IN THE SUPREME COURT OF IOWA

No. 23-0509

DOUGLAS B. WILSON and JANE WILSON,
Plaintiffs-Appellees,

vs.

SHENANDOAH MEDICAL CENTER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR PAGE COUNTY LACV105820
THE HONORABLE MARGARET REYES

Defendant-Appellant's Brief

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Cases

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Routing Statement

This case involves application of existing legal principles and normally would be appropriate for transfer to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a). However the issue on appeal—the good cause standard to allow testimony from an expert who was not timely disclosed—warrants clarification by the Supreme Court. The Court granted interlocutory review of the district court's refusal to bar an untimely expert.

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. The district court in this case found good cause based only on these factors. The district court's approach to "good cause" cannot be squared with a growing trend in unpublished decisions in the Court of Appeals. *See, e.g.*, *Reyes v. Smith*, No. 21-0303, 2022 Iowa App. Lexis 431 (Iowa Ct. App. 2022); *Stanton v. Knoxville Cmty. Hosp. Inc.*, No. 19-1277, 2020 WL 4498884 (Iowa Ct. App. 2020); *Tamayo v. Debrah*, No. 17-0971, 2018 WL 4922993 (Iowa Ct. App. 2018).

This case should be retained to provide clarification of the good cause standard to allow late experts to testify. In particular, clarity is needed on what constitutes prejudice and the obligations of the opposing counsel (if

any). *See* Iowa R. App. P. 6.1101(2)(f) (cases ordinarily retained include those involving changing legal principles).

Introduction

There is a statutory deadline for expert designations in professional negligence cases—Iowa Code section 668.11. If a party fails to timely designate, the expert is prohibited from testifying with one exception—if good cause is shown to excuse lack of compliance. As to an expert's opinions, Iowa Rules of Civil Procedure 1.500(2) and 1.517(3)(a) require timely production or the opinions are excluded at trial unless the failure to produce was substantially justified or harmless.

Here, there is no dispute that Plaintiffs missed their expert deadline and failed to timely produce their expert's opinions. The deviation from the deadline was serious.

Plaintiffs have never offered any explanation for the failure. Instead, Plaintiffs blamed Defendant Shenandoah Medical Center (the "Hospital") for their failure to timely disclose, arguing defense counsel failed to remind Plaintiffs of their deadline and misled Plaintiffs by continuing to work on the case in spite of Plaintiffs' missed deadline.[1] This purported "good cause"

[1] *See* App. 48-52 (Plaintiffs' December 13, 2022 filings in resistance to the Hospital's motion for summary judgment, including Brief (D0031 at 6-10); Statement of Undisputed Facts (D0030 ¶6); and Affidavit (D0032 ¶4).

was largely adopted by the district court. Plaintiffs also argued there was no prejudice given trial was not scheduled until July 2024. This "good cause" was also adopted by the district court, which attributed the "delayed" trial date to defense counsel notwithstanding the Hospital had previously established good cause for a trial date that exceeded the default trial scheduling time standards.

The legislature would not have enacted Iowa Code section 668.11 if it did not intend for it to be applied. The ruling in this case undermines the statute and turns the tables to punish a defendant for not reminding the plaintiff of its statutory deadlines, for continuing to work on the case, and for previously raising calendar conflicts. The ruling is inconsistent with a number of Iowa appellate cases on what establishes good cause to permit a party to call an untimely disclosed expert to testify.

Defendants rely on expert deadlines—and the statute and rules are intended to provide real procedural defenses when a plaintiff fails to comply. But rulings such as the one in this case severely limit—if not eliminate—the defenses created by the Iowa legislature and the rules of civil procedure.

The Hospital respectfully requests that the Court reverse the district court's March 5, 2023 ruling which held Plaintiffs were not barred from calling their late expert to testify.

Statement of the Case

Nature of the case and relevant proceedings.

This is a medical malpractice case. *See* D0001, Petition at ¶1 (12/27/21) ("This is a civil action for professional malpractice . . ."). Plaintiffs claim the Hospital provided negligent post-operative nursing care following Plaintiff Douglas Wilson's hip replacement and, as a result, he fell and was injured. *Id.* at 2-3, ¶¶4-12.

