IN THE SUPREME COURT OF IOWA
No. 23-0509

Page County No. LACV105820

DOUGLAS B. WILSON and JANE WILSON,
Plaintiffs/Appellees

v.

SHENANDOAH MEDICAL CENTER,
Defendant/Appellant

APPELLEES' FINAL BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2024, I electronically filed this document with the Clerk of the Iowa Supreme Court using the Appellate EDMS system which will serve the following parties or their attorneys:

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COST CERTIFICATE

No costs were incurred to create or file this brief other than attorney time which is not recoverable under the rules of appellate procedure in this type of case.

/s/ Jessica Zupp 1/30/24

CERTIFICATE OF COMPLIANCE

Pursuant to Iowa Rule of Appellate Procedure 6.906(4), the undersigned states that this brief complies with rule 6.903(1)(g) as cross-referenced by Iowa Rule of Appellate Procedure 6.906(4). This brief is

prepared in Times New Roman, a proportionally spaced typeface, and contains 7,918 words which is less than the length permitted for Appellees' brief. See Iowa R. Civ. P. 6.903(1)(g) (permitting 14,000 words for a proportionally spaced typeface).

/s/ Jessica A. Zupp. 1/30/24

NON-ORAL SUBMISSION

Oral argument was waived by Shenandoah in its Proof Brief at page thirty-four (34), and Wilsons do not believe oral argument is necessary either. Both parties contend the law is clear so this matter can easily be decided on the briefs without oral argument.

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ROUTING STATEMENT

Shenandoah's routing statement position is unclear. On one hand, Shenandoah says the ruling below is based upon "existing legal principals" and thus, it should be transferred to the Court of Appeals. (Shenandoah Proof Brief, p. 7). On the other hand, Shenandoah claims the case should be retained to provide clarification of the "good cause" standard under Iowa Code section 668.11 because *unpublished* Court of Appeals rulings allegedly conflict with the Iowa Supreme Court's ruling in Hantsbarger v. Coffin, 501 N.W.2d 501, 505-06 (Iowa 1993); (Appellant's Proof Brief, P. 27). Unpublished Court of Appeals rulings *cannot* conflict with Supreme Court

precedent because unpublished rulings have no precedential weight. Iowa R. App. P. 6.904(2)(c). So that would not be a basis for retention.

Even if an unpublished Court of Appeals ruling conflicts with Supreme Court precedent, there is no claim by Shenandoah in its routing statement that the district court's ruling in this case conflicts with either unpublished or published decisions, so there would still be no statutory basis for retention in *this* case. Accordingly, this case should be transferred.

STATEMENT OF THE ISSUE

I. WHETHER THE DISTRICT COURT'S FINDINGS OF "GOOD CAUSE" AND "HARMLESSNESS" WERE WELL WITHIN ITS BROAD DISCRETION.

Bell v. Community Ambulance Service Agency for Northern Des Moines County,
579 N.W.2d 330 (Iowa 1998)

Hantsbarger v. Coffin,
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State v. Buenaventura,
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Iowa Code § 668.11

Iowa Ct. R. 23.2(1)

Iowa R. Civ. P. 1.500(2)

Iowa R. Civ. P. 1.517

Iowa R. Civ. P. 6.903(1)(g)

Iowa R. Civ. P. 6.904(2)

STATEMENT OF THE CASE

Nature of the Case

This is an interlocutory appeal concerning the district court's broad powers to regulate discovery in a civil case. The district court refused to exclude Wilsons' expert, Nurse Beerman, and, as a result, the court denied

summary judgment to Shenandoah because that motion partially hinged on whether Nurse Beerman would be excluded or not.

Since the district court's ruling was supported by substantial evidence and was not clearly untenable, it was not an abuse of discretion. Thus, the district court's ruling should be affirmed.

Course of Proceedings

Shenandoah accurately stated the relevant course of proceedings, except Shenandoah failed to recite that before it filed its motion for summary judgment seeking back-door exclusion of Nurse Beerman, Shenandoah failed to engage in any good faith phone call about the discovery issue, and Shenandoah also failed to certify in its motion the time and date of its good faith call as required by Iowa Rule of Civil Procedure 1.517 (requiring counsel to certify the date and time of a good faith phone call before filing discovery related motions).

Regardless of Shenandoah's lack of compliance with Iowa Rule of Civil Procedure 1.517, the district court's ruling should nonetheless be affirmed because refusal to exclude Nurse Beerman was not clearly untenable under an abuse of discretion standard of review.

Even if the district court got everything wrong, the case should still be remanded for trial, not dismissal, because an expert isn't needed in this

obvious liability case. Shenandoah admits that its doctors ordered "1:1" nursing care for Mr. Wilson and it isn't in dispute that the nurse failed to prevent Mr. Wilson's fall by turning her head and stepping too far away from him when he was toileting. He fell as a result.

Thus, the district court's order should be affirmed and this matter should be remanded for trial.

STATEMENT OF FACTS

In this case, Douglas Wilson underwent hip replacement in December, 2019 at Shenandoah Medical Center. (D0001, P. 2, ¶4) (Petition). During recovery, after several episodes of instability and confusion by Mr. Wilson, it was ordered that he would receive "1:1" care from nurses. (D0001, P. 2, ¶8) (Petition); (**App. P. 72**: Trans. P. 7, L. 5-7) (containing Shenandoah's admission that one-to-one care was ordered by the provider). However, on January 4, 2020, the nurse who was supposed to be caring for Mr. Wilson allowed him to assist *himself* to a standing position so that he could then go to urinate, whereafter, predictably, Mr. Wilson lost his balance and fell. (D0001, P. 2, ¶9) (Petition). When Mr. Wilson fell, he injured his right hip and also struck his head on a hard object. (D0001, P. 2, ¶9) (Petition).

