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 Application for Further Review Of Court of Appeals July 24, 2024 Decision

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Questions presented for review

1. **Whether a plaintiff must actually articulate a reason for the failure to timely disclose an expert for a finding of good cause under Iowa Code section 668.11(2) to allow the expert to testify.**

2. **Whether defense counsel must somehow urge compliance before section 668.11(2) is enforced.**

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Statement supporting further review[1]

This appeal concerns what constitutes "good cause" to allow testimony from an untimely disclosed expert. The Court of Appeals' Decision is in conflict with other Iowa opinions. As argued in the Hospital's application for interlocutory review and routing statement, it is time for this Court to revisit the good cause analysis.

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

There is no dispute that Plaintiffs missed their agreed-to deadline for expert certification and production of expert reports. The deviation from the deadline was serious.

Plaintiffs have never offered any explanation for the noncompliance. Instead, Plaintiffs blamed Defendant Shenandoah Medical Center (the

[1] The following are attached:

Exh. 1 Court of Appeals Decision (7/24/24)
Exh. 2 District Court Ruling (3/5/23) (also at App. 54-61)

"Hospital"), arguing defense counsel failed to remind Plaintiffs of their deadline and misled Plaintiffs by continuing to work on the case in spite of the missed deadline.[2] This purported "good cause" was largely adopted by the district court—and affirmed by the Court of Appeals. Exh. 1 at 6, 10-11; *but see id.* at 15-16 (dissent). Plaintiffs also emphasized that trial was not imminent. The district court agreed and attributed the delayed trial date to defense counsel notwithstanding the Hospital had previously established good cause for the trial date. Again, the Court of Appeals endorsed this reasoning. Exh. 1 at 6; *but see id* at 16-17 (dissent).

Issues surrounding the good cause analysis that warrant further review include:

- whether a plaintiff must actually articulate a valid reason for their failure to comply with expert deadlines; and
- whether defense counsel must somehow urge compliance before section 668.11(2) is enforced.

The Decision in this case undermines section 668.11 and turns the tables to punish a defendant for not reminding the plaintiff of statutory deadlines, for continuing to work on the case, and for previously raising calendar conflicts. The Decision conflicts with a number of Iowa appellate

cases on what establishes good cause. Further review is warranted. *See* Iowa R. App. P. 6.1103(1)(b)(1); *see also* Exh. 1 at 13 (dissent, "I would follow *Stanton [Knoxville Cmty. Hosp. Inc.*, No. 19-1277, 2020 WL 4498884 (Iowa Ct. App. 2020)] and reverse . . .").

The issue is important. *See* Iowa R. App. P. 6.1103(1)(b)(1)(2). The legislature would not have enacted Iowa Code section 668.11 if it did not intend for it to be applied. Defendants rely on expert deadlines—and the statute and rules are intended to provide real procedural defenses when a plaintiff fails to comply. Decisions such as this one severely limit—if not eliminate—those defenses.

Is a valid reason required to support a good cause finding?

Neither the district court nor the Court of Appeals identified an actual explanation offered by Plaintiffs for their failure to comply with their 668.11 deadline. Instead, Plaintiffs blamed defense counsel. Exh. 1 at 12 (dissent: "The Wilsons offered no reason for their failure to comply with the statute . . . aside from blaming SMC . . ."). Thus, the Court of Appeals affirmed that Plaintiffs established good cause for their failure to timely designate in the absence of any reason offered by Plaintiffs. This is in conflict with other

[2]App. 48-52 (12/13/2022 resistance filings to motion for summary judgment: Brief (D0031 at 6-10), Statement of Undisputed Facts (D0030 ¶6), and Affidavit (D0032 ¶4).

decisions, including *Stanton*, that identified the failure to show a valid reason for noncompliance as a key concern supporting reversal. *Id.* at 12-13 (dissent, explaining *Stanton).*

"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) (good cause is "'a sound, effective, truthful reason, ... The movant must show his failure . . . 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"); *Laden & Pearson, P.C. v. McFadden*, No. 20-0093, 2021 Iowa App. LEXIS 498 **6, 9 (Iowa Ct. App. 2021) (affirming grant of summary judgment given failure to timely designate and establish good cause, noting party did not "provide a good-cause reason"); *Tamayo v. Debrah*, No. 17-0971, 2018 WL 4922993 *2 (Iowa Ct. App. 2018) (affirming that good cause was lacking when plaintiff's counsel conceded the expert deadline "'slipped through the cracks'" as this was "nothing more than an excuse, plea, or apology").

