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 Reply Brief

JENNIFER E. RINDEN AT0006606
VINCENT S. GEIS AT0013055
NANCY J. PENNER AT0006146
for
SHUTTLEWORTH & INGERSOLL, PLC
500 U.S. Bank Bldg., P.O. Box 2107
Cedar Rapids, IA 52406
PHONE: (319) 365-9461
FAX: (319) 365-8443
E-MAIL: jer@shuttleworthlaw.com
vsg@shuttleworthlaw.com
njp@shuttleworthlaw.com

Table of Contents

Table of Contents 2
Table of Authorities 5
Statement of Issue 5
Routing statement 7
Clarification of certain matters 7
Argument 10
I. Standard of review. 10
II. Preservation of error. 13
III. The district court should be reversed. 16
A. Plaintiffs failed to comply with two independent expert disclosure requirements: Iowa Code section 668.11 designations and rule 1.500(2) disclosures. 16
B. There is not good cause to allow Plaintiffs' expert to testify under Iowa Code section 668.11. 18
1. The Hospital did not contribute to the delay. 20
2. There was a loss of strategic advantage. 23
3. The Hospital did not "prejudice itself." 25
C. The rule 1.500(2) violation was not justified or harmless. 26
1. The rule 1.500(2) disclosure deadline. 26
2. This appeal does not involve a discovery motion and the Hospital had no obligation to make a "good faith phone call" 27
3. The untimely disclosure was not harmless. 28
4. The district court should be reversed. 28
D. Whether Plaintiffs can proceed without an expert is not before the Court. 29
Conclusion 29
Certificate of Compliance with Type-Volume Limitation, Typeface 32
Certificate of filing and service 33

Table of Authorities

Cases

Bell v. Cmty. Ambulance Serv. Agency,
579 N.W.2d 330 (Iowa 1998)..... 11
Cox v. Jones, 470 N.W.2d 23 (Iowa 1991)..... 18
Den Hartog v. City of Waterloo, 926 N.W.2d 764 (Iowa 2019)..... 10
Donovan v. State, 445 N.W.2d 763 (Iowa 1989) 20
Est. of Fahrmann v. ABCM Corp. ___N.W.2d ___, No. 22-0495,
2023 Iowa Sup. LEXIS 96 (Iowa 2023)..... 24
Hantsbarger v. Coffin, 501 N.W.2d 501 (Iowa 1993)..... 20, 23
Hartford-Carlisle Sav. Bank, 566 N.W.2d at 877 (Iowa 1997) 29
Hill v. McCartney, 590 N.W.2d 52 (Iowa Ct. App. 1998) 19
In re Bolger,
No. 22-1201, 2023 Iowa App. LEXIS 881 (Iowa Ct. App. 2023)..... 23, 26
Jack v. P & A Farms, Ltd.,
822 N.W.2d 511 (Iowa 2012)..... 10
Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009) 27
Kellen v. Pottebaum,
No. 18-1034, 2019 Iowa App. LEXIS 565 (Iowa Ct. App. 2019)..... 15
Laden & Pearson, P.C. v. McFadden,
No. 20-0093, 2021 Iowa App. LEXIS 498 (Iowa Ct. App. 2021)..... 18
McGrew v. Otoadese, 969 N.W.2d 311 (Iowa 2022)..... 16
McHugh v. Smith, 966 N.W.2d 285 (Iowa Ct. App. 2021) 25
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002) 29
Morales v. Miller,
No. 09–1717, 2011 WL 222527 (Iowa Ct. App. 2011) 24
Munoz v. Braland,
No. 09-0011, 2009 WL 3337672 (Iowa Ct. App. 2009)..... 20
Nedved v. Welch, 585 N.W.2d 238 (Iowa 1998)..... 18, 20, 21, 22, 23, 24, 25
Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins. Co.,
452 N.W.2d 389 (Iowa 1990)..... 12, 29
Reyes v. Smith, No. 21-0303,
2022 Iowa App. Lexis 431 (Iowa Ct. App. 2022)..... 18, 20, 23
Stanton v. Knoxville Cmty. Hosp. Inc.,
No. 19-1277, 2020 WL 4498884 (Iowa Ct. App. 2020)..... 8, 19
State v. Liggins, 978 N.W.2d 406 (Iowa 2022) 11

Tamayo v. Debrah, No. 17-0971,
2018 WL 4922993 (Iowa Ct. App. 2018) 15, 18, 20, 24
Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990)..... 8
Whitley v. C.R. Pharmacy Serv.,
816 N.W.2d 378 (Iowa 2012)..... 11