In a March 5, 2023, ruling, the district court held that Plaintiffs were not barred by Iowa Code section 668.11 and Iowa Rules of Civil Procedure from introducing expert testimony even though Plaintiffs missed their expert disclosure deadlines and offered no reason for their untimely disclosures. *See* App. 60 (D0036, Ruling at 7).

The Hospital sought permission to appeal the interlocutory ruling. App. 62 (Application, 3/28/23). The Application was granted. App. 63 (D0037, Order, 6/9/23).

Summary of the procedural facts.

Plaintiffs filed suit on December 27, 2021. D0001. On February 1, 2022, Plaintiffs timely filed a certificate of merit pursuant to Iowa Code section 147.140, identifying nursing expert Jenny Beerman. D0010. Later that month, counsel discussed the expert designation deadlines to include in the Trial Scheduling and Discovery Plan. App. 12-13 (Attachment to D0026,

Defendant's MSJ Stmt of Facts Exh. C ("Hospital SJ Exh.") at 2-3, 11/30/22). Plaintiffs' counsel proposed: "I propose a September 1st deadline for Plaintiffs' experts and December 1st for Defendant experts." App. 13 (*Id.* at 3). Defense counsel agreed and a revised draft of the Discovery Plan incorporating these deadlines was approved by Plaintiffs' counsel. App. 11-12 (*Id*. at 1-2). The Discovery Plan was filed on March 1, 2022. App. 15-20 (Attachment to D0026, Hospital SJ Exh. D); *see also* D0012 (Plan).

Thus, the expert disclosure deadlines were:

- Plaintiffs: September 1, 2022;
- Defendant: December 1, 2022.

App. 17 (Attachment to D0026, Hospital SJ Exh. D ¶8 (A)). The parties also agreed that expert reports would be provided at the same time. *Id*. ¶ 8 (B) (referencing Iowa Rule of Civil Procedure 1.500(2)(b) disclosures).

The Hospital filed a motion pursuant to Iowa Rule 23.2(2) for a trial date beyond the default trial scheduling time standards. D0013, Motion (3/8/22). Plaintiffs resisted the motion but "agree[d] that this is a medical malpractice case involving expert disclosures." D0015, Resistance at ¶4 (3/11/22). The district court granted the Hospital's motion, finding good cause for trial to be scheduled on July 23, 2024. D0018, Order (3/28/22).

This trial date was well within the extended standards for trial under Rule 23.2(2).[2]

On June 13, 2022, Plaintiffs provided answers to the Hospital's interrogatories, including one regarding expert witnesses. Plaintiffs incorporated the language of their Certificate of Merit by Jenny Beerman. App. 23-24 (Attachment to D0026, Hospital SJ Exh. E at 3-4). But Plaintiffs failed to disclose experts or opinions on their September 1st deadline.

The Hospital timely disclosed its experts with their opinions on November 30, 2022. App. 27-37 (Attachments to D0026, Hospital SJ Exh. F-G). The Hospital also filed a motion for summary judgment given Plaintiffs' failure to disclose. App. 5-7 (D0024, MSJ, 11/30/22). The Hospital argued Plaintiffs were barred from presenting expert testimony by section 668.11 (requiring timely disclosure of expert) and rules 1.500(2) and 1.517(3)(a) (requiring timely disclosure of expert's opinions). D0025, MSJ Brief at 6-8 (11/30/22). The Hospital further argued Plaintiffs could not prove their prima facie case without an expert. *Id.* at 9-14.

[2] The general rule for a complex civil case is for trial to be set within 24 months of filing—or December 27, 2023 in this case. *See* Iowa Rule 23.2(1)(e). However, under Rule 23.2(2)(e), upon a showing of good cause (as established here), a complex civil case may be set for 36 months of filing—or December 27, 2024 in this case.

After the Hospital filed its dispositive motion, Plaintiffs designated Nurse Beerman on December 2, 2022—three months late. D0027, Designation (12/2/22). Plaintiffs did not produce Nurse Beerman's report on December 2, 2022. Her opinions were not disclosed until December 29, 2022—approximately four months late. *See* App. 50 (D0031, MSJ Resistance Brief at 8, indicating report would be served); D0034, Notice of Service discovery response (12/29/22).