In *Stanton,* the Court relied upon the fact the expert deadline was clear and plaintiff's "counsel was actually aware" of it—"He agreed to it." *Id.* *4. While the plaintiff offered an explanation for the failure to designate, the Court of Appeals found it was not a valid reason. *Id.* Here, like *Stanton*, the expert deadline was clear, actually known by Plaintiffs, and was agreed-to by Plaintiffs.[3] But, unlike *Stanton¸* Plaintiffs offer no reason or explanation at all for the failure to timely designate. If there was a failure to establish good cause in *Stanton*, there was a failure here as well. Plaintiffs had "the burden to show good cause exists," *Reyes,* No. 21-0303, 2022 Iowa App. Lexis 431 *7 (citing *Nedved)*, and failed.

The Decision (at 5) quoted the good cause language from *Reyes* and *Nedved* but was silent on how Plaintiffs satisfied this threshold requirement (because Plaintiffs completely failed to do so). In his dissent, Judge Langholz identified this incongruity with prior case law, including *Stanton*. Exh. 1 at 12-13.

In summary, given the conflicting law on the issue, a party no longer knows whether a valid reason is required for a good cause finding under section 668.11(2). This conflict should be resolved.

[3]Exh. 1 at 5; App. 12-13.

Must defense counsel somehow urge compliance before 668.11(2) is enforced?

In addition to considering the proffered reason (if any) for a failure to comply, Iowa courts have also considered three factors in the good cause analysis: "(1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant's counsel's actions." *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998) (citing *Hantsbarger v. Coffin*, 501 N.W.2d 501 (Iowa 1993)). The third factor presents a conflict in the case law.

The overriding basis for the district court's ruling to excuse Plaintiffs' failure to comply with expert requirements was to place responsibility on the defense. The court cited, on one hand, the defense counsels' busy calendars resulting in "delays" and, on the other hand, defense counsel's ongoing work on the case. Exh. 2 at 5.

The ruling was in response to Plaintiffs' argument that blamed their missed deadline on the defense. Plaintiffs argued that the defense "'misled Plaintiffs about the seriousness with which the expert discovery deadline was being treated'" and should have conveyed the defense intent to file a dispositive motion. Exh. 1 at 15 (dissent).[4]

[4]Plaintiffs escalated their accusations on appeal, including: "Had defense counsel simply picked up the phone and asked about experts, like the rules

The district court recited that: the Hospital "acquiesced" in Plaintiffs' failure to timely disclose because defense counsel worked on scheduling depositions both before and after Plaintiffs' deadline; the Hospital counsel's unavailability resulted in scheduling delays;[5] and the Hospital "continued working on the case even without the Wilson's expert designation." Exh. 2 at 5. Even in finding a lack of prejudice (since trial was not imminent), the district court placed responsibility on the defense, emphasizing that it was the Hospital that requested the delayed trial date. *Id.*

In short, the district court placed the entire responsibility for Plaintiffs' unexplained noncompliance on the defense. The Court of Appeals found nothing troubling with this reasoning, quoted it at length, and re-employed it in its own Decision. Exh. 1 at 6-11. But this reasoning is in conflict with a number of decisions.

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require*, all* of this delay could have been avoided." Brief at 30-31 (1/30/24) (emphasis by Plaintiffs). But no rule requires this for a section 668.11 deadline violation. Nor is it required under Rules 1.500(2) or 1.517(3)(a). *E.g., Kellen v. Pottebaum*, No. 18-1034, 2019 Iowa App. LEXIS 565 *8 (Iowa Ct. App. 2019) (Rule 1.517(3)(a) is "automatic concerning the use of evidence that a party failed to provide").