Mr. Wilson and his wife, Jane Wilson, subsequently filed their petition for negligence, both ordinary and medical, on December 27, 2021. (D0001)

(Petition). Shenandoah Answered on January 20, 2022, denying everything except jurisdiction. (D0006) (Answer).

On February 1, 2022, in compliance with Iowa's new certificate of merit requirement, the Wilsons filed an affidavit from Jenny Beerman, RN, MN to prove their case was not frivolous. (D0010) (Certificate of Merit, hereinafter "COM"). In the affidavit, Nurse Beerman certified that Shenandoah breached the applicable standard of care following Mr. Wilson's hip replacement procedure. (D0010, p. 1) (COM).

On February 9, 2022, the Wilsons served discovery requests on Shenandoah (D0011) (Wilsons' Notice of Service (of Discovery Requests)). However, Wilsons later rescinded their discovery requests because they were served prior to the occurrence of the trial scheduling conference which, by rule, was too early to serve discovery. (D0030, P. 4) (Wilsons' Disputed Summary Judgment Facts).

On March 1, 2022, the parties filed a Trial Scheduling and Discovery Plan, hereinafter TSDP. (D0012) (TSDP). In the TSDP, the parties suggested dates of September 1, 2022 for the Wilsons, and December 1, 2022 for Shenandoah, by which to designate and disclose experts and expert materials. The trial date was left blank according to the instructions on the form. (D0012) (TSDP).

On March 8, 2022, following the filing of the TSDP, Shenandoah filed a motion to extend the case processing deadlines pursuant to Iowa Court Rule 23.2. Under that rule, "tort" cases are supposed to receive a trial date within eighteen months from filing the petition, and "complex civil" cases are supposed to receive a trial date within twenty-four months. Iowa Ct. R. 23.2(1). Under that rule, the case should have been tried by the end of June, 2023, or December, 2023 at the absolute latest. Instead, Shenandoah wanted an *additional* six months beyond the max deadline in Rule 23, to July 2024, which was nearly four-and-one-half years after the injury. (D0013, P. 2, ¶8) (Shenandoah's Motion to Extend Case Processing Deadlines).

The basis for Shenandoah's request for an extension was they were too busy to handle the case when they took it on. (D0013, P. 2, ¶8). (D0013, P. 2, ¶ 8) (complaining about hold-over cases from the Pandemic). Shenandoah also claimed it would take a long time to complete discovery because medical malpractice cases are highly complex. (D0013, P. 2, ¶8) (Shenandoah's Motion to Extend Case Processing Deadlines). The earliest defense counsel could be available for trial was July 23-29, 2024. (D0013, P. 2, ¶8) (Shenandoah's Motion to Extend Case Processing Deadlines). Wilsons resisted the motion. (D0014) (Wilsons' Resistance to Motion to Extend Case Processing Deadlines).

On March 29, 2022, after hearing, the district court granted Shenandoah's motion to extend the case processing deadlines. (D0018) (Order Setting Trial Dates & Future Status Conference). However, the court *did not* ratify the parties' TSDP to designate and disclose experts by the dates they had suggested. (D0018) (Order Setting Trial Dates & Future Status Conference). No court ordered deadlines were imposed for expert designations or disclosures, nor were any other pretrial dates set. Instead, the court merely scheduled trial for July 23-29 of 2024 and then set a phone status hearing for December 8, 2022 to set a later pretrial conference date. (D0018) (Order Setting Trial Dates & Future Status Conference). Neither party sought to have the court amend its order to incorporate the parties' expert disclosure dates nor any other parts of the TSDP.

On March 31, 2022, the Wilsons served their initial disclosures via email. (D0019) (Wilsons' Notice of Service of Initial Disclosures (hereinafter NSID)). On April 1, 2022, Shenandoah served its initial disclosures via email. (D0020) (Shenandoah's NSID).

On May 9, 2022, Shenandoah served discovery requests on the Wilsons. (D0030, P. 5) (Wilsons' Disputed Summary Judgment Facts). When Wilsons inquired about their previously served discovery requests, Shenandoah assured Wilsons that Shenandoah would respond to the requests

without the necessity of serving them again, and that Shenandoah would respond within thirty days. (D0030, P. 4) (Wilsons' Disputed Summary Judgment Facts). They also agreed that after written discovery was complete the parties would then move on to scheduling depositions in the "fall". (D0030, P. 4) (Wilsons' Disputed Summary Judgment Facts). "Fall" started September 22, 2022. Shenandoah also made a special request to schedule the Wilsons' depositions before Shenandoah subjected its medical staff to depositions, a proposition the Wilsons agreed to in good faith. (D0030, P. 4) (Wilsons' Disputed Summary Judgment Facts).

Shenandoah responded to Wilson's discovery requests on June 8, 2022. (D0021) (Shenandoah's Notice of Discovery Response (hereinafter "NODR"). Wilsons responded to Shenandoah's discovery requests on June 13, 2022 including Nurse Beerman's curriculum vitae, a summary of her anticipated opinions, and another copy of the certificate of merit. (**App. P. 23-26**: D0026, Attachment E) (Shenandoah's Undisputed Summary Judgment Facts) (Wilsons' Answers to Interrogatories served June 13, 2022 by Wilsons); (D0022) (Wilsons' NODR).