Statutes

Iowa Code Section 147.140(3) 25
Iowa Code Section 668.11 .....8, 11, 12, 13, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30
Iowa Code Section 668.11(1)(a)..... 18
Iowa Code Section 668.11(2) 11, 17

Rules

Federal Rule of Civil Procedure 37(c)(1) 15
Iowa Rule of Appellate Procedure 6.1101(2)(b) 7
Iowa Rule of Appellate Procedure 6.1101(2)(f)..... 7
Iowa Rule of Civil Procedure 1.500 ..... 14, 15
Iowa Rule of Civil Procedure 1.500(1)..... 14
Iowa Rule of Civil Procedure 1.500(2)..... 12
Iowa Rule of Civil Procedure 1.500(2)(a)-(c) 14
Iowa Rule of Civil Procedure 1.500(2)(b)..... 8
Iowa Rule of Civil Procedure 1.508(1)..... 14
Iowa Rule of Civil Procedure 1.508(3)..... 12, 15
Iowa Rule of Civil Procedure 1.517(1)..... 14, 15
Iowa Rule of Civil Procedure 1.517(1)(b)(1) 14
Iowa Rule of Civil Procedure 1.517(3)(a) 15, 17, 29
Iowa Rule of Evidence 5.403..... 11

Other

Federal Rule Civil Procedure 1993 comments……..16

Statement of Issue

1. Whether there is good cause to allow Plaintiffs to use an expert who was not timely disclosed when Plaintiffs offer no reason for the missed deadline and the district court's ruling places blame on the defense.

Cases

Bell v. Cmty. Ambulance Serv. Agency,
579 N.W.2d 330 (Iowa 1998)
Cox v. Jones, 470 N.W.2d 23 (Iowa 1991)
Den Hartog v. City of Waterloo, 926 N.W.2d 764 (Iowa 2019)
Donovan v. State, 445 N.W.2d 763 (Iowa 1989)
Est. of Fahrmann v. ABCM Corp. ___N.W.2d ___, No. 22-0495,
2023 Iowa Sup. LEXIS 96 (Iowa 2023)
Hantsbarger v. Coffin, 501 N.W.2d 501 (Iowa 1993)
Hartford-Carlisle Sav. Bank v. Shivers, 566 N.W.2d 877 (Iowa 1997)
Hill v. McCartney, 590 N.W.2d 52 (Iowa Ct. App. 1998)
In re Bolger,
No. 22-1201, 2023 Iowa App. LEXIS 881 (Iowa Ct. App. 2023)
Jack v. P & A Farms, Ltd.,
822 N.W.2d 511 (Iowa 2012)
Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009)
Kellen v. Pottebaum,
No. 18-1034, 2019 Iowa App. LEXIS 565 (Iowa Ct. App. 2019)
Laden & Pearson, P.C. v. McFadden,
No. 20-0093, 2021 Iowa App. LEXIS 498 (Iowa Ct. App. 2021)
McGrew v. Otoadese, 969 N.W.2d 311 (Iowa 2022)
McHugh v. Smith, 966 N.W.2d 285 (Iowa Ct. App. 2021)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Morales v. Miller,
No. 09–1717, 2011 WL 222527 (Iowa Ct. App. 2011)
Munoz v. Braland,
No. 09-0011, 2009 WL 3337672 (Iowa Ct. App. 2009)
Nedved v. Welch, 585 N.W.2d 238 (Iowa 1998) 19, 21, 22, 23, 24, 25, 26
Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins. Co.,
452 N.W.2d 389 (Iowa 1990)

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)
State v. Liggins, 978 N.W.2d 406 (Iowa 2022)
Tamayo v. Debrah, No. 17-0971,
2018 WL 4922993 (Iowa Ct. App. 2018)
Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990)
Whitley v. C.R. Pharmacy Serv.,
816 N.W.2d 378 (Iowa 2012)

Statutes
Iowa Code Section 147.140(3)
Iowa Code Section 668.11

Rules
Federal Rule of Civil Procedure 37(c)(1)
Iowa Rule of Civil Procedure 1.500
Iowa Rule of Civil Procedure 1.508
Iowa Rule of Civil Procedure 1.517

Other
Federal Rule Civil Procedure 1993 comments

Routing statement

Plaintiffs are mistaken about the Hospital's[1] routing statement. The Hospital did not rely upon the rule that inconsistent case law supports retention. *See* Iowa R. App. P. 6.1101(2)(b). Instead, the Hospital expressly acknowledged that this case would *normally* be appropriate for transfer but went on to explain the growing trend and developments in *unpublished* Court of Appeals decisions regarding untimely expert disclosures. Thus, the Hospital requested retention under Rule 6.1101(2)(f) that cases ordinarily retained include those involving changing legal principles.

