE JUDGE MICHAEL HOOPER

APPELLANT'S BRIEF

/s/ Kelly N Wyman
Wyman Law
607 S. Main Street
Council Bluffs, IA 51503
Telephone: 712 890 0015
Facsimile: 712 890 0020
kelly@kellywymanlaw.com

Dean T. Jennings
Jennings Law Firm
523 6th Avenue
Council Bluffs IA 51503
TELEPHONE: 712 256 1400
FACSIMILE: 712-890-0019
dean@deanjenningslaw.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this Appellant's Brief and Request for Oral Argument was served upon State's counsel of record by EDMS and upon the Defendant-Appellee on 10th Day of June 2024 by sending the same by United States Mail, First Class postage prepaid to:

Robert Mooney ***(Via EDMS and email)***
Kalli patricia Gloudemans
Mooney, Lenaghan, Westberg, Dorn
450 Regency Parkway Suite 320
Omaha NE 68114
Attorney for Defendants Dr. Christian Jones and Physicians Clinic

Frederick T. Harris ***(Via EDMS and email)***
Georgia Rose Rice
Lamson, Duggan & Murray
1045 76th Street Suite 3000
West Des Moines, IA 50266
Attorney for Defendant Dr. Barclay Monaster

/s/ Kelly N. Wyman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court erred in granting the Defendants Motion for Summary Judgment, facts remain disputed.

II. The District Court erred in applying section 668.11 after the deadline had expired on appeal for judicial error and failed to apply Iowa Rule of Civil Procedure 1.500(2)

III. The District Court abused its broad discretion in finding no good cause to extend Kirlins 668.11 deadline or set new discovery dates

ROUTING STATEMENT

This appeal should be retained. This appeal involves a substantial issue of first impression, requiring enunciation of legal issues. This appeal also involves issues of broad public importance that will require ultimate determination by the Iowa Supreme Court, See, Iowa Rs. App. P. 6.1101(2)(a), (c-d). This case should be retained to provide clarification of the interplay between a summary judicial dismissal pursuant to Iowa Rule of Civil Procedure 1.981(2) and survival of section 668.11 upon remand.

This case should be retained to provide clarification of the interplay between expiration of section 668.11 following a judicial dismissal and the surviving statute Iowa Rule of Civil Procedure 1.500(2).

Additionally, this case should be retained to provide clarification of the good cause standard to allow *allegedly* late experts to testify. Clarity is needed on what constitutes prejudice and the obligations of the opposing counsel (if any) and the Court (if any). *See* Iowa R. App. P. 6.1101 (2) (f) (cases ordinarily retained include those involving changing legal principles).

In *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505-06 (Iowa 1993), this Court identified certain factors in the good cause analysis including the presence or absence of prejudice and defense counsel's actions.

NATURE OF THE CASE

This case is a second appeal from the Iowa District Court for Pottawattamie County in the matter of case number LACV121621, John Patrick Kirlin, et al. vs. Dr. Barclay Monaster, et al. The case involves claims for permanent injuries suffered by Deputy John Patrick Kirlin and a related loss of consortium claim of Sara Louise Kirlin, all arising out of the negligent care and treatment (or failure to treat) provided by Dr. Jones and Dr. Monaster between April 1 – April 16, 2019.

On September 14, 2020, Kirlin's filed suit against Defendants Dr. Barclay Monaster, Dr. Christian Jones, Physicians Clinic d.b.a Methodist Physicians Clinic, Dr. Dan C. Kjeldgaard and Advanced Chiropractic Care, Inc. for claims arising out the subject incident in the Iowa District Court for Pottawattamie County, case number LACV120936.

All Defendants in that case moved to dismiss alleging a defective Certificate of merit. Kirlins filed a Dismissal Without Prejudice of this claim (LACV120936).

Kirlins refiled their petition on April 14, 2021, in the Iowa District Court for Pottawattamie County, case number LACV121621 against Defendants Dr. Barclay Monaster, Dr. Christian Jones, and Physicians Clinic *d.b.a* Methodist Physicians Clinic. D0001 Petition (04/14/21)

On May 13, 2021, Kirlins filed and served Certificate of Merit affidavits by

Dr. Brian Smith as to all Defendants. D0017-D0019, Certificate of Merit (5/13/21)

On August 19, 2021, Defendant Dr. Christian Jones and Methodist Physicians Clinic filed an Answer. D0043, Answer. (8/19/21). On August 20, 2021, Defendant Dr, Barclay Monaster filed an Answer. D0040, Answer (8/20/21).

On October 15, 2021, Defendants moved for summary judgment of Kirlins' claims alleging Kirlins could not file new a Certificate of Merit in this case, and they were bound by the Certificate of Mert in the 2020 case. D0047 and D0063, Motion for Summary Judgment (10/15/21). On December 20, 2021, a hearing was held on Defendants' Motions for Summary Judgment. D0089, Other Order (12/20/21). On January 18, 2022, the District Court issued an Order sustaining all Defendants' Motions for Summary Judgment. D0091, Order for Judgment (01/18/22).

February 25, 2022, Kirlins filed a Notice of Appeal. D0097 Notice of Appeal (02/25/22).