As the district court stated: "It is undisputed that [Plaintiffs] made their expert disclosures outside of the deadline established in the trial scheduling order." App. 59 (D0036 Ruling at 6, 3/5/23). In the summary judgment proceedings, Plaintiffs conceded their expert disclosure was untimely and offered no explanation. App. 47-52 (D0031, MSJ Resistance Brief at 5-10, 12/13/22). Instead, Plaintiffs argued they didn't need an expert, there was no prejudice to the Hospital, and defense counsel bore responsibility for the situation. App. 43-52 (brief at 1-9).

The district court denied the Hospital's motion. The district court characterized the case as a "medical malpractice action" but declined to rule on whether Plaintiffs needed expert testimony to prove their claim. App. 54, 56, 59 (D0036, Ruling at 1, 3, 6). Instead, it ruled that Plaintiffs had established good cause to allow their expert to testify. App. 58-59.

In determining that Plaintiffs established good cause, the district court analyzed the issue as to three factors applied by Iowa courts: "(1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant's counsel's actions." App. 57-58. The district court agreed the deviation was serious. App. 58 (citing prior Iowa cases that a three month delay is a serious deviation). The court's ruling was based only upon a finding of no prejudice or harm and defense actions. App. 58-59.

The court found a lack of prejudice since trial was scheduled for July 2024. *Id.* Even on this factor, the district court placed responsibility on the defense. In finding no prejudice, the court emphasized that it was the Hospital that requested the trial date of 2 ½ years from filing. App. 58. As to other defense actions, the court recited that the Hospital "acquiesced" in Plaintiffs' failure to timely disclose because defense counsel worked on scheduling depositions both before and after Plaintiffs' deadline; the Hospital counsel's unavailability resulted in scheduling delays; and the Hospital "continued working on the case even without the Wilson's expert designation." *Id.*

As to Plaintiffs' failure to timely provide their expert's opinion pursuant to Rule 1.500(2), the district court similarly found the failure

"harmless," again noting that it was the Hospital which requested a delayed trial date and had busy schedules. App. 59.

Summary of the Argument

The district court excused an unexplained but serious deviation in Plaintiffs' expert disclosures and placed the responsibility for the untimeliness entirely on the defense. The court faulted the defense counsel for having busy calendars and, ironically, for continuing to work on the case even though it was Plaintiffs who missed their deadline. Under the district court's ruling, the penalty for having any scheduling conflict in a case or continuing to work on a case is the party can no longer expect the opposing side to be held to deadlines. Under Plaintiffs' position, defense counsel is obligated to remind a plaintiff of deadlines or warn a plaintiff of pending dispositive motions so plaintiff can cure the problem. The Hospital respectfully submits this is not what the legislature intended in Iowa Code section 668.11 and the rules of civil procedure should not be rendered meaningless.

Argument

I. The district court's ruling deprived the Hospital of the protections of Iowa Code section 668.11 and Rules 1.500(2) and 1.517(3)(a).

A. Standard of review.

A review of the district court's interpretation of statutory provisions is for errors at law. *Den Hartog v. City of Waterloo*, 926 N.W.2d 764, 769 (Iowa 2019). The interpretation of rules of civil procedure is also reviewed for correction of errors at law. *See Jack v. P & A Farms, Ltd.*, 822 N.W.2d 511, 515 (Iowa 2012) ("we review the interpretation of our rules of civil procedure for correction of errors at law").

While the abuse of discretion standard applies to the good cause analysis under Iowa Code section 668.11, *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989), "[w]hen a discretionary decision by a trial court involves an erroneous interpretation of law, our review is for legal error" *Whitley v. C.R. Pharmacy Serv.*, 816 N.W.2d 378, 389 n.6 (Iowa 2012).

B. Error preservation.

The Hospital preserved error by raising the issue with the district court. *See* App. 5-7 (D0024, Motion, 11/30/22); App. 54-61 (D0036, Ruling, 3/5/23).

C. The applicable law.

In a medical malpractice case, Iowa law requires a party to timely designate expert witnesses and produce their opinions. *See* Iowa Code § 668.11 (2022); Iowa R. Civ. Proc. 1.500(2); *McGrew v. Otoadese*, 969 N.W.2d 311, 314 (Iowa 2022) (addressing expert pretrial disclosure

requirements—Iowa Code section 668.11 and Iowa Rule of Civil Procedure 1.500(2)).