The Court granted interlocutory review of the district court's refusal to bar an untimely expert. Plaintiffs' appeal brief demonstrates why this Court should retain the case to clarify the good cause standard to allow an untimely expert to testify. On appeal, Plaintiffs escalate their argument that the defense bears the responsibility for a plaintiff's failure to timely disclose experts.

Clarification of certain matters

Several issues warrant early clarification.

First, Plaintiffs are mistaken about the nature of the case.

---

[1]Defendant-Appellant Shenandoah Medical Center will be referred to as the "Hospital."

This appeal does not concern a discovery dispute or motion. The Hospital filed a motion for summary judgment. App. 5-7 (D0024, MSJ, 11/30/22). It is common and procedurally proper to file a motion for summary judgment in a professional negligence case based upon a plaintiff's failure to designate an expert timely. *See, e.g.*, *Thomas v. Fellows*, 456 N.W.2d 170, 171 (Iowa 1990) (affirming summary judgment for defendant in medical malpractice case where plaintiff did not designate experts timely under Iowa Code section 668.11); *Stanton v. Knoxville Cmty. Hosp. Inc.*, No. 19-1277, 2020 WL 4498884 *6 (Iowa Ct. App. 2020) (remanding for entry of summary judgment for defendants in medical malpractice case given lack of good cause under section 668.11).

The Hospital did not file a motion to compel discovery or any other discovery motion. Nor was it required to do so. Plaintiffs cite no authority to the contrary. Nor was the Hospital required to engage in a good faith attempt to avoid court intervention as if it were moving to compel. Plaintiffs cite no authority that such requirements apply to a motion for summary judgment, to the good cause analysis under Iowa Code section 668.11, or to a party's obligations to produce expert reports under Iowa Rule of Civil Procedure 1.500(2)(b). Plaintiffs rely heavily upon this flawed position.

Second, Plaintiffs are mistaken to the extent they imply that the timing of depositions somehow explains or justifies their untimely expert disclosures.

Like the argument that the Hospital was obligated to "pick up the phone" and ask if Plaintiffs were going to designate experts, Plaintiffs focus heavily on an argument that the Hospital is to blame for delaying discovery. However, Plaintiffs have never argued that they could not timely disclose their expert *because* of a delay in any discovery. Plaintiffs have never argued they were waiting on depositions *in order to* disclose. Plaintiffs never offered *any* reason or explanation at all why they missed their deadline. [2] They still do not.

The parties' discussion about the timing of depositions was nothing more than case activity occurring during the same time that expert disclosure deadlines were progressing. It was disconnected activity in the case. While in some cases parties *do* request certain discovery in order to designate experts, that never happened here. At no time did Plaintiffs indicate they needed anything to comply with their expert deadlines. The timing of other

[2]Plaintiffs only argued that the delayed depositions suggested that the Hospital was not taking expert deadlines seriously. App. 48 (D0031, MSJ resistance brief at 6, 12/13/22) (deposition discussion "seemingly indicat[ed] that Defendant was not treating the already-late-disclosure as fatal to Plaintiffs' claims" and Defendant was not "treating that deadline seriously").

discovery is irrelevant to the expert issue. Yet Plaintiffs go so far as suggesting that defense counsel communication on discovery was not in good faith, was a misuse of discovery extensions, and even dishonest. These accusations are without justification. *See* Plaintiffs' brief at 30.

Third, Plaintiffs are also mistaken in arguing that this Court may rule that their case may proceed without an expert.

The district court did not rule on this issue and it is not before this Court. App. 59 (D0036, ruling at 6, 3/5/23). Nor did the Hospital request a ruling on this issue from this Court. Instead, the Hospital requested that this Court "reverse the district court's March 5, 2023 ruling and hold that Plaintiffs are barred from presenting expert testimony at trial." Hospital's opening brief at 34.

Additional issues are clarified below.

Argument

I. Standard of review.

Plaintiffs over-argue the abuse of discretion standard.

First, this case involves statutory and rule interpretation—both reviewed for errors at law. *Den Hartog v. City of Waterloo*, 926 N.W.2d 764, 769 (Iowa 2019) (statute); *Jack v. P & A Farms, Ltd.*, 822 N.W.2d 511, 515 (Iowa 2012) (rule). And, "[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).

The above applies in this case. The only exception that allows an untimely expert to testify under Iowa Code section 668.11 is if the proponent shows good cause. Section 668.11(2). Plaintiffs have never articulated any cause for their missed deadline, much less a good cause—a failure ignored by the district court. This case involves interpretation of the statute. Specifically, can there be good cause under section 668.11 in the absence of *any* explanation at all of the failure to timely designate?