After written discovery was complete, Wilsons again asked about scheduling depositions. (**App. P. 42**: D0030, P. 8) (Wilsons' Disputed Summary Judgment Facts). One email was sent by Wilsons' counsel on

September 8, 2022 seeking to complete depositions by the end of the year. (**App. P. 42**: D0030, P. 8) (Wilsons' Disputed Summary Judgment Facts). Shenandoah responded to that email by assuring that its legal staff would work with Wilsons to find some dates available for depositions, and defense counsel copied in its legal staff, Haley Fauconniere, to that thread. (**App. P. 41-42**:D0030, P. 7-8) (Wilsons' Disputed Summary Judgment Facts).

No dates were ever provided by staff for defense counsel as promised, though. When enough time passed without a list of dates, Wilsons followed up on October 25, 2022 with another email. (**App. P. 41**:D0030, P. 7) (Wilsons' Disputed Summary Judgment Facts). Wilsons' counsel advised that he was still available for depositions that year, but it was starting to become "hit and miss" on the calendar now for both November and December, 2022. (**App. P. 41**:D0030, P.7) (Wilsons' Disputed Summary Judgment Facts). Fauconniere responded to Wilsons' lawyer's email on the same day stating that defense counsel were "booked solid in November and December" and she asked, "What does your January look like?" (**App. P. 41**:D0030, P. 7) (Wilsons' Disputed Summary Judgment Facts). Fauconniere then listed some dates in January, 2023 when defense counsel could be available for depositions. (**App. P. 41**:D0030, P. 7) (Wilsons' Disputed Summary Judgment Facts). There was no claim, by her or defense

counsel, that the lack of expert designation and disclosure by Wilsons was a material issue.

On November 30, 2022, before any January depositions could occur, Shenandoah instead filed a motion for summary judgment claiming that Wilsons hadn't designated or disclosed their expert properly yet, and since experts were required in medical malpractice cases, summary judgment was appropriate on the whole case. (**App. P. 5-**7: D0024) (Shenandoah's Motion for Summary Judgment).

Before filing their motion, though, Shenandoah had not yet made any required good faith attempt to resolve the expert discovery issue under Iowa Rule of Civil Procedure 1.517, nor had Shenandoah yet filed a motion to exclude Wilsons' expert(s) under Iowa Code section 668.11. Shenandoah instead skipped over those steps and went straight to seeking summary judgment.

Surprised by the timing of the potentially dispositive motion in the absence of the promised depositions, on December 2, 2022, Wilsons filed their expert *designation*, naming Nurse Beerman. (D0027) (Wilsons' Expert Designation). A few weeks later, on December 29, 2022, Wilsons provided their *disclosures* on Nurse Beerman, including her report. (Appellant's Proof Brief, P. 13) (admitting report served); (D0034) (Wilsons' Expert

Disclosure). None of the material information was new, though; it was the same Nurse Beerman information which had already been provided in discovery, but now in new formatting.

On December 13, 2022, Wilsons resisted the summary judgment motion. They claimed an expert wasn't required on the whole case because the breach of the duty to provide a "1:1" level of care was obvious; the doctor ordered it and the nurse failed to implement it. (D0029, P. 1, ¶2) (Wilsons' Resistance to Summary Judgment Motion). Wilsons also asserted there was good cause for designating Beerman late, to wit: Wilsons reasonably relied upon Shenandoah's agreement to schedule depositions in the Fall. (D0029, P. 1, ¶4) (Wilsons' Resistance to Summary Judgment Motion). Wilsons additionally claimed that any late *disclosure* of Beerman's opinions was harmless because defense counsel agreed to delayed depositions and trial wasn't until July, 2024 anyway which was at Shenandoahs' request. (D0030, P. 2-3, ¶6) (Wilsons' Disputed Summary Judgment Facts); (**App. P. 50**: D0031 P. 8) (Wilsons' Summary Judgment Brief) (referencing the lack of prejudice due to the July, 2024 trial date). Finally, Wilsons raised the issue of the lack of a good faith meet-and-confer phone call attempt by defense counsel as required by Iowa Rule of Civil

Procedure 1.517. (**App. P. 49**: D0031, P. 7) (Wilsons' Summary Judgment Brief).

Shenandoah replied to Wilson's summary judgment arguments by reiterating its prior motion points. (D0033) (Shenandoah's Reply to Resistance to Motion for Summary Judgment). Notably, however, Shenandoah failed in its reply to address the issue of the lack of a good faith discovery call before filing its discovery-related summary judgment motion. (D0033) (Shenandoah's Reply to Resistance to Motion for Summary Judgment).

The district court held a hearing on January 19, 2023. (D0035) (Court Reporter Memorandum). At the hearing, defense counsel admitted that "promptly" after its motion for summary judgment was filed, Wilsons filed their designation and disclosures. (**App. P. 71**: Transcript, P. 6, L. 6-13). The *only* prejudice claimed was "Shenandoah had to provide their disclosures first, causing prejudice to the Defendant." (**App. P. 74**: Trans. P. 9, L. 23-25). There was no claim by Shenandoah that Wilsons' case was frivolous, nor any claim of a fear that Wilsons would not have an expert retained in time for trial, nor any *evidence* of any extra time, labor, or expense that *anyone* had to put into the defense of the case as the result of any delay by Wilsons.