"Iowa Code section 668.11 governs the disclosure of expert witnesses in liability cases involving licensed professionals." *McGrew*, 969 N.W.2d at 319 (internal quotations omitted). The statute provides:

> 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).

The statute mandates "early identification of experts by a plaintiff in a medical malpractice case." *Donovan*, 445 N.W.2d at 765. Section 668.11 was intended to "provid[e] certainty about the identity of experts." *Nedved v.*

Welch, 585 N.W.2d 238, 240 (Iowa 1998). It also ensures expert testimony is "prepared at an early stage in the litigation in order that the professional does not have to spend time, effort and expense in defending a frivolous action." *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993).

Iowa Rule of Civil Procedure 1.500(2)(b) requires a retained expert to provide a signed report that contains the following:

> (1) A complete statement of all opinions the witness will express and the basis and reason for them.
> (2) The facts or data considered by the witness in forming the opinions.
> (3) Any exhibits that will be used to summarize or support the opinions.
> (4) The witness's qualifications, including a list of all publications authored in the previous ten years.
> (5) A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
> (6) A statement of the compensation to be paid for the study and testimony in the case.

The timing of the Rule 1.500(2)(b) disclosure was agreed-to in this case as September 1, 2022. App. 17 (Attachment to D0026, Hospital SJ Exh. D ¶8(B)); *see also* D0012, Plan at 3 (3/1/22).

As to the failure to comply with Rule 1.500, one looks to Rule 1.517:

> If a party fails to provide information or identify a witness as required by rule 1.500, 1.503 (4), or 1.508 (3), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. . . .

Iowa R. Civ. P. 1.517(3)(a).

The district court appeared to agree that Plaintiffs' compliance with Iowa Code section 147.140, requiring a certificate of merit from an expert, did not constitute substantial compliance with other expert disclosure requirements. App. 57 (D0036, Ruling at 4). This was correct. *See* Iowa Code § 147.140(3) ("The parties shall comply with the requirements of section 668.11 and all other applicable law governing certification and disclosure of expert witnesses."); *McHugh v. Smith*, 966 N.W.2d 285, 288 (Iowa Ct. App. 2021) ("Nor does section 147.140 supplant the requirements of Iowa Code section 668.11"); *Reyes v. Smith*, No. 21-0303, 2022 Iowa App. Lexis 431 *4-5 (Iowa Ct. App. 2022) (holding plaintiff "did not substantially comply with section 668.11 simply by filing their certificate of merit").

Here, Plaintiffs have not disputed that they failed to timely designate experts and timely produce opinions. The only issue as to section 668.11 is if Plaintiffs established good cause to allow their untimely expert to testify. The analysis as to rules 1.500(2)(b) and 1.517(3)(a) is whether Plaintiffs' failure was substantially justified or harmless.

D. There was no showing of good cause or substantial justification.

"Good cause under 668.11 must be more than an excuse, a plea, or justification for the resulting effect." *Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991). In defining good cause, Iowa law relies upon the definition used in determining whether to set aside a default judgment. *Nedved*, 585 N.W.2d at 240. Good cause 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. (emphasis removed; quoting *Donovan*, 445 N.W.2d at 766); *Reyes*, No. 21-0303, 2022 Iowa App. Lexis 431 **5, 8 (citing same, finding plaintiff "has shown little more than want of ordinary care or attention in missing the expert-designation deadline"); *Tamayo v. Debrah*, No. 17-0971, 2018 WL 4922993 *2 (Iowa Ct. App. 2018) (affirming that good cause was lacking when plaintiff's counsel conceded the expert deadline "'slipped through the cracks'" as this was "nothing more than an excuse, plea, or apology").