February 20, 2023, the Supreme Court reversed and remanded the case on judicial error. D0107, Supreme Court Opinion (02/20/23)

A trial scheduling conference (unsuccessful) was generated for March 30, 2023. D0108, Computer Generate Notice (03/30/2023)

Judge Hooper personally held a status conference with the parties April 4, 2023, setting only a new trial date and retaining the old TSDP. D0012, Computer Generated notice (04/04/2023)

July 31, 2023, Defendants moved for Summary judgment of Kirlins' claims claiming the Kirlins missed the section 668.11 deadline that had restarted the day of remand and expired 29 days later. D0118 and D0120, Motions for Summary Judgment (07/31/23)

A telephonic hearing on Defendants' Motions (x2) for Summary Judgment was held on October 2, 2023. D0132, Order - Taken Under Advis. (10/02/23)

Judge Hooper granted the Defendants Motions for Summary Judgment on November 17, 2023. D0140, Order for Judgment (11/17/23)

November 28, 2023, Kirlins urged the Court to reconsider and exercise his broad judicial discretion to avoid the disparate prejudice to Kirlins, in part of Judge Hoopers making. D0104, Motion to Rec. or Amend (11/28/23)

Judge Hooper overruled Kirlins' Motion to reconsider on January 16, 2024. D0149, Other Order Mot. Rec. Denied (01/16/24)

Kirlins appealed February 5, 2024. D0150, Notice of Appeal (02/05/24)

STATEMENT OF THE CASE

As this Appeal was made from a District Court Order sustaining Motions for Summary Judgment, there has been a limited record generated in this matter and the Statement of Facts which follows largely originates from Plaintiff's Petition.

Beginning on April 1, 2019, Plaintiff, Jahn Kirlin, experienced a sudden and continuous significant right-side neck pain and intense headaches and pressure behind his right eye. D0001, Petition at 2 (04/14/21)

Dr. Jones began treating Jahn for the new symptoms on April 4, 2019, recommending some pain management medications, a pain management referral and eventually suggesting an MRI would be necessary if symptoms did not improve. D0001, Petition at 2 (04/14/21)

On April 12, 2019, Dr. Jones was alerted the head and neck pain was continuing with no relief, the office stated it was too late in the day on a Friday to order the MRI, and it would be ordered on Monday April 15, 2019. D0001, Petition at 2 (04/14/21)

On Monday April 15, 2019, Dr. Monaster took over Jahn's care upon his return from a leave of absence following drug and alcohol treatment. Dr. Monaster insisted on seeing Jahn before ordering an MRI. Jahn scheduled an appointment for 1:30 pm the same day. Jahn was seen by Dr. Monaster. Dr. Monaster refused to order the MRI, emphasized a $3000 test was not necessary, ordered a prescription for steroids, suggested Jahn could continue his chiropractic care and to follow up at the end of the week. D0001, Petition at 2 (04/14/21))

On April 16, 2019, Jahn experienced stroke symptoms after chiropractic treatment of his neck. Jahn was transported by ambulance to Jennie Edmundson

Hospital and eventually to the University of Nebraska Medical Center. It was confirmed that Jahn suffered bilateral distal cervical vertebral artery dissections with high-grade stenoses, and small thrombus in the proximal basilar artery, with permanent and irreversible damage. Dr. Monaster was contacted by Jahn's wife, Sara Kirlin, to advise Jahn had suffered a stroke and was being taken to the emergency room. Dr. Monaster never met Jahn at the emergency room on April 16, 2019. D0001, Petition at 2 (04/14/21)

Methodist Physicians Clinic, Dr. Jones and/ or Dr. Monaster have changed or altered Jahn's medical records or omitted the Aoril 15, 2019 visit; the medical records are void of an appointment with Jahn on April 15, 2019; Dr. Monaster was intoxicated at the time of the appointment with Jahn on April 15, 2019; Dr. Monaster was arrested and plead guilty to Operating a motor vehicle While Under the Influence, 2nd offence, on April 16, 2019. D0001, Petition at 2 (04/14/21))

Dr. Jones and Dr. Monaster established a physician-patient relationship between Dr. Jones and Dr. Monaster and Jahn Kirlin. At all times material hereto, Dr. Jones and Dr. Monaster were employed by Methodist Physicians Clinic and were acting within the course of their employment. D0001, Petition at 3 (04/14/21)

As a result of the actions of Defendants Dr. Jones. Dr. Monaster, and Methodist Physicians Clinic, Plaintiff Jahn Kirlin has suffered and incurred permanent injuries and damages, continues to suffer and incur damages and will for the remainder of his

life. Sara Kirlin has been denied the normal relationship, companionship and consortium with Jahn Kirlin. D0001, Petition at 3 (04/14/21)

ARGUMENT

I. The District Court Erred in Granting Defendants' Motion for Summary Judgment

Preservation of Error:

Error is preserved on this issue by Plaintiffs timely resisting Defendants' Motions for Summary Judgment and timely moved under *Iowa R. Civ. P. 1.904(3)* for the Court to reconsider, enlarge, or amend its ruling. D0125, Resistance to MSJ (08/14/23) and D0141, Motion to Rec. (11/28/23)

Standard of Review:

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 649-50 (Iowa 2000).

Argument:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law. *Iowa R. Civ. P. 1.981*(3). The purpose of the rule is to avoid useless trials. Where there is no genuine issue of fact to be decided, the party with a just cause should be

able to obtain a judgment promptly and without the expense and delay of a trial. *Bauer v. Stern Finance Company*, 169 N.W.2d 850, 853 (Iowa 1969); *Jensen v. Voshell*, 193 N.W.2d 86, 88 (Iowa 1971); and *Davis v. Comito*, 204 N.W.2d 607, 608 (Iowa 1973). "In ruling on a motion for summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does." *Bauer v. Stern Finance Company*, 169 N.W.2d at 853. “The burden is upon the party moving for summary judgment to show absence of any genuine issue of a material fact. All material properly before the court must be viewed in the light most favorable to the opposing party. *Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970); *Continental Ill. Nat. B. T. Co. v. Security State Bank*, 182 N.W.2d 116, 118 (Iowa 1970); and *Davis v. Comito*, 204 N.W.2d at 612.

Summary judgment should not be granted if reasonable minds can differ on how a material factual issue should be resolved. *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004). *Sweeney v. City of Bettendorf,* 762 N.W.2d 873, 877 (Iowa 2009).