Second, if the abuse of discretion standard was as outcome-determinative as Plaintiffs suggest, there would be no meaningful review of any discretionary ruling. This is not the case. *See, e.g.*, *State v. Liggins*, 978 N.W.2d 406, 422 (Iowa 2022) (addressing evidentiary rule, "Despite the discretionary nature of rule 5.403, we do not hesitate to reverse if unfairly prejudicial evidence is admitted.").

Third, Plaintiffs' authority is not compelling. Their lead-off case, *Bell v. Cmty. Ambulance Serv. Agency*, 579 N.W.2d 330, 338 (Iowa 1998), did not involve exclusion of untimely disclosed expert testimony but the exclusion of expert testimony at trial as involving legal conclusions. Further,

Plaintiffs cite discovery sanction cases (brief at 25) which have no application to section 668.11.

Plaintiffs rely heavily on *Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins. Co.*, 452 N.W.2d 389 (Iowa 1990) for the standard of review and throughout their brief. It is easily distinguishable. The expert identified only a week before trial and still allowed by the court in *Hawkeye* was a damage expert in a business case. *Id.* at 390, 392. He was not an expert designated under Iowa Code section 668.11 for the liability or causation elements of the plaintiff's case (as in this case). Nor was there any indication in *Hawkeye* that the late expert provided the *only* damage evidence. The same is not true in this case. The expert issue in this case involves Plaintiffs' *only* expert and *only* evidence on professional negligence. Nor did *Hawkeye* involve Iowa Code section 668.11 or rule 1.500(2). *Id.* at 393 (applying expert discovery rule 125(c) [now 1.508(3)]). There was no discussion of a good cause standard or if the untimely disclosure was substantially justified.

In short, there are significant substantive differences in the two cases. Contrary to Plaintiffs' argument (brief at 27), *Hawkeye* does not establish the "test" for whether an untimely expert should be allowed to testify under section 668.11 or rule 1.500(2). And, the Court in *Hawkeye* did not give the

district court any margin. 452 N.W.2d at 393 ("we narrowly find no abuse of discretion").

II. Preservation of error.

Plaintiffs are mistaken that the Hospital failed to preserve error as to rule 1.500(2) because defense counsel did not make a "good faith phone call" as required for a discovery motion.[3] Plaintiffs cite no law to support that the Hospital's motion for summary judgment based upon the failure to timely designate experts or provide their opinions under rule 1.500(2) is a discovery motion or should be treated as such by the Court. The district court did not adopt this argument.

The disclosure requirements of rule 1.500(2) do not give rise to a discovery motion in the same way as when a party fails to respond to discovery requests. The obligation to disclose expert information set forth in rule 1.500(2) exists regardless of any discovery requests. A party must comply even in the absence of an interrogatory or request for production seeking expert information. Nothing in rule 1.500(2) indicates the

[3] While Plaintiffs only argue the discovery motion obligations apply to rule 1.500(2) under error preservation, in their argument on section 668.11 they complain that this appeal could have been avoided if defense counsel had just "picked up the phone" and called Plaintiffs' counsel. *Compare* Plaintiffs' brief at 23 (error preservation) *with* 31, 33-35 (section 668.11 argument). Regardless, the obligations do not apply to either expert disclosure requirement—section 668.11 or rule 1.500(2).

obligations are dependent upon a discovery request. The plain language of the rule is to the contrary: "In addition to the disclosures required by rule 1.500(1) [Initial disclosures], a party must disclose to the other parties the identity of any [expert] witness" as well as either a written report (if a retained expert) or summary of facts and opinions (if a non-retained expert). Iowa R. Civ. P. 1.500(2)(a)-(c).

Further demonstrating rule 1.500(2) obligations are independent of discovery requests and responses, there is *another* rule that deals with expert discovery—rule 1.508. That rule sets forth that expert discovery may be conducted "[i]n addition to" the disclosures required under rule 1.500(2). Iowa R. Civ. P. 1.508(1). The Hospital did not bring a motion based on any failure to respond to expert discovery served under rule 1.508. *See* App. 5-7 (D0024).

Nor does rule 1.517 support Plaintiffs' position. Rule 1.517(1) concerns motions to compel discovery and provides a party "may" move to compel a disclosure required by Rule 1.500. Iowa R. Civ. P. 1.517(1)(b)(1). A motion to compel is not required. The Hospital did not cite or rely upon rule 1.517(1) in its motion for summary judgment. Instead, the Hospital relied upon rule 1.517(3). D0025, MSJ brief at 7-8 (11/30/22).