[5] Plaintiffs have never argued that they could not timely disclose their expert *because* of a delay in any discovery or that they were waiting on depositions *in order to* disclose. Further, 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.

In *Stanton,* the Court of Appeals strongly disagreed that defense actions supported a good cause finding. 2020 WL 4498884 *4. The Court rejected the notion that defendants should not promptly move for summary judgment based upon a plaintiff's failure to timely designate experts. *Id.* **4-6. The Court also rejected an argument that the defense approach to "wait and 'see'" if there was a failure to designate was inappropriate. *Id.* **4 n.3 (defense counsel "had no duty to wait longer or offer additional help to their adversary [and a] contrary view would turn defense counsel into their 'brother's keeper'"—something "expressly rejected" by *Hantsbarger*).[6] Here, Plaintiffs essentially make the very argument rejected in *Stanton*—that defense counsel had a duty to help plaintiffs by "picking up the phone" to resolve the expert issue before filing a motion.[7]

As Judge Langholz explained in dissent, *Stanton* emphasized its concern over a district court's conclusion that defense counsel's actions supported a good cause finding. Exh. 1 at 14. Judge Langholz' explanation highlights the very real and practical problems created by the third *Hantsbarger* factor:

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[6] *Hantsbarger*, 501 N.W.2d at 505 (discussing defense actions but "not suggest[ing] that opposing counsel must act as his or her 'brother's keeper.'").

[7] *E.g.,* Plaintiffs' brief at 33-35 (1/30/24).

> The conduct the Wilsons complain about is precisely the sort of normal, zealous advocacy one would expect from opposing counsel. SMC's counsel were under no duty to preview their forthcoming summary-judgment motion to the other side—indeed, doing so at the expense of their client's possible ground for dismissing the case might well have breached their ethical duties. . . .
>
> Nor was it misleading to engage in scheduling discussions after the Wilsons missed the deadline. It was prudent, courteous, and ethical from SMC to keep the litigation train moving . . . I would thus reiterate *Stanton's* guidance that good cause cannot be based on this type of conduct by opposing counsel . . .

Id. at 15-16.

Stanton does not stand alone as contrary to the Decision. In *Reyes*, 2022 Iowa App. Lexis 431 *5-6, the Court essentially dismissed an excuse that the defense "remained silent" as plaintiff missed the deadline. In *Tamayo*, 2018 WL 4922993 *3, the Court of Appeals rejected the notion the defendant must remind the plaintiff of its deadline. *Id.* ("the defense had no obligation to remind [plaintiff] of the deadline before moving to strike her experts" and duty to confer to resolve a discovery dispute does not apply).

The third *Hantsbarger* factor that allows the court to consider the defense counsel's action in whether a plaintiff has demonstrated good cause under 668.11 should be re-evaluated. As it was applied here, it would require the Hospital to unilaterally refuse to continue to work on the case because it envisioned a dispositive motion. And, it is unjust to penalize a party who

continues to work on a case notwithstanding the possibility of a dispositive motion by holding that work is an acquiescence or waiver of some kind. Indeed, possible grounds for a dispositive motion may be identified early in a case but the default deadline for such a motion is 60 days before trial. Iowa R. Civ. P. 1.981(3). Moreover there are numerous times during litigation when a party waits for an advantageous time to raise an issue or file a motion. Further, if a motion is ultimately not filed or a ruling is delayed, precious time is lost.

The Court of Appeals' Decision places a defendant in a no-win situation. To be on solid ground in moving for relief when the plaintiff fails to comply with expert deadlines, a defendant should never raise scheduling conflicts in the case, should remind the plaintiff of expert disclosure obligations, and should unilaterally refuse to continue to work on the case if a plaintiff fails to disclose. This turns the expert disclosure obligation on its head and shifts the burden to the defendant to show it had good cause for its actions or inactions. It is contrary to the reasoning in *Stanton*, *Reyes*, and *Tamayo.*

In summary, given the conflicting law on the issue, a defendant no longer knows what is required in order to expect enforcement of expert deadlines. This conflict should be resolved.

Argument.