Granting summary judgment was judicial error when the record is viewed in the light most favorable to Kirlins and all reasonable inferences are resolved in their favor.

Defendants fail to provide this Court with any documentary evidence to support their conclusions. A self-serving affidavit manufactured by an interested party to support summary judgment should not be allowed to resolve genuine issues

of material facts in dispute. Determination of credibility of witnesses, parties (including those purporting to be experts) is a core jury function at the very heart of the constitutional right to a jury trial. Plaintiff listed 32 disputed facts for the Court. Included in the disputed facts was whether the Court can take judicial notice of a deadline while the case is summarily dismissed and whether the court can posthumously rewrite, edit or amend section 668.11.

This Court reviews summary judgment motions for correction of errors at law. *Lennette v. State*, 975 N.W.2d 380, 388 (Iowa 2022). Summary judgment is proper only if the record reflects "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Iowa R. Civ. P. 1.981(3).* This appeal turns on the district Court's application of section 668.11 "summary judgment is the proper vehicle to test the validity of [the] claim . . . [and] we need only decide whether the district court properly applied the law." *Hill v. State, Dep't of Hum. Servs.,* 493 N.W.2d 803, 804–05 (Iowa 1992) (citation omitted); see also *Johnson v. Associated Milk Producers, Inc.,* 886 N.W.2d 384, 389 (Iowa 2016) ("Summary judgment is proper if the only issue is the legal consequences flowing from undisputed facts." (quoting Peak v. Adams, 799 N.W.2d 535, 542 (Iowa 2011)).

II. The District Court Erred in applying Section 668.11 after the deadline had expired while the case was previously on appeal for Judicial Error and Failed to Apply Iowa R. Civ P.1.500(2)

Preservation of Error:

Error is preserved on this issue by Plaintiffs timely resisting Defendants' Motions for Summary Judgment and timely moved under *Iowa R. Civ. P. 1.904(3)* for the Court to Reconsider, Enlarge, or Amend its ruling. (D0125 Resistance; D0141 Motion)

Standard of Review:

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 649-50 (Iowa 2000).

Argument:

In this medical malpractice case, the parties' expert certification deadlines were arguably controlled by the plain language of *Iowa Code* §668.11, which states:

> **668.11. Disclosure of expert witnesses in liability cases involving licensed professionals.**
> 1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:
> a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.
> b. The defendant within ninety days of plaintiff's certification.

> 2. If a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown.
> 3. This section does not apply to court appointed experts or to rebuttal experts called with the approval of the court.

Iowa Code §668.11 (2022) (emphasis added). The language of the statute has been found to be clear and unmistakably applicable to medical malpractice cases.

However, *Iowa Code* §668.11 is not self-executing and can only apply when there is a case over which it can govern, which was lost once the district court dismissed the action on Defendants' summary judgment motions, divesting this Court of any jurisdiction. It is the same analysis the Supreme Court applied in its January 6, 2023, opinion in this case. Once the court dismissed Plaintiff's case upon motion of the Defendant's, this Court's jurisdiction ended, and deadlines were mooted. When the Court summarily dismissed Kirlins first suit, it became "nonexistent" and "unreviewable." See *Lawson v. Kurtzhals*, 792 N.W.2d 251,11 of 13, 255 n.2 (Iowa 2010).

"*The district court lacks jurisdiction to posthumously continue a deadline beyond dismissal.*" *Kirlin v. Monaster*, 984 N.W.2d 412 (Iowa 2023). Like the Supreme Court's January 6, 2023, opinion in this case communicated, "***unless, and until, the general assembly expressly provides*"** the court cannot rewrite the Iowa Code. ***Kirlin v. Monaster***, 984 N.W.2d 412 (Iowa 2023)

The court cannot unilaterally rewrite Iowa Code §668.11 to include its survival or to be paused at the time of a complete summary dismissal of the action on the merits. Instead, by default, as stated in *Iowa R. Civ. P. 1.500(2)*, we continue to apply jurisprudence under Iowa Court Rule 23.5-Form 2 which specifically states section 8A applies *unless an Iowa Code provision requires an earlier designation date*. At the time of dismissal and remand to the district court, *Iowa Code* §668.11 no longer applied, the deadlines are controlled by Form 2: Trial Scheduling and Discovery Plan §8A and 8B and 1.500(2)(a)(b).

Plaintiffs' designation of experts was not due until August 21, 2023, in this case. *Iowa R. Civ. P. 1.500(2)* 23.5-Form 2: Trial Scheduling and Discovery Plan §8 is the applicable plaintiff's expert certification and disclosure deadline date unless the Iowa Code requires an earlier designation, such as Iowa code §668.11. "In construing a statute, the courts are required to interpret the language used by the legislature fairly and sensibly, in accordance with the plain meaning of the words used." *Green v. Brinegar*, 228 Iowa 477 (Iowa 1940).

Iowa code §668.11 is only always triggered by the last defendant's answer, unless the court for good cause extends the time of disclosure. *See Iowa Code* §668.11. Defendants answered the complaint in this case on August 19, 2021, and August 20, 2021. Pursuant to *Iowa Code* 668.11 plaintiff's certification of experts expired 180 days after August 20, 2021, or February 16, 2022. The Court had

summarily dismissed the case January 18, 2022, or 29 days before the deadline.