Rule 1.517(3) does not require a motion to compel but sets forth the automatic consequence of a failure to disclose that is not substantially justified or harmless:

> (3) Failure to disclose, to supplement an earlier response, or to admit.
>
> a. Failure to disclose or supplement. 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). This is the rule at issue and relied upon by the Hospital. It is different from rule 1.517(1) that concerns a motion to compel.

In *Kellen v. Pottebaum*, No. 18-1034, 2019 Iowa App. LEXIS 565 *8 (Iowa Ct. App. 2019) the Court found Rule 1.517(3)(a) is "automatic concerning the use of evidence that a party failed to provide" and rejected the argument that a motion to compel was required for evidence to be excluded.[4] *See also Tamayo v. Debrah*, No. 17-0971, 2018 WL 4922993 *3 (Iowa Ct. App. 2018) (defense had "no obligation to remind [plaintiff] of the deadline . . . . While [rule 1.501(3)] requires conferral among counsel to resolve discovery disputes, this case does not involve a discovery dispute but

[4] Federal Rule of Civil Procedure 37(c)(1) is the parallel federal rule and is similarly described as a "self-executing sanction for failure to make a

a missed statutory deadline;" medical malpractice case dealing with section 668.11).

In summary, Plaintiffs' repeated argument and accusations throughout their brief that the Hospital failed to comply with procedural prerequisites for its motion and failed to act in good faith in bringing its motion are without merit.

III. The district court should be reversed.

A. Plaintiffs failed to comply with two independent expert disclosure requirements: Iowa Code section 668.11 designations and rule 1.500(2) disclosures.

Plaintiffs should be barred from introducing expert testimony for two reasons: 1) the failure to timely designate experts under Iowa Code section 668.11 and establish good cause to allow their late expert to testify; and 2) the failure to timely produce expert opinions under rule 1.500(2) and establish that failure was substantially justified or harmless under Rule 1.517(3)(a). *See 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)). A failure to comply with either requirement bars the expert from testifying.

---

disclosure required by Rule 26(a), without need for a motion [to compel]." Fed Rules Civ. Proc. R. 37, 1993 comments to Rule 37(c).

The applicable tests are similar as to whether Plaintiffs' failures to timely designate and disclose under section 668.11 and rule 1.500(2) can be excused. Section 668.11(2) requires good cause to allow an untimely expert to testify. Rule 1.517(3)(a) requires substantial justification or harmlessness to allow an undisclosed expert to testify.

However, the distinction between the two expert requirements and Plaintiffs' failed compliance becomes more focused given Plaintiffs' appeal arguments.

Plaintiffs argue (brief at 38) that under rule 1.500(2), their expert disclosure was "technically" not late because the district court failed to enter an order approving or adopting the parties' discovery plan deadlines. Therefore, Plaintiffs argue the September 1, 2022 discovery plan deadline does not apply but the default 90-days-before-trial deadline applies. But even if this argument has merit (which it does not, as explained below), it does not apply to the separate *statutory* 668.11 deadline. Plaintiffs do not argue it does. And, Plaintiffs were indeed late under section 668.11.

If the discovery plan has no effect as Plaintiffs argue, then the section 668.11 statutory deadline was not modified by agreement. Under section 668.11, Plaintiffs were required to designate their experts 180 days after the Hospital's answer filed on January 20, 2022 (D0006)—or July 19, 2022.

Iowa code § 668.11(1)(a). There is no dispute that Plaintiffs filed their designation on December 2, 2022—4 ½ months after the statutory deadline. *See* D0027.

Thus, to the extent Plaintiffs now disavow the agreed-to discovery plan deadline of September 1, 2022, that does nothing to change the statutory section 668.11 deadline or their failure to meet it.

B. There is not good cause to allow Plaintiffs' expert to testify under Iowa Code section 668.11.

As a threshold matter, Plaintiffs fail to address their burden to actually show good cause. Iowa appellate decisions do not skip this analysis and it can determine the outcome.[5] *See Laden & Pearson, P.C. v. McFadden*, No. 20-0093, 2021 Iowa App. LEXIS 498 **8-9 (Iowa Ct. App. 2021) (affirming grant of summary judgment in legal malpractice case given

[5] "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); *see also Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998) (defining good cause as "'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.'") (emphasis and citation removed); *Reyes v. Smith*, No. 21-0303, 2022 Iowa App. Lexis 431 **5,8 (Iowa Ct. App. 2022) (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

failure to designate under section 668.11 and establish good cause); *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").

While it was Plaintiffs' burden to show good cause, in their zeal to make this case the Hospital's fault, Plaintiffs argue their burden to show good cause can be carried solely by the defense.