Counsel for Wilsons responded that he "provided information about my expert during written discovery." (**App. P. 76**: Transcript, P. 11, L. 7-9). He also stated that he had been attempting to schedule depositions since before the September and October emails, claiming deposition requests were made as far back as May, 2022. (**App. P. 76**: Transcript P. 11, L. 10-11). Shenandoah did not deny those assertions. Wilsons' counsel also rejected any claim of prejudice noting that case was "still not set for trial for another year and five or six months." (**App. P. 76**: Trans. P. 11, L. 23-25). So, regardless of Wilsons' timing, or lack thereof, defense counsel still would not be ready until 2024 anyway. Finally, Wilsons' counsel reminded the court that even if Shenandoah was correct about everything, dismissal was still not a mandatory remedy; other sanctions were available. (**App. P. 76**: Trans. P. 11, L. 25); (**App. P. 77**: Trans. P. 12, L. 1). Shenandoah gave a brief rebuttal argument reiterating its points again, but still never addressed the absence of a good faith phone call.

On March 5, 2023, the district court entered its order denying Shenandoah's motion for summary judgment. That is the order which is the subject of this appeal.

In the order, the district court properly determined that the relevant statutes were Iowa Code section 668.11 and Iowa Rule of Civil Procedure

1.500(2). (**App. P. 56**: D0036, P. 3). The court concluded that "good cause" is an exception to the designation deadlines in Iowa Code section 668.11. (**App. P. 57**: D0036, P. 4) (Summary Judgment Ruling). The court also concluded that "substantial justification" and "harmlessness" are both exceptions to Iowa Rule of Civil Procedure 1.517's remedial mechanisms. (**App. P. 57**: D0036, P. 4) (Summary Judgment Ruling) (good cause); (**App. P. 59**: D0036, P. 6) (Summary Judgment Ruling) (substantial justification and harmlessness standards). The court underlined the "substantial justification" and "harmless" language from the rule in its order and concluded that Shenandoah omitted that operative language from its summary judgment brief. (**App. P. 59**: D0036, P. 6) (Summary Judgment Ruling) (showing the underline and highlighting Shenandoah's omission).

Applying the "good cause" and "harmlessness" tests, the court found that since Wilsons had provided information about their expert, Nurse Beerman, in part through the certificate of merit and in part through discovery, and because defense counsel had delayed depositions in the case due to their *own unavailability* to work on the case, there was sufficient good cause to excuse the late designation under Iowa Code section 668.11. (**App. P. 58**: D0036, P. 5) (Summary Judgment Ruling).

Additionally, applying Iowa Rule of Civil Procedure 1.500(2), the court found that although Wilsons' expert disclosures were after the proposed date in the parties' TSDP, the court was not willing to bar the expert from testifying because "the court considers the Wilson's [sic] failure to meet the disclosures harmless considering the delayed trial date requested by SMC, the unavailability of SMC's counsel for depositions, and the lack of surprise or prejudice to SMC." (**App. P. 59**: D0036, P. 6) (Summary Judgment Ruling). Declining to bar the expert, the court determined that the rest of the motion for summary judgment was therefore moot, so the motion was denied. (**App. P. 59**: D0036, p. 6) (Summary Judgment Ruling).

Shenandoah subsequently petitioned to file an interlocutory appeal on March 29, 2023 which was granted by the Iowa Supreme Court on June 9, 2023.

This Court should affirm the district court's ruling and remand this matter for trial.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF "GOOD CAUSE" AND "HARMLESSNESS" WERE WELL WITHIN ITS BROAD DISCRETION.

Standard of Review:

The standard of review is for abuse of discretion. That standard is a determinative factor in this appeal.

Preservation of Error:

Shenandoah *did* properly preserve error on their Iowa Code section 668.11 expert designation claim.

Shenandoah did *not* properly preserve error on their Iowa Rule of Civil Procedure 1.500(2) expert disclosure claim. Shenandoah never made a good faith phone call about this expert *discovery* issue, nor did Shenandoah *certify* the *time* and *date* of its good faith phone call in its discovery-related motion as required by Iowa Rule of Civil Procedure 1.517. Thus, *if* the Court on appeal finds that the district court abused its broad discretion in finding Wilsons' delayed disclosure harmless, *then* Wilsons' alternate basis for affirmance is Shenandoah's failure to preserve the issue via its own lack of a good faith phone call.

A. THE ABUSE OF DISCRETION STANDARD OF REVIEW REQUIRES GREAT DEFERENCE TO THE DISTRICT COURT.

The Iowa Supreme Court has "frequently stated" that "a trial court is entitled to exercise a broad discretion in the admissibility of expert testimony." Bell v. Community Ambulance Service Agency for Northern Des Moines County, 579 N.W.2d 330, 338 (Iowa 1998). "[G]reat deference is given" to the district court to exclude expert testimony, or not. Bell, 579 N.W.2d at 338. "Courts typically have not, and will not interfere" with district court expert testimony rulings unless the discretion "has been manifestly abused to the prejudice of the complaining party." Id. Therefore, rulings concerning the application of the statutes or rules concerning the discovery of experts are reviewed for an abuse of discretion. Matter of Dethmers Manufacturing Company, 985 N.W.2d 806, 813 (Iowa 2023).