The case was over, the court no longer had jurisdiction. No further pleadings could be filed. Subsequently, the Iowa Supreme Court reversed the dismissal, finding the district court errored in granting summary judgment. At the time of remand, no deadlines existed. All deadlines, including the trial date, had expired during the appeal. The district court's erroneous dismissal of the case is the exclusive reason Kirlins had been prohibited from compliance with section 668.11. Until 43 days later, April 4, 2023, when the Court scheduled a new trial date, there remained no deadlines. When the Court opted to ONLY provide a new trial date, the only surviving expert deadlines for all parties was Iowa R. Civ. P. 1.500(2), 23.5-Form 2: Trial Scheduling and Discovery Plan §8, which states Kirlins designate experts 210 days before trial, or August 21, 2023. It is perplexing how the Court can find section 668.11 is the ONLY date to survive a judicial dismissal.

The trial court had the discretion to grant the additional time to designate Kirlins' experts, if he truly opined their deadline had run.

Upon remand, counsel for Kirlins immediately sought to obtain new discovery dates. Just *one day after procedendo issued*, by email dated February 21, 2023, Kirlins' counsel routed a new proposed TSDP to Defendants' attorneys Harris and Mooney for comment and changes. D0120, Motion for Summary

Judgment Ex M (07/31/23).

From: Kelly Wyman
Sent: Tuesday, February 21, 2023 12:59 PM
To: Robert Mooney <rmooney@mlwdlaw.com>; Harris, Rick <rharris@ldmlaw.com>
Cc: dean@deanjenningslaw.com
Subject: Kirlin v Monaster, et al - Trial Scheduling and Discovery Plan

Bob and Rick:

Please find attached a proposed discovery plan and let me know if you desire changes.

Kelly

Kelly N. Wyman, Attorney | Wyman Law Firm
523 S. 6th Avenue, Council Bluffs, IA 51503 | P: 712-890-0015 | F: 712-890-0020
kelly@kellywymanlaw.com

No response was received.

Kirlins' counsel routed a second email March 7, 2023, asking for review and comment. D0120, Motion for Summary Judgment Ex M (07/31/23).

From: Kelly Wyman <kelly@kellywymanlaw.com>
Sent: Tuesday, March 7, 2023 5:58 PM
To: Robert Mooney <rmooney@mlwdlaw.com>; Harris, Rick <rharris@ldmlaw.com>
Cc: dean@deanjenningslaw.com
Subject: RE: Kirlin v Monaster, et al - Trial Scheduling and Discovery Plan

Sending again for your review and comment

Kelly N. Wyman, Attorney | Wyman Law Firm
523 S. 6th Avenue, Council Bluffs, IA 51503 | P: 712-890-0015 | F: 712-890-0020
kelly@kellywymanlaw.com

Attorney Gloudemans made an appearance, and Kirlins' counsel forwarded the email to her on March 30, 2023. D0120, Motion for Summary Judgment Ex M (07/31/23). No response was ever received.

FW: Kirlin v Monaster, et al - Trial Scheduling and Discovery Plan
Kelly Wyman <kelly@kellywymanlaw.com>
Thu 03/30/2023 4:08 PM
To:kgloudemans@mlwdlaw.com <kgloudemans@mlwdlaw.com>

1 attachments (3 MB)
2023.02.21 - C- KIRLIN - Form 2 Trial Scheduling and Discovery Plan.pdf;

Kelly N. Wyman, Attorney | Wyman Law Firm
607 S Main Street, Council Bluffs, IA 51503 | P: 712-890-0015 | F: 712-890-0020
kelly@kellywymanlaw.com

After remand, it was 38 days before court administration set an initial trial scheduling conference on March 30, 2023. D0108, Trial Scheduling Conference (03/30/23). This trial scheduling conference was a failure as counsel for the defense was now lobbying for doubling the length of the trial, and plaintiff not concede as that meant a long delay to schedule a two week trial on the Court's schedule.

Attorneys Harris and Mooney responded on March 30, 2023, and each requested dates certain for experts (a clear signal they did not believe Kirlins deadline had passed). D0120, Motion for Summary Judgment Ex M (07/31/23).

On Mar 30, 2023, at 5:17 PM, Harris, Rick <rharris@ldmlaw.com> wrote:

Hi Kelly and Dean,

Bryony brought me up to speed on the trial setting conference held earlier today. She was not included in your emails below but I have included her here.

In terms of how long the case will take to try, how many days do you anticipate it taking to present your case assuming we get the jury picked, openings and one witness done on trial day one?

It is my preference to have a date certain for experts.

Thank you.

Rick

RICK T. HARRIS
PARTNER
1045 76th Street, Suite 3000 | West Des Moines, IA 50266
M: (515) 513-5003 | F: (515) 298-6536 | C: (515) 865-9824
rharris@ldmlaw.com | www.ldmlaw.com

and

From: Robert Mooney <rmooney@mlwdlaw.com>
Sent: Thursday, March 30, 2023 5:39 PM
To: Harris, Rick <rharris@ldmlaw.com>
Cc: Kelly Wyman <kelly@kellywymanlaw.com>; Dean Jennings (dean@deanjenningslaw.com) <dean@deanjenningslaw.com>; Whitaker, Bryony <bwhitaker@ldmlaw.com>; Kalli Gloudemans <kgloudemans@mlwdlaw.com>
Subject: Re: Kirlin v Monaster, et al - Trial Scheduling and Discovery Plan

All, I'm going to go dark on Monday as I'm in trial for two weeks. I've included Kalli Gloudemans on this e-mail just so she can respond for Dr. Jones and MPC. Please include her going forward. I'm for dates certain too.

Sincerely,

Robert A. Mooney
Rmooney@mlwdlaw.com

Attorney Wyman responded on March 31, 2023. D0120, Motion for Summary Judgment, Ex M (07/31/23).