Plaintiffs are silent as to *any* reason for not timely designating experts. This is sufficient to reverse the district court. *See Stanton v. Knoxville Cmty. Hosp. Inc.*, No. 19-1277, 2020 WL 4498884 **4 (Iowa Ct. App. 2020)

(reversing, on interlocutory review, a denial of a summary judgment motion when plaintiff failed to timely designate experts under section 668.11, emphasizing that plaintiff "has not shown a valid reason for his failure to timely designate his expert"). In *Stanton*, the court relied upon the fact the expert deadline was clear and plaintiff's "counsel was actually aware" of it—"He agreed to it." *Id.* While the plaintiff offered an explanation for the failure to designate, the Court of Appeals found it was not a valid reason to satisfy the good cause showing. *Id.* Here, like *Stanton*, the expert deadline was clear, actually known by Plaintiffs, and was agreed-to by Plaintiffs. But, unlike *Stanton*¸ Plaintiffs offer no reason or explanation at all for the failure to timely designate. If there was a failure to establish good cause in *Stanton*, there was a failure here as well.

Plaintiffs had "the burden to show good cause exists." *Reyes,* No. 21-0303, 2022 Iowa App. Lexis 431 *7 (citing *Nedved)*. Yet Plaintiffs in this case did not even attempt to explain the lack of compliance. There was no confusion or misunderstanding about the deadline or that experts were expected in this case.

As to Plaintiffs' failure to disclose opinions under Rule 1.500(2)(b), Plaintiffs similarly have offered nothing to support that the failure was

substantially justified to avoid the penalty of exclusion under Rule 1.517(3)(a).

Plaintiffs' failure to provide any reason at all for their untimely designation and disclosure was enough to bar their expert.

E. Other factors do not support good cause.

Iowa courts have also considered three factors in the good cause analysis: "(1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant's counsel's actions." *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998) (citing *Hantsbarger*).

These factors are all that the district court considered. It failed to consider the threshold requirement for some actual showing of good cause or substantial justification as discussed above. As to the three factors, the court's analysis is flawed as to the second and third factors.

1. Plaintiffs' deviation was serious.

Plaintiffs' designation was three months late. This is a serious deviation. The district court appeared to agree. App. 58 (D0036, Ruling at 5, citing "*Nedved v. Welch*, 555 N.W.2d 238, 240 (Iowa 1998) (affirming the rejection of an expert designation filed three months late)").

In addition to *Nedved*, other Iowa cases have found that "several months" or two to four months do not support a good cause finding. *See*

Donovan, 445 N.W.2d at 766 (affirming district court's refusal to extend expert deadline when it was missed by "several months" when extension sought); *Reyes*, No. 21-0303, 2022 Iowa App. Lexis 431 *6 ("a delay of sixty-six days is substantial"); *Stanton*, No. 19-1277, 2020 WL 4498884 *3 (agreeing four months was a serious deviation); *Sadler v. Primus*, No. 18-1198, 2019 WL 4302125 *3 (Iowa Ct. App. 2019) (deviation of four months was "serious" for good cause analysis under section 668.11); *Tamayo*, No. 17-0971, 2018 WL 4922993 *2 (two month delay and "even longer" to provide opinions was significant); *Munoz v. Braland*, No. 09-0011, 2009 WL 3337672 *1 (Iowa Ct. App. 2009) ("We believe the first factor is dispositive. [Plaintiff] did not seek an extension of the expert designation deadline until three months after the deadline expired . . . As the district court stated, '[S]uch deviation from the statutory deadline is serious and precludes the Court from finding good cause.'").

2. There was prejudice to the Hospital and Plaintiffs' failure was not harmless.

The district court erred in summarily concluding that the trial date in 2024 meant there was no prejudice and the untimely disclosure was harmless. App. 58-59 (D0036, Ruling at 5-6).

The Hospital was prejudiced and the delay in disclosure was not harmless.

First, there is a well-founded presumption of negligence when a plaintiff misses their expert deadline. *See Nedved*, 585 N.W.2d at 241 (some prejudice may be presumed when a party fails to timely designate an expert). The Hospital was faced with uncertainty as to Plaintiffs' intent and plans to continue the case with experts. As far as the Hospital knew, Plaintiffs' certificate of merit expert withdrew from participating in the case or was not able or willing to testify. Or, perhaps Plaintiffs had made the strategic and economic decision to proceed without an expert. Both of these situations happen. One of the purposes of section 668.11 is to provide early certainty as to experts. *Id.* at 240; *see also In re Bolger*, No. 22-1201, 2023 Iowa App. LEXIS 881 *14 (Iowa Ct. App. 2023) ("If the expert-disclosure requirements fell away every time a party could infer the likely use of an expert from a party's legal position, the rule would have little applicability in most civil litigation and no real teeth as an enforcement mechanism.")