An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons that are clearly untenable or to an extent clearly untenable. State v. Buenaventura, 660 N.W.2d 38, 50 (Iowa 2003). Grounds and reasons are clearly untenable if not "supported by substantial evidence" or when they are "based on an erroneous application of the law." Buenaventura, 660 N.W.2d at 50 (quoting Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000)).

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.

Hence, the courts on appeal should accord respectful deference to the findings of the district court if they are supported by substantial evidence, and not clearly untenable. That deference should be given *even if* the appellate court would have made a different decision had it been the first arbiter, rather than the reviewing court.

In the case at issue, the district court's ruling should be affirmed under an abuse of discretion standard of review because it is supported by substantial evidence: emails, and it is not clearly untenable under the Hawkeye test.

B. THERE WAS NO ABUSE OF DISCRETION IN THE DISTRICT COURT'S FINDING OF "GOOD CAUSE" PURSUANT TO IOWA CODE SECTION 668.11.

Pursuant to Iowa Code section 668.11 experts must be designated by an injured plaintiff within six months of a defendant's answer. Iowa Code § 668.11 (establishing a 180-day rule). If experts are not timely designated, then the expert is prohibited from testifying unless leave for the testimony is given for "good cause" shown. Iowa Code § 668.11.

The purpose of 668.11 is to ensure that medical professionals don't have to spend time, money, and effort defending frivolous claims which later result in last minute dismissals. Nedved v. Welch, 585 N.W.2d 238, 240 (Iowa 1998) (denying Nedved's request to extend the expert designation deadline because Nedved's claim that it had been trying to schedule depositions was completely unsupported by the record and the expert's name had never even been told to opposing counsel prior to the expiration of the deadline). Another purpose is to provide some certainty as to the identify of a party's experts. Id. The "good cause" test for a excusing a delayed

designation examines for 1) seriousness, 2) prejudice and 3) contribution or fault, and requires substantial evidence of a truthful reason for delay. Nedved, 585 N.W.2d at 240. Only where no good cause exists will an untimely designated expert be prohibited from testifying.

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) (stating "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."). 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) (nothing 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).

Also, if counsel agrees to delay discovery or depositions, that too can constitute good cause if there is actual evidence to support that being the cause for delay. Nedved, 585 N.W.2d at 240 (rejecting Nedved's late depositions argument because there was no evidence in the record to support the argument). In Nedved, Plaintiff *claimed* Defendants wanted to delay discovery, and that was the reason for his delayed designation; however,

Nedved had no proof of that claim; it was just a bare assertion by him without any evidence. Id.

Finally, in cases where a scheduled trial date remains unaffected by delayed discovery, the court is less likely to find any prejudice occurred and thus less likely to exclude an expert from testifying. Edgar v. Armored Carrier Corp., 128 N.W.2d 922, 926 (Iowa 1964). This is because there is still plenty of time to counteract any surprise or prejudice caused by a "late" designation. For example, in Hawkeye, the Supreme Court affirmed the district court giving defense counsel merely the weekend to review the information from Plaintiff's new expert, and that was held to be sufficient to cure any prejudice and allow the late expert to testify.

1. Shenandoah's Counsel Contributed to the Delay.

In this case the district court found there was substantial evidence of good cause for delayed designation, to wit: emails showing *both counsel* expressly agreed to extend discovery depositions into the "fall", which was *past* the 180-day deadline. (**App. P. 38**: D0030, P. 4) (Wilsons' Disputed Summary Judgment Facts). In the emails, Wilsons were ready to get started with depositions in spring and summer, 2022, but defense counsel wanted to delay until fall, and further, defense counsel only wanted to take depositions in a particular order. On May 9, 2022, defense counsel, Vince Geis, emailed

and said "We can work on deposition dates as well. We will want the Wilson's depositions before our nurses. I think we will both want discovery responses before any depositions. **So perhaps we can look at holding some dates for this fall**." (**App. P. 38**: D0030, p. 4) (Plaintiff's Disputed Summary Judgment Facts) (emphasis added). When no dates ever got scheduled, Wilsons began following up again in September and October only be told then that defense counsel *now* wasn't available until January, 2023. (**App. P. 41-42**: D0030, P. 7-8) (Wilsons' Disputed Summary Judgment Facts). Since, under Nedved, an agreement to delay discovery constitutes good cause to miss or extend an expert deadline, and there is substantial evidence of an agreement to do that in this case, the Court should affirm the district court's conclusion that good cause existed.

While, to be sure, defense counsel is not required to be his brother's keeper, courts also do not condone misusing good faith discovery extensions in order to lull the other party into a *false* sense of security over the agreed-upon delay. In re Marriage of Hutchinson, 974 N.W.2d 466, 476-77 (Iowa 2022) (describing bribes, dishonesty, and false promises as extrinsically fraudulent). The rules are supposed to be construed and applied to encourage *good faith* and fair dealing, not baits and switches. Had defense

counsel simply picked up the phone and asked about experts, like the rules require, *all* of this delay could have been avoided.

In summary, if a two-year delay combined with a new expert the week of trial was not reversible in the Hawkeye case, then it is not reversible error here because the case was on file for less time, trial was further away, and Wilsons did far more than Preferred Marketing did in the Hawkeye case to make their expert known. And where, as here, the undisputed evidence shows the parties agreed to delay discovery due to defense counsel's busy schedule and defense counsel's preferred ordering of discovery deponents, the district court's conclusion that Nurse Beerman would not be excluded was not "clearly" untenable. Rather, the district court's conclusion was a reasonable way to ensure a fair process for both parties especially in light of trial being scheduled still over eighteen 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-one-year remaining before trial in this case is enough time for Shenandoah to deal with the (non) surprise of Nurse Beerman. The district court should therefore be affirmed.