From: Kelly Wyman <kelly@kellywymanlaw.com>
Sent: Friday, March 31, 2023 8:02 AM
To: Robert Mooney; Harris, Rick
Cc: Dean Jennings (dean@deanjenningslaw.com); Whitaker, Bryony; Kalli Gloudemans
Subject: RE: Kirlin v Monaster, et al - Trial Scheduling and Discovery Plan

All:

It has always been 5 days. To Court Admin's point the TSDP entered on June 23, 2021, was 5 days, it is still in effect, and we can back deadlines into the new trial date.

If we can reach agreement to a date specific for experts and the Court agrees to take them out of order, then he will order it.

I don't know why we are now trying to change the length of the trial that everyone previously agreed to and the Court approved.

Kelly

No proposal for expert dates was received from counsel for the defense.

The Court held a second trial scheduling conference on April 4, 2023, 43 days after remand, and refused to enter a new TSDP; only a new trial date was set' he also altered the length of the trial to 7 days. D0113, Trial Order (04/04/23)

The Court ***now*** adopts Defendants position, i.e. Kirlins' deadline was March 21, 2023, or 29 days after remand (D 0140, Order for Judgment at 6, 11/17/23); Judge Hooper accommodated a trial scheduling conference 43 days after remand and after the imagined March 21, 2023 date.

The logic of the Defendants, and the Court, is unsound. For example, if the judicial dismissal had occurred 29 days later (following the logic of the Defendants) it would be impossible for Kirlins to designate experts. If the original 668.11 deadline resumes right where it ended, procedendo and certification would be the same day; an unintended and untenable requirement only on Kirlins, and

certainly not intended by the legislature.

The law favors determination of cases on their merits and looks with disfavor on advantage taken of what manifestly must have been a misunderstanding of counsel. *First National Bank of Newton v. Federal Reserve Bank of Chicago*, 210 Iowa 521, 231 N.W. 453, 69 A.L.R. 1329.

Darrah v. Des Moines General Hospital, 436 N.W.2d 53 (Iowa 1989), is also distinguished. *Darrah* allowed continuing jurisdiction over collateral issues even after the district court lost jurisdiction over the merits of a case. Iowa Code §668.11 goes to the merits of the action, not a matter collateral to the underlying action. There was no way the district court retained jurisdiction once the action was dismissed by the court on the merits pursuant to Defendants' own motions for summary judgment. Kirlins could NOT certify experts on the original section 668.11 date of March 21, 2023; and due to no fault of their own.

III. **The District Court Abused its Broad Discretion in finding No Good Cause existed to extend Kirlins' 668.11 deadline**

Preservation of Error:

Error is preserved on this issue by Plaintiffs timely resisting Defendants' Motions for Summary Judgment and timely moved under *Iowa R. Civ. P. 1.904(3)* for the Court to reconsider, enlarge, or amend its ruling. (D0125 Resistance;

D0141 Motion)

Standard of Review:

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 649-50 (Iowa 2000).

Argument:

In 1989, the Iowa Supreme Court first addressed *Iowa Code* §668.11 and the issue of "good cause." In *Donovan v. State*, a plaintiff sued the State of Iowa alleging medical malpractice. *Donovan v. State* 445 N.W.2d 763, 764 (Iowa 1989). The *Donovan* court explained:

> While section 668.11 does not define good cause, we have discussed it in other contexts. Iowa Rule of Civil Procedure 236, for example, provides that a default judgment may be set aside on a showing of good cause, which is a sound, effective, truthful reason, something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them.

Id. at 765-766 (citing *Dealers Warehouse Co. v. Wahl & Assocs.*, 216 N.W.2d 391, 394-95 (Iowa 1974)) (emphasis added).

The Iowa Supreme Court, in 1993, subsequently discussed the "good cause" component of the statute in *Hantsbarger v. Coffin*, 501 N.W.2d 501, 503 (Iowa 1993). The *Hantsbarger* court determined the plaintiffs had failed to substantially comply with the statute. *Id.* The *Hantsbarger* court addressed the issue by comparing and contrasting the matter with the *Donovan* case, noting that unlike the *Donovan* plaintiffs, the plaintiffs had complied with discovery, had their experts in hand before the deadline and had named them. *Id*.

The *Hantsbarger* court concluded:

> In determining whether good cause exists for granting plaintiffs' request to be excused from complying with the section 668.11-time limit, we believe the district court could have properly considered the seriousness of the deviation and defendant's prejudice or lack thereof.….
>
> We also note that in Donovan, defense counsel wrote letters and sought to cajole plaintiffs' counsel into compliance. Here, defendant's counsel silently waited for the time period to pass and then used plaintiffs' deficient designation to seek a prohibition of plaintiffs' experts and a dismissal of their claims. While we do not suggest that opposing counsel must act as his or her "brother's keeper," we believe it is appropriate to consider defendant's counsel's actions, or lack thereof, in determining good cause for granting plaintiffs' request for relief.
>
> We conclude that the district court abused its discretion by failing to grant plaintiffs' request to be excused from complying with section 668.11. Defendant was not prejudiced, plaintiffs were ready with their experts, and had a good record of complying with discovery in this case. Because the ruling prohibiting expert testimony caused the eventual dismissal of this case, we reverse the dismissal. We remand to the district court for an order reinstating the case and for further proceedings.

Id. at 505-506. (emphasis added). The court also took note of plaintiff's quick follow-up to cure the defendant's objections regarding their expert designation. *Id*

From *Hantsbarger* developed three factors that are now considered by Iowa's courts, in addition to the general good cause definition expounded by the *Donovan* court, in assessing whether good cause exists justifying an *Iowa Code* §668.11 deadline extension. Those factors are:

(1) the seriousness of the deviation;

(2) the prejudice to the opposing party; and

(3) opposing counsel's actions or lack thereof.