The certainty as to experts is important. *See Tamayo*, 2018 WL 4922993 *3 ("We conclude the defendants sustained some prejudice by virtue of the delay in gleaning the merits of [the plaintiff's] case."); *Bulmer v. UnityPoint Health*, No. 17-2084, 2019 Iowa App. LEXIS 519 *6 (Iowa Ct. App. 2019) (an open-ended expert deadline "[left] the defendants in a legal limbo"); *Hard Surface Sols., Inc. v. Sherwin-*

Williams Co., 271 F.R.D. 612, 617 (N.D. Ill. 2010) ("Late disclosure is not harmless . . . simply because there is time to reopen or to extend discovery. If that were the determining factor, no court could preclude expert or other testimony that was unseasonably disclosed contrary to the discovery deadline dates set by the Court.").

Second, a defendant is prejudiced when they designate their own experts before the plaintiff. Here, given the deadline for expert *reports* was also missed, the Hospital was required to produce its expert reports without knowing the precise criticisms to which they needed to respond. This is prejudicial. In this circumstance, the defendant loses—and the plaintiff gains—"the strategic advantage of seeing his opponent's expert materials before he had to designate." *Stanton*, 2020 WL 4498884 *3. "That is the opposite of what the parties had agreed to [and] opposite of the legislature's plan as reflected in Section 668.11(1)(b)." *Id; Reyes*, No. 21-0303, 2022 Iowa App. Lexis 431 *6 (late expert deprives defendant "of their strategic advantage under section 668.11 of knowing the plaintiffs' expert evidence before designating their own experts"); *see also In re Bolger*, No. 22-1201, 2023 Iowa App. LEXIS 881 *14 (agreeing party is "hamstrung in his attempt to prepare his own expert" when opposing party fails to timely designate).

As reflected in comments to Federal Rule of Civil Procedure 26(a)(2): "in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. . . . ." Fed. R. Civ. P. 26(a)(2), Notes of Advisory Committee on 1993 amendments; *see also Morales v. Miller*, No. 09–1717, 2011 WL 222527 *6 (Iowa Ct. App. 2011) (noting if plaintiffs were allowed to add a new late expert "there would have been some prejudice—at a minimum, additional work required of defense counsel and defense experts").

Third, the Hospital was prejudiced by expending resources and time to prepare a motion based upon Plaintiffs' missed deadline. The Hospital had every right to file the motion. It was not required to assume Plaintiffs still intended to use an expert or, as explained below, remind Plaintiffs of their deadlines. *See Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998) (holding plaintiff's failure to timely produce an expert report was not harmless because the defendant prepared its motion for summary judgment based on plaintiff's lack of expert support); *Benedict v. Zimmer, Inc.*, 232 F.R.D. 305, 319 (N.D. Iowa 2005) ("Zimmer thus premised its Motion . . . on the Benedicts' failure to disclose. The court finds this reliance clearly prejudiced Zimmer.").

Finally, a showing of overwhelming prejudice is not required to enforce expert deadlines. *See Sadler*, 2019 WL 4302125 *3 ("While we agree that the level of prejudice to the Pathways defendants is not astounding, at the end of the day 'we cannot ignore the legislature's intent to provide professionals relief from nuisance suits to avoid the costs of extended litigation in frivolous cases.'" (quoting *Hantsbarger*); *Morales*, No. 09-1717, 2011 WL 222527 *6 (finding no error in the district court's exclusion of an untimely expert witness disclosure even though "the prejudice from allowing … [the] expert would not have been overwhelming, because the case was not scheduled to be tried until [the following year]").

Even a complete lack of prejudice (not the case here) is not dispositive on the good cause determination. "Lack of prejudice, by itself, does not excuse the [plaintiff's] late designation." *Nedved*, 585 N.W.2d at 241; *see also Reyes*, No. 21-0303, 2022 Iowa App. Lexis 431 *5 (same, citing *Nedved)*.

