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 REPLY BRIEF

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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 30th Day of July 2024 by sending the same by United States Mail, First Class postage prepaid to:

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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

ARGUMENT

I. **Legislative Intent**

Argument:

Monaster contends, "the Kirlins cite no legal authority for the proposition that a case being remanded upon appeal automatically vacates prior orders in that case." §668.11 is not applicable by an "order". To be clear, Kirlin's do not argue prior orders were vacated. Kirlins argue the resurrection of the §668.11 deadline upon remand is *always extremely prejudicial* to one party. In this case, the Kirlins were expected to finalize and prepare reports and designations of their experts in 29 days following remand. In the next case, it could be a defendant who is left with just one day to designate and disclose experts.

The plain language of §668.11 intends plaintiffs have 180 days to certify their experts and defendants 90 days in response to certify experts. *See Iowa code §668.11.* In this case on defendants' theory, following remand, Kirlins had just 29 days and the defendants would all get the full 90 days. This timeline will be different in every remanded case, as the alleged time remaining it is dependent on the date of dismissal by the district court.

The purpose of §668.11 is "to require the plaintiff to have his or her proof 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." *Hantsburger v.*

Coffin, 501 N.W. 2d 501, 505 (Iowa 1993). Kirlins filed this petition on April 14, 2021. (D0001) It is defendants that continue to cause time delays and expense of the defendant professionals fighting the trial of this case on the merits with multiple motions to dismiss. Kirlin's certified experts in this case and defendants certified 90 days later, as anticipated by §668.11, and all before the district Court issued a dismissal ruling. (D0122, D0138, D0139, D140). Kirlins' were not lacking diligence with their proof.

"The language 'we remand for further proceedings' in an appellate opinion signals the appellate court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case." 5 Am. Jur. 2d *Appellate Review* § 669 (2024). The district Court has judicial discretion to do what is necessary to proceed with the case to a trial on the merits.

The legislature wrote §668.11 to apply when a there is a case over which it can govern. It starts from a defendants' answer in a new litigation. A summary dismissal by the Court, ends the case and all deadlines are mooted, including the trial date, and all discovery deadlines. §668.11 is a discovery deadline, with legislative intent to provide 180 days to plaintiffs and 90 days in response to defendants to certify experts. The allegation that §668.11 is the only discovery deadline that continues from where it left off is not only highly prejudicial, but also inconsistent

with the plain language of §668.11, i.e. *the plaintiff within one hundred eighty days of the defendant's answer*,.

Upon remand new trial dates must be set when the appeal lasts more than a year; so, does it also follow discovery deadlines that expired shall be reset. A lot can happen in a year, experts die, retire, or their availability changes and they may need to be supplemented or completely recertified. Medical experts have become very expensive in litigation. It is unconscionable and arguably unethical, that a party or their counsel be required to spend significant funds on experts just in case this Court rules in their favor and they get a remand with only days to be ready for discovery date or trial date.

While the legislature is presumed to know the law, they cannot be presumed to anticipate every set of facts applicable to the application of their laws. The legislative intent to prevent frivolous actions is not accomplished by dismissal of a case when the Court's judicial discretion could have cleaned up the judicial error and resulting deadline issues.

II. **Distinguished from *Stanton v Knoxville Community Hospital, Inc.* No 19-1277, 2020 WL 4498884 at 4(Iowa Ct of App. August 5, 2020)**

Argument:

Kirlins' position is distinguished from the Court's opinion in *Stanton v*

Knoxville Community Hospital, Inc. No 19-1277, 2020 WL 4498884 at 4(Iowa Ct of App. August 5, 2020). Kirlins' actively pursued their case, timely served certificates of merit, actively sought expert opinions and did not wait until after the deadline to "seek" experts.

Also, unlike *Stanton*, the Kirlin deadline was not clear. Arguably, the District could have exercised discretion to allow a new TSDP with new specific expert deadlines, as the Kirlin's proposed just 2 days after remand. Instead the District Court waited until the alleged §668.11 deadline passed to advise the parties there would be no new TSDP and the only new date would be a trial date.

Finally, also unlike *Stanton*, defendants in this case *did not* have to designate their experts before plaintiffs, they had their full 90 days following plaintiffs' disclosures.

III. **Jones Claim of Prejudice**

Argument:

Defendant Jones alleges Plaintiffs' "serious deviation" caused great prejudice to Defendants, and that they missed four extra months in which Defendants should have known the identity of Plaintiffs' experts, their qualifications, and their specific opinions. However, Defendant Jones remained silent following remand and proceeded with discovery of the Plaintiffs (D0111), leading Plaintiff's to believe there was no issue, just like in *Wilson v. Shenandoah Med. Ctr.*, No. 23-0509 (Iowa Ct. App. July 24, 2024) the opinion recently issued, the Jones' defendants acquiesced

to the delayed disclosures by engaging in written discovery and scheduling negotiations of Plaintiff's depositions.

Jones argues,

> "defendants are further prejudiced as they are squeezed on the deadlines within which to depose Plaintiffs' experts, and if need be, file timely motions to exclude such experts. Based on the trial date of March 18, 2024, and Plaintiffs finally providing expert disclosures on August 8, 2023, Defendants only had seven months to work with this information, rather than eleven months had Plaintiffs properly complied with Iowa Code §668.11".

The procedural history prior to the initial dismissal and appeal contradicts this claim of "prejudice." Kirlins' filed their petition April 14, 2021 (D0001) and defendants failed to file answers until August 20, 2021 (D0043 and D0044) due to the filing of frivolous motions to dismiss (D0007 and D0014) to again delay the case. Upon filing their answer on August 20, 2021, Plaintiff's expert disclosures would have been February 16, 2022. Defendants agreed to a trial date of July 12, 2022. (D0035). Defendants would have had just 146 days or 4.8 months after Plaintiff's expert certifications were due to work with the information provided in Plaintiff's expert disclosures. A much shorter deadline, created by an agreed trial date and their delays in filing an answer. It seems exaggerated that four months was adequate in the originality of the case, and now seven months is prejudicial. They plead to this Court

they are entitled to 11 months, or they suffer prejudice. Defendants were not prejudiced.

Kirlins' position is that they were prejudiced by the extremely shortened time frame resulting from judicial error resulting in a dismissal, appeal and remand; and then an absence of judicial discretion by the Court to correct the misunderstanding, accident, mistake or excusable neglect suffered by the Kirlins when defendants summarily argued 668.11 survived dismissal of the case and was revived and restarted at remand.

It could not be clearer there was misunderstanding or mistake when the Court held a trial scheduling conference after the alleged passing of §668.11 deadline ran for Kirlins, and no party (or the court) realized Kirlins' deadline, if restarted, had expired. Kirlins understanding was §668.11 terminated with the case over which it governed.

CONCLUSION

The *Hantsbarger* factors all weighed heavily in favor of the court exercising judicial discretion and finding good cause existed for any alleged delay. The district Court had refused Monaster's request for additional time to certify experts and all parties had fully certified experts before the Court's summary dismissal. Harmless delay could have allowed this case to proceeded to trial on the merits.

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

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CERTIFICATE OF COMPLIANCE

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

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