Plaintiffs argue the defense "can generate good cause . . . by sitting idly in silence" while the deadline passes. Brief at 28. They continue to argue the first factor sometimes applied by courts—whether the delay in disclosure was serious—is more likely to support exclusion if the defendant previously raised the issue with the plaintiff. *Id.* Plaintiffs cite *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998) but *Hill* does not support that opposing counsel's action or inaction is relevant to whether the delay was serious. Instead, when discussing the first factor, the Court in *Hill* only discussed the actual length of the delay at issue: "In this case, the

---

deadline "'slipped through the cracks'" as this was "nothing more than an excuse, plea, or apology").

deviation from the time limits were serious. This is not a case like *Hantsbarger* where the plaintiffs designated their expert a week late." *Id.*

This is consistent with how other Iowa cases view the first factor—how many days, weeks, or months late was the designation? In this case, the designation was 4 ½ months after the statutory deadline and 3 months after the agreed-to deadline. In each of the following cases, the court found delays of similar lengths were serious independent of any discussion of counsel conduct. *Nedved v. Welch*, 555 N.W.2d 238, 240 (Iowa 1998) (three months late); *Donovan v. State,* 445 N.W.2d 763, 766 (Iowa 1989) (several months late); *Reyes v. Smith*, No. 21-0303, 2022 Iowa App. Lexis 431 *6 (Iowa Ct. App. 2022) (66 days late); *Stanton v. Knoxville Cmty. Hosp. Inc.*, No. 19-1277, 2020 WL 4498884 *3 (Iowa Ct. App. 2020) (four months late); *Tamayo*, No. 17-0971, 2018 WL 4922993 *2 (two months late); *Munoz v. Braland*, No. 09-0011, 2009 WL 3337672 *1 (Iowa Ct. App. 2009) (three months late—and dispositive as it "'precludes the Court from finding good cause'").

1. The Hospital did not contribute to the delay.

Plaintiffs' argument that the Hospital "contributed to the delay" is misleading and without any basis in the record. They argue (brief at 29-30) that an agreed delay in depositions somehow supports good cause. But

Plaintiffs have never argued that they could not timely disclose their expert because of a delay in any discovery. Plaintiffs never communicated to Hospital counsel that they needed depositions in order to disclose. No such communication is set forth in counsel's emails. App. 11-13 (Attachment to D0026, Hospital MSJ Exh. C, 11/30/22); App. 38-42 (Attachment to D0030, Plaintiffs' MSJ Exh. A-B, 12/13/22).[6]

That Plaintiffs did not actually need depositions to disclose experts is not surprising. This is medical malpractice case. Experts and their opinions are often disclosed in such cases based solely on the medical records—records which are typically in a plaintiff's possession before the petition is filed. Indeed, Iowa Code section 668.11 requires disclosure of a plaintiff's experts 180 days after a defendant's answer—*not* after depositions or other discovery is completed.

Plaintiffs misapply *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998) where a good cause explanation for untimely designation was rejected by the court. The explanations offered by the plaintiff in *Nedved* were rejected because they were inconsistent and the plaintiff failed to support

[6] As discussed previously, the parties' discussions about the timing of depositions were nothing more than case activity that was occurring during the same time period that expert disclosure deadlines were progressing. The timing of depositions is irrelevant to the expert issue.

them with any evidence. 585 N.W.2d at 240. By citing *Nedved*, Plaintiffs suggest they have the same explanation as offered in *Nedved* ("the parties' inability 'to schedule the depositions necessary for Plaintiffs' experts to reach opinions and conclusions.'" *Id.*) but, unlike in *Nedved*, Plaintiffs have proof of that explanation. Brief at 28-30. Plaintiffs go so far as describing *Nedved* as supporting that "an agreement to delay discovery constitutes good cause to miss" an expert deadline. *Id.* at 30.

The flaw in Plaintiffs' argument based on *Nedved* is that Plaintiffs never actually conveyed to the Hospital that they needed depositions in order to designate experts. Nor did they ever inform the district court of such an explanation for their failure to timely designate. Plaintiffs can cite nothing in the record (because it does not exist) that Plaintiffs conveyed they needed depositions in order to designate experts and provide reports. In fact, in response to the Hospital's motion for summary judgment, Plaintiffs designated their expert and provided her report—late but without deposition testimony.

In their ongoing effort to blame the Hospital, Plaintiffs import their discovery motion argument here, arguing: "Had defense counsel simply picked up the phone and asked about experts, like the rules require, *all* of this delay could have been avoided." Brief at 30-31 (emphasis by Plaintiffs).

No rule requires this for a section 668.11 deadline violation. None. Plaintiffs cite none. And how is Plaintiffs' argument *not* making defense counsel into his "brother's keeper?" *See Hantsbarger v. Coffin*, 501 N.W.2d 501, 505 (Iowa 1993) (opposing counsel need not "act as his or her 'brother's keeper'").