I. Summary of relevant proceedings.

The expert deadlines were agreed-to in this case. Exh. 1 at 5. In fact, the deadlines were proposed by Plaintiffs themselves. App. 13 (Attachment to D0026, Defendant's MSJ Stmt of Facts Exh. C ("Hospital SJ Exh.") at 3, 11/30/22). The parties also agreed that expert reports would be provided at the same time as designations. App. 17 (Attachment to D0026, Hospital SJ Exh. D ¶8 (B).

The Hospital filed a motion pursuant to Iowa Rule 23.2(2) for a trial date beyond the default trial scheduling time standards. D0013, Motion (3/8/22). The district court granted the motion, finding good cause for trial to be scheduled on July 23, 2024. D0018, Order (3/28/22).

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

The Hospital timely disclosed its experts with their opinions on November 30, 2022. App. 27-37 (Attachments to D0026, Hospital SJ Exh.

F-G). The Hospital also filed a motion for summary judgment, arguing Plaintiffs were barred from presenting expert testimony by section 668.11 and rules 1.500(2 and 1.517(3)(a). D0025, MSJ Brief at 6-8 (11/30/22). The Hospital further argued Plaintiffs could not prove their case without an expert. *Id.* at 9-14.

After the Hospital filed its motion, Plaintiffs designated Nurse Beerman on December 2, 2022—three months after the agreed-to deadline. D0027, Designation (12/2/22). Plaintiffs produced Nurse Beerman's report on December 29, 2022—approximately four months late. *See* App. 50 (D0031, MSJ Resistance Brief at 8, indicating report would be served); D0034, Notice of Service discovery response (12/29/22).

The district court held: "It is undisputed that [Plaintiffs] made their expert disclosures outside of the deadline established in the trial scheduling order." Exh. 2 at 6. The Court of Appeals agreed that Plaintiffs' "disclosure was untimely." Exh. 1 at 5. In the summary judgment proceedings, Plaintiffs conceded their expert disclosure was untimely and offered no explanation. App. 47-52 (D0031, MSJ Resistance Brief at 5-10, 12/13/22). Instead, Plaintiffs argued they did not need an expert, there was no prejudice to the Hospital, and defense counsel bore responsibility for the situation. App. 43-52 (brief at 1-9).

The district court denied the Hospital's motion, ruling that Plaintiffs had established good cause to allow their expert to testify and thus declining to rule on whether Plaintiffs needed an expert. Exh. 2 at 5-6.[8]

This Court granted the Hospital's application for interlocutory appeal. App. 63 (6/9/23).

II. The district court and Court of Appeals should be reversed.

A. The applicable law.

In a medical malpractice case, Iowa law requires a party to timely designate expert witnesses and produce their opinions. *See* Iowa Code § 668.11 (2022); Iowa R. Civ. Proc. 1.500(2). Section 668.11 was intended to "provid[e] certainty about the identity of experts." *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998). It also ensures expert testimony is "prepared at an early stage in the litigation in order that the professional does not have to spend time, effort and expense in defending a frivolous action." *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). An untimely disclosed expert "shall be prohibited from testifying" unless good cause is shown. Section 668.11(2).

[8] Plaintiffs argued on appeal that their case, in general, survived because they could proceed without an expert. Plaintiffs' brief at 42-43. The Hospital did not seek *reversal* on this issue because it was not the successful party. *Compare Moyer v. City of Des Moines,* 505 N.W.2d 191, 193 (Iowa 1993)

Iowa Rule of Civil Procedure 1.500(2)(b) requires a retained expert to provide a signed report including a complete statement of opinions. As to the failure to comply with Rule 1.500, Rule 1.517(3)(a) provides the information or witness is not allowed at trial "unless the failure was substantially justified or is harmless."

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

A review of the district court's interpretation of statutory provisions and rules of civil procedure is 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) (rules).

B. There was no showing of good cause.

As fully explained in the statement supporting further review, there was no showing of good cause.

C. Other factors do not support good cause.

("A successful party, without appealing, may attempt to save a judgment on appeal based on grounds urged . . . but not considered" by the district court).