2. No Strategic Advantage Was Lost.

Shenandoah claims in its brief that it suffered the loss of a strategic advantage by disclosing its expert materials first. Shenandoah doesn't explain exactly what the advantage is, or how it practically impacted them in this case, though. Was it the loss of the element of surprise? Did Shenandoah have to expend *extra* time or expense that it normally wouldn't have spent? Does Shenandoah now have to get a rebuttal report that it otherwise wouldn't have gotten? Something else? Shenandoah doesn't explain, so it is impossible to weigh the significance.

In truth, Shenandoah's harm is the exact same harm that everyone in its position would claim when there is no other evidence of real prejudice. Shenandoah cannot claim Nurse Beerman's name is new; they already knew of her. They cannot claim they were ready for *trial* because their schedules were too busy for *depositions*. They cannot claim the trial needs to be continued as a result of the delay, trial was still eighteen months away. The *only* thing they can claim is that they designated first, a common occurrence in late designation cases. This harm, while theoretically real, is *de minimus* when compared to the alternate harm on Wilsons' side of the scales of justice: complete deprivation of trial. In balance, the district court's decision

avoided the worst harms by allowing Nurse Beerman to remain as an expert. Thus, the district court should be affirmed.

3. Shenandoah Prejudiced Itself.

Shenandoah claims in its brief that because it had to designate its expert first, it has somehow lost a strategic advantage. (Proof Brief, P. 25). However, that claim is not supported by the record in this case. Here, Nurse Beerman's certificate of merit was served by Wilsons on February 1, 2022, nine months before Shenandoah designated an expert. Wilsons also gave discovery responses about Nurse Beerman in their answers served June 13, 2022 a little more than five months before Shenandoah designated an expert on November 30, 2022. That information exchange negates any "strategic" loss claimed by Shenandoah. Shenandoah had nine, and then five months, respectively, to strategize about Beerman before naming its own experts.

Shenandoah *chose* to designate first rather than picking up the phone to discuss the issue like Iowa Rule of Civil Procedure 1.517 demands. Had Shenandoah made a phone call, Shenandoah could have *asked* counsel for Wilsons if Beerman is the expert Wilsons intended to use or if Wilsons were going to retain someone else or no one at all. In the same call, Shenandoah also could have discussed an extension of expert deadlines for itself. Both of those discussion points would have saved Shenandoah from "losing" its

strategic advantage. But rather than place one simple call, Shenandoah instead chose the summary judgment route and then this appeal. That isn't "losing" an advantage, it is giving one up voluntarily.

Assuming there was any "strategic advantage" lost, Wilsons submit there is no Iowa authority cited by Shenandoah which recognizes *that kind* of harm as sufficient to exclude an expert *especially* when the opposing party already has all the relevant information about the expert. The only case cited by Shenandoah for their "lost strategic advantage" theory is their own lawyers' former case: Stanton v. Knoxville Community Hospital, Inc., 2020 WL 4498884 *3-4 (Iowa App. 2020). But the case is unpublished so it carries no precedential weight. Iowa R. App. P. 6.904(2)(c) ("Unpublished opinions or decisions shall not constitute controlling legal authority.").

Even if Stanton were persuasive, though, it should still be rejected because it is factually dissimilar from this case. First, Stanton didn't even *look* for an expert for more than a year after filing his case. Second, Stanton didn't answer the discovery question about his experts. Third, there was no agreement in Stanton to delay discovery. Fourth, the defense lawyers, which just so happen to be two of the three same defense counsel here: Jennifer Rinden and Nancy Penner, didn't have unavailability problems with their

trial calendar like they do here. Fifth, trial wasn't still eighteen months away at the time Stanton's designation was due in that case.

In this case, by contrast, Nurse Beerman's certificate was on file thirty-seven days after the petition was filed: December 27, 2021-February 1, 2022. More information was given about her in discovery on June 13, 2022, less than six months after the case was filed. And here, Shenandoah asked to push depositions back; in May, Shenandoah delayed until "fall", and then when "fall" came, they were still too busy until winter, January, 2023. Thus, when Shenandoah's own expert deadlines were possibly looming, rather than engage in a bait-and-switch, Rinden and Penner should have picked up the phone and talked about Beerman and expert issues. But rather than do that, they filed Shenandoah's expert materials and moved for summary judgment. Hence, under these facts, any "strategic advantage" Shenandoah had was *given away*, not lost. Shenandoah had plenty of options to avoid lost strategy; it simply chose not to exercise those options.

The district court was correct to determine that the harms claimed by Shenandoah were not sufficient to exclude Beerman, thus, its decision should be affirmed.

C. THERE WAS NO ABUSE OF DISCRETION IN THE DISTRICT COURT'S FINDING OF HARMLESSNESS PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.517.

Pursuant to Iowa Rule of Civil Procedure, 1.500(2) certain information about a party's experts, and the experts' reports, must be disclosed to the other party by deadlines set forth in a court's "trial scheduling order" or, in the absence of an order, then "no later than 90 days before the date set for trial." Iowa R. Civ. P. 1.500(2)(d)(1). If a party fails to disclose that information on time, then the party is not allowed to use that witness at a hearing, to supply evidence on a motion, or at trial unless the failure was either substantially justified or is harmless. Iowa R. Civ. P. 1.517(3)(a).