Kirlins have demonstrated good cause exists for extension of the deadline due to there being no active case in which Plaintiffs could have complied with section 668.11 on March 21, 2023. This was a circumstance ***not*** created by Kirlins. After remand, it was reasonable to assume *Iowa code* §668.11 no longer applied, the Court refused to entertain a new TSDP, it was reasonable for Plaintiffs to rely upon the TSDP deadlines; especially when all Defendants, stayed silent as to their position that Kirlins' deadline had already expired before the court was able to hold a TSC.

Kirlins have vigorously and diligently prosecuted this case and have indicated their ongoing intent to do so, including filing all Certificates of Merit <30 days after filing the Petition; updating initial disclosures shortly after remand, responding early

to all discovery requests, requesting deposition dates of the defendants, supplying dates the Kirlins could be deposed, and disclosing and certifying their experts prior to the August 21, 2023, deadline.

Counsel can generate good cause through their conduct such as by sitting idly in silence while a material deadline passes. *Hantsbarger v.Coffin*, 501 N.W.2d 501 (Iowa 1993). By contrast, courts are more likely to find a violation is serious when the complaining party expressly raised the issue and still no expert was designated. *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa 1998) (noting that defense counsel had "specifically inquired whether Hill intended to call an expert witness at trial" and that Hill still did not designate an expert). Just like the poorly behaved Defendants in *Hansberger,* all these Defendants, silently waited after remand for another 132 days, before acting**.** Discovery continued during that time, disclosures were made, interrogatories were exchanged, and depositions dates were floated.

Kirlins were completely blindsided when Defendants filed motions for summary judgment. The April 4, 2023, trial scheduling conference with the Court was 45 days after remand by the Supreme Court. It was also after March 21, 2023, the date Defendants now allege is the only surviving deadline. Neither attorney for Defendants, raised this issue at the trial scheduling conference. Defendants' attorneys never called, emailed, responded to emails or otherwise addressed deadlines. Surprised by the timing of the potentially dispositive motion, on August

8, 2023, Kirlins filed their expert designation and disclosures including all reports, naming all 3 experts. (D0027) (Kirlins' Expert Designation).

The Iowa Supreme Court held in *Hansberger v. Coffin*, 501 N.W. 2d 501, at 505, that the trial court had abused its discretion in failing to find good cause for extending the §668.11 deadline because the defendant could not show any prejudice and because defense counsel "*silently waited for the time period to pass and then used plaintiff's deficient designation to seek a prohibition of plaintiffs' experts and a dismissal of their claims*" The Court also noted in *Donovan*, defense counsel wrote letters and sought to cajole plaintiffs' counsel into compliance. Here, all Defendants, silently waited for the deadline to pass, including an additional 132 days to make the deviation serious, then sought a complete prohibition of Kirlins experts and a summary dismissal of their claims based on deadlines conceived, only in their collective imaginations**.**

While Plaintiffs do not suggest that opposing counsel must act as his or her "brother's keeper," it is appropriate to consider defendants' counsel's actions, or lack thereof, in determining good cause for granting plaintiffs' request for relief…. *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505-06 (Iowa 1993). Furthermore, the public policy reasons underlying *Iowa Code* §668.11 support extending Plaintiffs' expert designation deadline and accepting Plaintiffs' expert certifications and reports per the deadline of rule1.500(2).

> The policy purpose of Iowa Code section 668.11 has been expressed by Iowa Courts stating that "[Iowa Code section 668.11] is designed to require plaintiffs to have their proof prepared at an early stage in the litigation". See *Nedved*, 585 N.W.2d at 240 (emphasis added). Iowa Courts "cannot ignore the legislature's intent to provide professionals relief from nuisance suits and to avoid the costs of extended litigation in frivolous cases." See *Hantsbarger*, 501 N.W.2d at 504–05.

Defendants cannot identify any legitimate prejudice to the case that would result from Plaintiffs' designation being received consistent with the designation under rule 1.500. Plaintiff's served certificates of merit in this case more than three (3) months before Defendants even answered the claim. Plaintiffs have been ready and willing to prosecute this case with experts and their proof was being timely provided at an early stage in this litigation. Defendants did nothing and refused to respond to emails regarding a new TSDP. Defendants have not scheduled a single deposition. From the preparatory actions of the Defendants in this case, it was at an early stage in litigation. I note for this Court, neither Defendant alleges Kirlins' case is frivolous.

These Defendants do not assert prejudice in their two separately filed motions for summary judgment. It is not until deep into a memorandum of authorities filed by Defendant Monaster that prejudice is first discussed. *See D0120 page 9, ¶3*. Defendant Monaster first pleads, prejudice is presumed; then pleads impossible trial schedule, "*Defendants would have ninety days under 668.11 to designate and*

disclose their expert witnesses. Plaintiffs' experts would need to be deposed after Defendants had been informed by their own experts of their opinions. There is a substantial chance that this would conflict with the Parties motion deadlines and discovery deadlines, if not the trial date itself." They did not claim the trial needs to be continued because of the delay, trial was still 7 months away. The *only* thing they can claim is that all parties designated later, a common occurrence in late designation cases. This harm, while theoretically real, is *de minimus* when compared to the alternate harm on Kirlins' side of the scales of justice: complete deprivation of trial. In balance, the district court's decision surrendered to the worst harms by dismissing Kirlins' case.

Defendant Monaster erroneously implies he is entitled to some sequence of discovery of his own creation, or he is prejudiced more than Kirlins or the other defendants. This is not prejudice.

This case has been pending since April 2021. The trial was still more than 7 months away at the time Kirlins disclosed their experts. These defendants have certainly had their experts ready, retained and reviewing the medical records since the first Kirlin case was filed in 2020. Defendants have known since before they filed their answer and only one month after the filing of this action, Kirlins have experts to present the liability issues in this case, as certified in Kirlins' certificates of merit filed May 13, 2021.