2. There was a loss of strategic advantage.

Plaintiffs argue (brief at 32) the prejudice to the Hospital is "the exact same harm" that always occurs when a plaintiff fails to timely designate. But that does not mean there was no prejudice. In fact, Plaintiffs concede there *was* harm.

The Hospital did not coin the "loss of strategic advantage" phrase—Iowa Courts have done that. The inherent prejudice when opposing counsel miss their expert deadline is well-recognized. *See Nedved*, 585 N.W.2d at 241 (prejudice may be presumed when a party fails to timely designate an expert); *In re Bolger*, No. 22-1201, 2023 Iowa App. LEXIS 881 *14 (Iowa Ct. App. 2023) (agreeing party is "hamstrung in his attempt to prepare his own expert" when opposing party fails to timely designate); *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"); *Stanton*, 2020 WL 4498884

*3 (when defense designates first the defendant loses—and the plaintiff gains—"the strategic advantage of seeing his opponent's expert materials before he had to designate."); *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."); *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").

And, 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. In fact, when interpreting Iowa's certificate of merit statute (section 147.140), the Iowa Supreme Court recently found a defendant "need not show prejudice" to obtain relief for noncompliance as there is no prejudice requirement in the statute. *Est. of Fahrmann v. ABCM Corp.* ___N.W.2d ___, No. 22-0495, 2023 Iowa Sup. LEXIS 96 *12 (Iowa 2023); Iowa Code § 668.11.

Faced with this law, Plaintiffs argue (brief at 32-33) for a balancing of prejudice, noting the harm to the Hospital is "*de minimus* when compared to

the alternative harm" to Plaintiffs. Plaintiffs cite no authority for this proposed new test to apply to whether an untimely expert should be excluded under section 668.11.

3. The Hospital did not "prejudice itself."

Plaintiffs either misunderstand or misleadingly apply the expert statutes and rules in arguing (at 33-34) that the Hospital knew the identity of Plaintiffs' expert given the certificate of merit and discovery responses and had "all the relevant information about the expert." There is no requirement that a plaintiff use the same expert in section 668.11 designations (and, thus, at trial) as a plaintiff does for certificates of merit.[7] The Hospital did *not* have all the relevant information about Plaintiffs' expert or even if Plaintiffs would have an expert at trial. A purpose of a section 668.11 disclosure is to provide the very certainty on experts that was delayed in this case. *See Nedved*, 585 N.W.2d at 240.

Further, "[i]f the expert-disclosure requirements fell away every time a party could infer the likely use of an expert from a party's legal position,

[7] Iowa's certificate of merit statute provides that: "The parties shall comply with the requirements of section 668.11 and all other applicable law governing certification and disclosure of expert witnesses." Iowa Code § 147.140(3); *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").

the rule would have little applicability in most civil litigation and no real teeth as an enforcement mechanism." *In re Bolger*, No. 22-1201, 2023 Iowa App. LEXIS 881 *14.

Plaintiffs criticize the Hospital (brief at 33) for designating its experts without first "picking up the phone to discuss the issue like [rule] 1.517 demands." Plaintiffs again mistakenly import a discovery rule into the analysis where it does not belong.

Plaintiffs' criticism of the Hospital's choice to timely designate its own experts is unavailing. The Hospital simply complied with its deadline. Plaintiffs did not.

C. The rule 1.500(2) violation was not justified or harmless.

1. The Rule 1.500(2) disclosure deadline.

While the district court's trial order has no language approving the parties' discovery plan or otherwise entering it as an order, *see* D0018, Plaintiffs' argument that their disclosures were therefore not technically late fails for three reasons.

First, the argument *only* applies to the rule 1.500(2) disclosure of the expert's opinion. It does not apply in any regard to the section 668.11 deadline. If, as Plaintiffs argue, the discovery plan was never reduced to an order, then the designation deadline is controlled entirely by Iowa Code §

668.11. As explained above, Plaintiffs missed that deadline by 4 ½ months. They were indeed late.

Second, it is not clear that there was no order as to the September 1, 2022 deadline in the discovery plan. The plan itself states "It is ordered." App. 15 (Attachment to D0026, Hospital MSJ Exh. D); *see also* D0012, plan, 3/1/22. The district court treated the discovery plan's September 1, 2022 deadline as ordered: "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).