If a failure is not substantially justified or harmless, then the district court can exclude the witness pursuant to Iowa Rule of Civil Procedure 1.517(3)(a). Generally, though, courts are "unwilling to dispose of cases for failure to abide by the rules of discovery. Hantsburger v, 501 N.W.2d at 505. "Rather, our objective is to dispose of cases on the merits." Id. Thus, the rules provide that "instead of this sanction", meaning instead of excluding the expert, the court may order payment of the other party's attorney fees, inform a jury about a party's late disclosures, or impose "other appropriate sanctions" including those listed in "rule 1.517(2)(b)." Iowa R. Civ. P.

1.517(3)(a)(1)-(3). Those "other appropriate" sanctions also include ruling that certain facts will be taken as established, ruling that certain claims or defenses can no longer be made, or ordering certain parts of the pleadings be stricken. Iowa R. Civ. P. 1.517(2)(b) (1)-(3). Dismissal is never mandatory.

Before a party seeks relief from the district court to compel expert disclosures following a timeline violation, the party is *supposed to first* confer with opposing counsel about the issue, and then, in his or her motion to compel or impose sanctions, state the time and date of the attempts to confer. Iowa R. Civ. P. 1.517(1)(b)(4). The reason for the rule is so that discovery disputes don't consume "considerable court time" on appeal or on remand. Matter of Dethmers Manufacturing Company, 985 N.W.2d at 821. Often, if an "attorney had picked up the phone, all of this time and trouble could have been avoided by a discussion...". Id. (Waterman, J., concurring). Application of the discovery rules is supposed to encourage lawyers to conduct "good faith negotiations" and not "punt" the issue to the district court by stonewalling. Id. Strict meet and confer requirements, as the rule expresses, often promote "[prompt] productive discussions" obviating the delays and expenses of an appeal. Id.

1. Wilsons' Disclosures Were Not Technically Late.

In this case, the parties entered into a trial scheduling and discovery *plan* which set forth September 1, 2022 as Wilsons' expert disclosure deadline. However, that *plan* was never ratified by the district court in its trial-setting *order*. The order only set the timeframe for trial in July, 2024, and set a status hearing for December, 2023. It did not adopt any TSDP agreements of the parties. Since the rule says that only deadlines set forth in "orders" can trump the otherwise applicable ninety-days-before-trial rule, Wilsons' disclosures were never late at all because trial wasn't scheduled until July, 2024. Iowa R. Civ. P. 1.500(2) (pretrial expert disclosure deadline).

2. Shenandoah Failed to Satisfy the Good Faith Phone Call Requirement.

In this case, Wilsons raised the issue of the lack of an Iowa Rule of Civil Procedure 1.517 phone call by Shenandoah in Wilsons' summary judgment brief. (**App. P. 49**: D0031, P. 7) (citing the rule and noting that before compel sanctions may be imposed, counsel must still have communication to attempt resolution in good faith). Wilsons also raised in their brief the issue of the lack of the time and date certification about the phone call in Shenandoah's motion. (**App. P. 49**: D0031, P. 7). Shenandoah never denied either of those failure, nor denied that they were dispositive.

Although the district court never ruled on the lack of a good faith phone call or the absence of time and date certification issues, those alternate theories of relief justify affirmance in this case. As the Supreme Court noted in Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 774 (Iowa 2009) a successful party is "not required to cross-appeal or to request the district court to rule on the issue" after the district court enters other positive relief for that party. Jasper, 764 N.W.2d at 774. "As a successful party at trial, error was preserved by asserting the claim before the district court. An erroneous decision by the district court can be affirmed on appeal based on a different ground that was properly raised at trial." Id.

Accordingly, since Shenandoah never denied its own lack of a good faith phone call, and its own lack of good faith time and date certification on the face of its motion, and those failures are fatal, the Court on appeal should affirm the district court. Matter of Dethmers Manufacturing Company, 985 N.W.2d at 821 (Waterman, J., concurring, and noting that motions for discovery sanctions must be preceded by a phone call and statutory certification in the motion). Shenandoah is required to comply with the discovery rules before it can seek their protection; Shenandoah must take the bitter with the sweet. In this case, the failure to have the phone call is fatal under the discovery rules.

3. The Delayed Disclosure Was Harmless.

In this case, the district court found that the parties had already engaged in extensive discovery about Nurse Beerman, thus, there was no "surprise" to Shenandoah about who Wilsons' expert would be. (**App. P. 59**: D0036, P. 6) (Order Denying Summary Judgment). Additionally, because there was already a certificate of merit on file there was no chance that the case Wilsons filed after Mr. Wilson's fall at Shendoah was "frivolous". (**App. P. 55**; D0036, P. 2) (Order Denying Summary Judgment). Finally, since the trial was not scheduled until July, 2024, a delay which came at the insistence of Shenandoah, there were more than eighteen months remaining for Shenandoah to get prepared. (**App. P. 58**: D0036, P. 5) (Order Denying Summary Judgment). Like a single weekend was long enough for Hawkeye to get prepared to meet Preferred Marketing's new expert in the Hawkeye case, so too then would eighteen months of prep time here cure any potential harm. Thus, the district court's ruling should be affirmed.

When, as in this case, the disclosure delay was arguably not even past the court "ordered" deadline because there was no court "order" imposing a deadline, and where, even if there was a deadline it was missed merely by a few months, and where trial was still nearly two years away because defense counsel was too busy to try the case sooner, the district court did not

"clearly" act untenably in *not* excluding Beerman. Thus, the district court's ruling should be affirmed.