Notably, in case where his own expert designations were arguably late, counsel for Defendant Monaster, Rick Harris, filed an interlocutory appeal April 27, 2023, in CASE NO. LACL148007, *The Estate of Jeffrey David Brown, et al. v Catholic Health Initiatives- Iowa Corp*., et al. at Page 23, asserting,

> "plaintiff has suffered minimal prejudice to his case. Defendants designated their retained experts five [5] months ahead of the trial date. On top of their designations, defendants later provided several expert reports well ahead of their disclosure deadline under the TSDP to mitigate any prejudice".

Attorney Harris cannot now claim more than 7 months is prejudicial to him, when 5 months was not prejudicial to the Brown plaintiffs.

If an abuse of discretion is found, the district court's ruling will still be affirmed unless "prejudice is shown." *State v. Tipton*, 897 N.W.2d 653, 690 (Iowa 2017). In addition, the court may ***only impose default or dismissal as a sanction*** where it is shown that the discovery violation was the result of ***willfulness, fault, or bad faith***. *In re Marriage of Williams*, 595 N.W.2d 126,139 (Iowa 1999) (affirming default judgment against crack-addicted husband who failed to comply with discovery at all). This is because the law prefers a trial on the merits over one dismissed on technicalities. *Williams*, 595 N.W.2d at 129 (stating, "Because the sanctions of dismissal and default judgment preclude a trial on the merits, the range of the trial court's discretion to impose such sanctions is narrow.")

Reviewing for an abuse of discretion is fundamentally distinct from a de novo

review. In a "close case" especially, the standard matters greatly. *Preferred Marketing Associates Co. v. Hawkeye Nat. Life Ins. Co*., 452 N.W.2d 389, 393 (Iowa 1990) (finding the expert exclusion ruling to be a "close case"). For example, in the case of *Preferred Marketing Associates Co. v. Hawkeye Nat. Life Ins. Co*., 452 N.W.2d 389 (Iowa 1990), Preferred Marketing Associates identified a new damages expert a week before their continued trial date which was more than two years after they filed their original petition. *Preferred Marketing Associates Co.,* 452 N.W.2d at 392. To make matters worse, in their answers to interrogatories, Preferred Marketing had identified that they would be calling no expert at all. *Id*. at 393. And, their late designation was more than seven months' late. *Id.* Yet, the district court allowed the new damages expert to testify anyway, and the Iowa Supreme Court affirmed under the abuse of discretion standard.

According to the Supreme Court, Hawkeye's complaints about the late, new, and surprise expert being unfair had "some force", and "[w]ere we deciding the matter in the first instance we might well exclude expert testimony thrust on the Defendant at so late a date." *Preferred Marketing Associates, Co*., 452 N.W.2d at 393. However, since the standard of review was abuse of discretion, and the district court afforded Hawkeye some time to talk to the new expert before trial, the Supreme Court held that the "district court could reasonably believe that its orders would rectify any imbalance caused by PMA's tactics." *Id*. at 393. Since the district court's

ruling was not “clearly” untenable, it was affirmed.

Judicial discretion dictates just cause exists, not of Kirlins own making. The district court's discretion is broad to craft remedies other than dismissal and will not be disturbed if reasonable under the circumstances. District courts have inherent power to maintain and regulate cases proceeding to final disposition. *Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010). The district court was well within its broad discretion to not exclude Kirlins’ experts. The district court could have chosen from many remedies. It could have continued discovery dates, it could have continued the trial date, or it could have made other accommodations for defense counsel, such as by allowing Defendants to have a late designation, or some other time to prepare, like in the *Hawkeye* case.

However, the trial court erroneously in this case, did not consider other sanctions. The rule says “may”, not “shall”, and trial was still 7 months away. The harm which is the object of the statute: not making doctors waste time defending frivolous cases, did not exist in this case, and at least one expert who designated was not a surprise, as Smith was also the Certificate of Merit affiant to the violation of the standard of care to all Defendants. (D0017, D0018, D0019 Certificate of Merit).

Rather, the district court’s discretion reasonably could have ensured a fair process for both parties considering trial being scheduled still over 7 months away. If one weekend was enough time for defendants to figure out their strategy in dealing

with *Preferred Marketing's* new expert in *Hawkeye*, then the more-than-7 months remaining before trial in this case is enough time for Defendants to manage the Kirlin's expert disclosures.

According to this Court's reasoning, Plaintiffs should have designated experts March 21, 2023, and Defendants would still have their full ninety (90) days to counter designate, or June 19, 2023. Under this reasoning, Kirlins would have been forced to 1) secure, pay and prepare expensive expert reports while their case was summarily dismissed; or 2) been limited in their time to consult and prepare with exert witnesses, (29 days to be exact) after remand; and 3) be the only party that was prejudiced, as Defendant still get 90 days after Kirlins designate. The case was judicially dismissed; counsel for Kirlins cannot spend $50,000 on expert opinions, *in case* they win a remand.

This Court's holding is a case of first impression and a dangerous precedent. Under this theory, inequities will always occur and ***only*** one party will be prejudiced every time. Kirlins urge this Court to consider scenarios beyond the 29 days remaining on Kirlins §668.11 deadline. Suppose the case had been dismissed with just 10 days remaining on the §668.11 deadline, or just 5 days remaining on the §668.11 deadline. Defendants could equally be prejudiced, if a trial court's summary dismissal issued *after* a plaintiff designates, but before defendant's 90-day period to designate expired. It could be a defendant that has only 29, or 10 or 5 days to

designate next time. Is this the intended result by the legislature? Or is this why the legislature left an alternate rule in place in Iowa Rule of Civil Procedure 1.500(2).