The district court's finding of no prejudice was based upon the trial date in July 2024—but this finding was inextricably tied to the court's assigning responsibility to the defense. App. 58 (D0036, Ruling at 5, the Hospital "is not prejudiced by [Plaintiffs'] delay because trial is not scheduled to occur until July 2014—a delay requested by [defense]

counsel."). But, as explained above, the district court had previously ruled there was good cause for the delay in the trial date. *See* D0018, Order (3/29/22). That good cause included the consequences of COVID-19 continuances and the resulting impact on court and counsel trial calendars as new cases also continue to be filed and scheduled for trial. D0013, Motion at ¶8 (3/8/22).

The district court's ruling places parties and their chosen counsel in a no-win situation: either raise legitimate scheduling issues to ensure adequate counsel coverage for trials and other proceedings (such as depositions) or remain silent as to scheduling conflicts in order to safeguard the right to object to untimely disclosures. It is unfair to punish a party by excusing its opponent's deadline violations merely because the party's chosen counsel raise scheduling issues in the case. Indeed, while defense counsel had some scheduling conflicts in this case, the Hospital timely and fully disclosed experts on its deadline. It was Plaintiffs, apparently without scheduling conflicts, who missed their deadlines by three and four months.

In addition, relying on a non-imminent trial date for a finding of no prejudice is contrary to an important purpose of section 668.11—to allow early resolution of cases and protect professionals from spending "time, effort and expense" in defense. *Hantsbarger*, 501 N.W.2d at 504. The

668.11 deadline is early in the case and it allows early dispositive motions. In other words, a dispositive motion based on noncompliant expert disclosures under section 668.11 will often be well in advance of trial. It makes no sense to excuse the noncompliant expert designation based on a lack of prejudice since the trial date is far off.

The district court erred in finding no prejudice.

3. The Hospital is not to blame for Plaintiffs' late disclosures.

The overriding basis for the district court's ruling to excuse Plaintiffs' failure to comply with expert requirements was to place responsibility on the defense. The court cited, on one hand, the defense counsels' busy calendars resulting in "delays" and, on the other hand, defense counsel's ongoing work on the case. App. 58 (D0036, Ruling at 5).

As explained above, it is unfair and unsupported by Iowa case law to punish a party because its chosen counsel raised scheduling issues in a case.

As to defense counsel's ongoing work in the case, that too creates a no-win situation for the defense. To punish the Hospital because its counsel continued to work on the case pending the filing of a motion and its ruling sends an unworkable and unsupported message. For example, had Plaintiffs disclosed their expert and her opinion only a few weeks late, the Hospital

may not have filed a motion at all given Iowa case law.[3] The Hospital waited a full three months. When Plaintiffs still failed to disclose, it prepared and filed its motion. But if the Hospital had refused to continue to work on the case or discuss the case with Plaintiffs during that waiting time, it would surely be criticized for that position. And, if the motion was ultimately not filed for some reason, precious preparation time would be lost.

It is unworkable to suggest that a party should unilaterally refuse to continue to work on a case because it envisions a dispositive motion later. And, it is unjust to penalize a party who continues to work on a case notwithstanding the possibility of a dispositive motion by holding that work is an acquiescence or waiver of some kind. Indeed, grounds for a dispositive motion may be identified quite early in a case but the deadline for such a motion is 60 days before trial. Iowa R. Civ. P. 1.981(3).

In the district court, Plaintiffs blamed defense counsel for not reminding Plaintiffs of the expert disclosure requirement. Even assuming opposing counsel has such obligations (which they do not), there was no reason for the defense to do so here. Plaintiffs repeatedly demonstrated they

[3] *See Hill*, 590 N.W.2d at 55 (distinguishing between being a week late and being several months late); *Hantsbarger*, 501 N.W.2d at 505-506 (finding district court should have found good cause in favor of plaintiff when a complete designation "was only delinquent for about one week").

understood the expert issue in this case. They referred to the case as a "professional malpractice" case in the December 27, 2021 petition. D0001. They timely filed an expert certificate of merit on February 1, 2022. D0010. They proposed their own expert deadline during counsel discussions in February 2022. App. 12-13 (Attachment to D0026, Hospital SJ Exh. C at 2-3). They agreed to a Discovery Plan filed March 1, 2022 with expert deadlines. *Id.;* D0012 (Plan). They agreed in a March 11, 2022 pleading that this "is a medical malpractice case involving expert disclosures." D0015, Resistance at ¶4 (3/11/22). They answered discovery about an expert in June, 2022. App. 23-24 (Attachment to D0026, Hospital SJ Exh. E at 3-4).