Third, Plaintiffs never disputed the deadline in the district court or made this argument in the district court. Plaintiffs conceded their expert disclosure was untimely. App. 47-52 (D0031, MSJ Resistance Brief at 5-10, 12/13/22). In other words, Plaintiffs did not raise in the district court what they argue on appeal—that their Rule 1.500(2) disclosure of their expert's opinion was "not technically late." This argument cannot be used to affirm the district court. *See Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 774 (Iowa 2009) (successful party preserves error by raising argument before district court).

2. This appeal does not involve a discovery motion and the Hospital had no obligation to make a "good faith phone call."

There is a good reason the district court did not rule—or even mention—Plaintiffs' novel argument that the Hospital's motion for summary judgment was actually a discovery motion to which the requirement of a good faith attempt to resolve the issue applied. As argued above, this case does not involve a discovery dispute or motion. The Hospital incorporates its argument set forth above under error preservation (Argument II).

3. The untimely disclosure was not harmless.

Again, Plaintiffs misunderstand and misapply the expert disclosure requirements. The certificate of merit provided no certainty as to Plaintiffs' trial expert. That certainty was not provided until the section 668.11 designation—4 1/2 months late. And there was no information about Plaintiffs' expert's opinions—whether those of Nurse Beerman or some other expert—until disclosed even later. As previously argued, the untimely disclosures were prejudicial and not harmless.

4. The district court should be reversed.

Importantly, this case does not involve just a failure to disclose opinions and other expert information under rule 1.500(2). It involves the failure to timely designate under the statutory obligation in section 668.11. Even assuming this Court were to find Plaintiffs' failure under rule 1.500(2) was somehow substantially justified and somehow harmless, that does

nothing to cure Plaintiffs' section 668.11 failure. The optional sanctions available to the district court in rule 1.517(3)(a) do not apply to section 668.11. Exclusion *was* required given Plaintiffs' complete failure to show good cause for their serious deviation from their 668.11 deadline.

Plaintiffs repeated citation and reliance on *Hawkeye* lacks merit. *Hawkeye* was not even a case to which section 668.11 applied and it predates rule 1.500(2). 452 N.W.2d 389. It concerns different rules, a different kind of expert, and different procedural considerations.

D. Whether Plaintiffs can proceed without an expert is not before the Court.

If the Court determines Plaintiffs' expert cannot testify, Plaintiffs argue this Court should rule that Plaintiffs do not need an expert. The district court did not rule on this issue and there is no ruling for this Court to review. *See Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) (court has no duty or authority to render advisory opinions); *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Conclusion

This is not a case where discovery was needed for expert disclosures. There has never been any suggestion by Plaintiffs that they needed

depositions in order to designate experts or provide opinions. Plaintiffs missed their statutory deadline by 4 ½ months—and they have never offered an explanation or good cause. The parties' agreement to delay depositions is unrelated and irrelevant. It does not support Plaintiffs' accusations that the Hospital is to blame for Plaintiffs' failures or that it somehow acted in bad faith.

This is not a discovery case. There was no discovery motion. Plaintiffs' attempt to convert the case into a discovery dispute to again cast blame on the Hospital is unsupportable.

If the good cause standard in Iowa Code section 668.11 means anything, Plaintiffs' arguments must be rejected and the district court reversed.

Nor were Plaintiffs' untimely disclosures harmless. The inherent prejudice caused when a plaintiff is untimely with expert disclosures is well-recognized—and real. Relying on a remote trial date to excuse noncompliance with expert deadlines defeats the purpose and language of section 668.11 and rule 1.500(2).

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

/s/Nancy J. Penner
JENNIFER E. RINDEN AT0006606
VINCENT S. GEIS AT0013055
NANCY J. PENNER AT0006146
for
SHUTTLEWORTH & INGERSOLL, PLC
500 U.S. Bank Bldg., P.O. Box 2107
Cedar Rapids, IA 52406

Attorneys for Defendant/Appellant
Shenandoah Medical Center

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903 (1)(g)(1) or (2) because:

   [x] this brief contains 5,216 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

   [ ] this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point, or

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/Nancy Penner _____ 2/8/24_____

Signature Date

Certificate of filing and service

The undersigned certifies this brief was electronically filed and served on the 8th day of February, 2024, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

Gary T. Gee
112 South Elm Street
P.O. Box 177
Shenandoah, IA 51601
Garygeelaw@gmail.com

Andrew D. Sibbernsen
Sibbernsen Law Firm, P.C.
444 Regency Parkway Drive, Suite 300
Omaha, NE 68114
andy@sibblaw.com

Jessica A. Zupp
1919 4th Ave S., Ste. 2
Denison, Iowa 51442
jessica@zuppandzupp.com

Clerk of the Iowa Supreme Court
Iowa Judicial Branch Building
1111 East Court Avenue, 4th Floor
Des Moines, IA 50319

/s/ Haley Fauconniere