4. Exclusion Was Not Required.

Even presuming that Wilsons' expert disclosure was late, and even presuming it was not mostly harmless, the district court was still well within its broad discretion to not exclude the expert. The district court could have chosen among many remedies. It could have limited the expert to only testifying about certain issues, it could have found that certain other issues in the pleadings were deemed admitted or denied, it could have struck particular claims or defenses, it could have awarded attorney fees, or it could have made other accommodations for defense counsel, such as by allowing Shenandoah to have a late designation, or some other time to prepare, like in the Hawkeye case.

However, the trial court aptly determined in this case that no sanctions were needed. The rule says "may", not "shall", and trial was still two years 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 the expert who was designated was not a surprise; Nurse Beerman was the certificate of merit affiant and fully disclosed about in discovery. Indeed, even if Wilsons had fully designated and disclosed on time, defense counsel was still not

even ready for depositions themselves, much less ready for a trial. The district court rightly determined, therefore, that exclusion of Nurse Beerman in 2022 was not necessary for a trial in 2024.

If it isn't an abuse of discretion to allow a new expert to testify one week before a trial in a two-year-old case where prior discovery indicated *no* expert would testify, such as in Hawkeye, then it most certainly is not an abuse of discretion in a less-than-one-year-old case where trial was still two years away and where discovery was delayed by Shenandoah which was *not* surprised or prejudiced in any meaningful way. *This* case, even more so than the ruling in Hawkeye, should be affirmed and the case should be remanded for trial.

D. Wilsons' Case Does Not Require an Expert.

In this case, Wilsons argued in their summary judgment resistance that *even if* Nurse Beerman were excluded, it doesn't mean the case should be concluded at summary judgment because the negligence in this case was so obvious that no expert is needed. (**App. P. 43-47**: D0031) (Wilsons' Summary Judgment Brief). The district court did not rule on this issue because it allowed Nurse Beerman to remain as an expert in the case.

If the Court on appeal determines that the district court erroneously retained Nurse Beerman as an expert in the case, the Court should still

remand the matter for trial anyway because the ordinary negligence claim survives the lack of an expert. First, defense counsel agreed at the summary judgment hearing that the level of care ordered by doctors for Mr. Wilson was "one-to-one nursing care." (**App. P. 72**: Transcript, P. 7). Second, Shenandoah's own witness agreed that Shenandoah's night nurse for Mr. Wilson consciously stepped away from him to "allow a 'touch of privacy'" (over safety) which was enough space between herself and Mr. Wilson for Mr. Wilson then to confusedly try to stand again, which then led to his fall. (**App. P. 30**: D0026, Exhibit G, P. 2).

Thus, in this case, Beerman isn't even needed as an expert anyway, and excluding her wouldn't avoid a trial. Thus, the case would and should still be heard by a jury on the merits. That being the case, since trial is unavoidable, it just makes sense to allow Nurse Beerman to testify at it. No harm, no foul. The district court's ruling should be affirmed.

CONCLUSION

Everyone agrees that the appellate standard of review is for abuse of discretion. That test is highly deferential to the district court. Unless the district court's decision was not supported by substantial evidence or unless it was "clearly" untenable, then it should be affirmed. The law favors trial on the merits, not dismissal by surprise.

There was good cause to permit the late designation of Nurse Beerman because both counsel agreed to complete written discovery before depositions, to conduct depositions only in a particular order of witnesses, and defense counsel wasn't physically available for depositions until January, 2023 anyway. Under Nedved, those circumstances amount to "good cause" for delayed designation.

The late disclosure was also harmless because Beerman wasn't a surprise; she executed the certificate of merit and was the subject of written discovery. There was also no forced rush: trial was nearly two years away and defense counsel were, by their admission, too busy to work on this case until 2023 at the soonest. The only claimed prejudice: that Shenandoah designated its expert first, not second, is the exact same prejudice every defendant in this situation would face, it isn't unique. Presuming it is legitimate, though, designating first rather than second is a *de minimus* harm when compared to a complete loss of trial rights on the other side of the scales.

Even if there was no good faith and the error wasn't totally harmless, many remedies shy of exclusion of the dispositive expert were available. The sanction of exclusion should be limited to rare circumstances only. If was not an abuse of discretion for the Hawkeye court to permit a new expert

a week before trial in a two-year old case, then it was not an abuse of discretion for the district court here to keep Beerman as an expert in the case either.

Next, technically speaking, it is doubtful whether the September 1, 2022 deadline in the TSDP even applied to disclosures in this case at all since the TSDP date was never ratified by a court *order*. Of course, no one will ever know that answer because Shenandoah skipped the discovery phone call, compel, and sanction process and went straight to filing for surprise summary judgment instead. Had defense counsel picked up the phone pursuant to Iowa Rule of Civil Procedure 1.517 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 appeal.

Finally, even if the district court abused its discretion in not excluding Beerman, the case should still be remanded for trial anyway. The promised level of care to Mr. Wilson: "one-to-one" was not met, and even defense counsel, and the defense doctor, agree. And if the case is destined for trial anyway, then it just makes sense to let Nurse Beerman testify, too. At least then a jury will get a full story, rather than just a partial one.

There is no doubt the district court's ruling was well within its broad discretion to resolve discovery disputes. Since it was supported by

substantial evidence and is not clearly untenable, it should be affirmed. The case should be remanded.