Moreover there are numerous times during litigation when one party waits for an advantageous time to raise an issue or file a motion. For example, does a defendant have the obligation to inform a plaintiff before the close of evidence that plaintiff failed to introduce certain evidence and the defense will move for directed verdict? Should the court penalize the defendant and deny the motion because the defendant was silent? Does a defendant have the obligation to inform a plaintiff that their expert's opinion fails to support a specific theory and, perhaps, plaintiff should supplement before the defense files a dispositive motion? Should the court deny the

motion because the defendant did not do so? Why is timely designation of experts different?

Part of the alleged acquiescing or misleading conduct by the defense in this case included discussions to schedule depositions even after Plaintiffs' expert deadline of September 1, 2022 had passed. App. 58 (D0036, Ruling at 5). But that could not have contributed to Plaintiffs' failure to comply with the deadline *before* September 1, 2022. It had nothing to do with Plaintiffs' noncompliance. Instead, the defense proceeded with deposition discussions because there was no certainty when the district court would rule. Had the defense taken the position that the case was at a stand-still and refused to discuss scheduling, it would be accused of delaying the case for that reason.

Importantly, the district court's ruling is at odds with a growing number of Court of Appeals cases. In *Reyes v. Smith*, as here, the plaintiff complied with the certificate of merit deadline but missed their expert deadline and the defense then timely designated experts and moved for summary judgment three months later. No. 21-0303, 2022 Iowa App. Lexis 431 *2 (Iowa Ct. App. 2022). The plaintiff complained the defense "remained silent" as plaintiff missed the deadline. *Id.* *5. The Court of Appeals did not disagree but rejected that good cause argument, citing

Hantsbarger as "rejecting a suggestion 'that opposing counsel must act as his or her 'brother's keeper.'" *Id.**6.

Similarly, in *Stanton v. Knoxville Cmty. Hosp. Inc.*, the Court of Appeals strongly disagreed that defense actions supported a good cause finding. No. 19-1277, 2020 WL 4498884 *4 (Iowa Ct. App. 2020). In reversing the district court's finding of good cause and denial of summary judgment, the *Stanton* Court rejected the notion that defendants should not promptly move for summary judgment based upon a plaintiff's failure to timely designate experts. *Id.* **4-6. There was even an email in the record where defense counsel agreed to "wait and 'see'" if plaintiff failed to designate but the *Stanton* Court forcefully rejected that this approach was inappropriate. *Id.* **4 n.3 (defense counsel "had no duty to wait longer or offer additional help to their adversary [and a] contrary view would turn defense counsel into their 'brother's keeper'"—something "expressly rejected" by *Hantsbarger* Court); *Hantsbarger*, 501 N.W.2d at 505 (discussing defense actions but making clear that Court was "not suggest[ing] that opposing counsel must act as his or her 'brother's keeper.'")

And in *Tamayo v. Debrah*, the Court of Appeals similarly rejected the notion the defendant must remind the plaintiff of its deadline. No. 17-0971,

2018 WL 4922993 *3 (finding that inaction by defendants did not favor a finding of good cause, “the defense had no obligation to remind [plaintiff] of the deadline before moving to strike her experts” and the duty to confer to resolve a discovery dispute does not apply).

In sum, the district court’s ruling places a defendant in a no-win situation. To be on solid ground in moving for relief when the plaintiff fails to comply with expert deadlines, a defendant should never raise scheduling conflicts in the case, should remind the plaintiff of expert disclosure obligations, and should unilaterally refuse to continue to work on the case if a plaintiff fails to disclose. This turns the expert disclosure obligation on its head and shifts the burden to the defendant to show it had good cause for its actions or inactions.

Conclusion

For the reasons set forth above, the Hospital requests that the Court reverse the district court’s March 5, 2023 ruling and hold that Plaintiffs are barred from presenting expert testimony at trial.

Oral Argument Statement

This case can be reversed without oral argument. If argument is granted, the Hospital requests to be heard.

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