The trial Court's November 17, 2023, order granting summary judgment engages in an analysis regarding reversal of a judgment or decree. (D 0140 Order on Motion for Summary Judgment, Page 5). The Court's analysis is elementary. "The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered, except as restricted by the opinion of the appellate court." *Phoenix Fin. Corp. v. Bridge Co*., 237 Iowa 165, 172 (Iowa 1946). The Court states, "applying this principle, when the Iowa Supreme Court reversed this Court and remanded the case, the parties were placed back into the same position they were in before the dismissal, including being subject to applicable deadlines." (D 0140 Order on Motion for Summary Judgment, Page 5-6).

The Court appears to take a literal definition when applying this principle, but only as to one deadline. At remand, there were no applicable deadlines, they all expired. Did the Court mean to say, the literal interpretation means the trial date also passed so we do not get a new trial date? Of course that is not the intention of the Iowa Supreme Court. The Supreme Court did not intend remand for further proceedings to mean – unless they all expired while the appeal was pending.

Judge Hooper fails to articulate why the only date that survives is 668.11. The

Court recognized the need for a new trial date. Judge Hooper clearly understood that the Supreme Court's order does not intend proceedings can only literally pick up where they left off; it is a procedural impossibility.

In the case at issue, the district court's ruling should be overturned under an abuse of discretion standard of review because it is not supported by substantial evidence, and it is clearly untenable under the *Hawkeye* test. Defendants were not prejudiced, Kirlins were ready with their experts, and had a good record of complying with discovery in this case. Because the ruling prohibiting expert testimony caused the ensuing dismissal of this case, the order should be reversed.

CONCLUSION

This medical malpractice action was arguably subject to the mandate of *Iowa Code* §668.11, until such time as the court 's judicial error in dismissing the action terminated the case and all deadlines. A result that permanently prevented compliance with *Iowa Code* §668.11. Kirlins fully complied with their obligation to designate and make disclosures pursuant to Iowa R. Civ. P. 1.500(2) the only new deadlines triggered by the entry of a new Trial Date. Should this Court determine the trial court had authority to posthumously continue a §668.11 deadline beyond dismissal, then good cause exists to extend the §668.11 deadline to August 21, 2023. The *Hantsbarger* factors all

weighed heavily in favor of the court exercising judicial discretion and finding good cause existed for any alleged delay.

The law favors trial on the merits, not dismissal by surprise or mistake.

There was good cause to permit the late designation of Kirlins experts because the Court's now post haste created deadline was passed before the court ever set the new trial date or held the first status conference; the Court's anticipated course of action to the procedural posture of these proceedings could not have been known. Defendant Jones and Clinic continued to engage in discovery. Defendant Monaster did not participate in discovery. Under *Nedved v. Welch, 585 N.W.2d 238, 240 (Iowa 1998),* those circumstances amount to "good cause" for delayed designation.

There were many remedies shy of exclusion of the Kirlin experts available. The sanction of exclusion should be limited to rare circumstances only. If it was not abuse of discretion for the *Hawkeye* court to permit a new expert a week before trial in a two-year old case, then it would not have been an abuse of discretion for the district court here to allow Kirlins experts.

Notably, all parties had ***fully disclosed and designated*** all experts by the time of the court's November 17, 2023, order dismissing the case; all parties were prepared to proceed to trial on the merits 4 months later. The Court had the discretion to allow this case to proceed on the merits.

Had Defense counsel spoken up at the scheduling conference, the entire past year could have been spent on depositions and trial preparations rather than a premature summary judgment motion and a costly, time-consuming second appeal.

There is no case cited by either Defendant, or the Court that specifically addresses the issue of a section 668.11 deadline resuming *after* a case was summarily dismissed; then revived at remand. Most medical negligence cases are dismissed before the 668.11 deadlines or because of 668.11 deadlines. This is a new set of facts, i.e. remand after the 668.11 deadline ran on appeal. In view of the wide discretion of the trial Court, the excessive prejudicial affect to Kirlins and all future parties with this Court's precedent, the balance of equities and broad discretion of the Court allowed the Court to find the §668.11 deadline lapsed while the case was on appeal. The Court's revival of only one deadline post remand, prejudicing only one party, is abuse of discretion.

When a case is remanded without specific directions, the trial court should exercise its broad discretionary powers to review the procedural posture of the case and devise trial schedule deadlines to affect ***fair, nonprejudicial further proceedings***. The Court had full discretion to fashion a remedy that mitigates prejudice to either party

When an appeal challenges a judge's discretionary decision, the reviewing court looks not to whether it would have ruled differently, but rather focuses on whether the trial judge abused his discretion in deciding as he did. Abuse of discretion is defined as -an erroneous conclusion and judgment, one clearly against logic *and effect* of facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.

For the foregoing reasons, Kirlins requests this court reverse the district Court's dismissal and remand the matter for trial on the merits.

NOTICE AND REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument as the issues presented, though implicating well settled areas of law, involve unique facts and circumstances that would benefit from the question/answer dialogue associated with oral arguments.

/s/Kelly N Wyman
607 S. Main Street
Council Bluffs, Iowa 51503
712-890-0015 Telephone
712-890-0020 Facsimile
kelly@kellywymanlaw.com

Dean T. Jennings
Jennings Law Firm
523 6th Avenue
Council Bluffs IA 51503
712-256-1400 Telephone
712-890-0019 Facsimile
Dean@deanjenningslaw.com
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

X this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

2. This brief complies with the length limitations of Iowa R. App. P. 6.903(1)(i)(1) or (2) because:

X this brief contains 7293 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2)

/s/*Kelly N. Wyman* 06/10/24

607 S. Main Street
COUNCIL BLUFFS, IA 51503
TELEPHONE: 712-890-0015
FACSIMILE: 712-890-0020
ATTORNEY FOR
APPELLANT