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

1. Plaintiffs' deviation was serious.

The district court and Court of Appeals appear to agree that Plaintiffs' designation (three months late) was a serious deviation. Exh. 1 at 5-6; Exh. 2 at 5. It was. *E.g., Nedved*, 555 N.W.2d at 240 (affirming the rejection of an expert designation filed three months late); *Munoz v. Braland*, No. 09-0011, 2009 WL 3337672 *1 (Iowa Ct. App. 2009) ("We believe the first factor is dispositive. [Plaintiff] did not seek an extension of the expert designation deadline until three months after the deadline expired . . . As the district court stated, '[S]uch deviation from the statutory deadline is serious and precludes the Court from finding good cause.'").

2. There was prejudice to the Hospital.

The district court erred in summarily concluding that the trial date meant there was no prejudice. Exh. 2 at 5-6. The Court of Appeals affirmed the district court's reasoning. Exh. 1 at 6. This, too, supports further review. There *was* prejudice. *See id.* at 16-17 (dissent).

First, there is a well-founded presumption of negligence when a plaintiff misses their expert deadline. And, Plaintiffs' discovery response (a

regurgitation of their certificate of merit), does not provide the certainty of a 668.11 certification and signed expert report. *See Nedved*, 585 N.W.2d at 241 (some 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) ("If the expert-disclosure requirements fell away every time a party could infer the likely use of an expert from a party's legal position, the rule would have little applicability in most civil litigation and no real teeth as an enforcement mechanism.")

The certainty as to experts is important. *See Tamayo*, 2018 WL 4922993 *3 ("We conclude the defendants sustained some prejudice by virtue of the delay in gleaning the merits of [the plaintiff's] case."); *Hard Surface Sols., Inc. v. Sherwin-Williams Co.*, 271 F.R.D. 612, 617 (N.D. Ill. 2010) ("Late disclosure is not harmless . . . simply because there is time to reopen or to extend discovery. If that were the determining factor, no court could preclude expert or other testimony that was unseasonably disclosed contrary to the discovery deadline dates set by the Court.").

Second, a defendant is prejudiced when they designate their own experts before the plaintiff. Here, the Hospital was required to produce its expert reports without knowing the precise criticisms to which they

needed to respond. This is prejudicial. In this circumstance, the defendant loses—and the plaintiff gains—"the strategic advantage of seeing his opponent's expert materials before he had to designate." *Stanton*, 2020 WL 4498884 *3. "That is the opposite of what the parties had agreed to [and] opposite of the legislature's plan as reflected in Section 668.11(1)(b)." *Id; Reyes*, 2022 Iowa App. Lexis 431 *6 (late expert deprives defendant "of their strategic advantage under section 668.11 of knowing the plaintiffs' expert evidence before designating their own experts"); *see also In re Bolger*, 2023 Iowa App. LEXIS 881 *14 (agreeing party is "hamstrung in his attempt to prepare his own expert" when opposing party fails to timely designate).

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

Finally, even a complete lack of prejudice (not the case here) is not dispositive on the good cause determination. "Lack of prejudice, by itself, does not excuse the [plaintiff's] late designation." *Nedved*, 585 N.W.2d at 241; *see also Reyes*, 2022 Iowa App. Lexis 431 *5 (same, citing *Nedved)*. In fact, when interpreting Iowa's certificate of merit statute (section 147.140), this 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.*, 999 N.W.2d 283, 288-89 (Iowa 2023). Section 668.11 contains no requirements of prejudice.

The district court's finding of no prejudice was based upon the trial date in July 2024—but this finding was inextricably tied to the court's assigning responsibility to the defense. Exh. 2 at 5 (the Hospital "is not prejudiced by [Plaintiffs'] delay because trial is not scheduled to occur until July 2014—a delay requested by [defense] counsel."). But, the district court had previously ruled there was good cause for the delay in the trial date. *See* D0018, Order (3/29/22). That good cause included the consequences of COVID-19 continuances and the resulting impact on court and counsel trial calendars as new cases also continue to be filed and scheduled for trial. D0013, Motion at ¶8 (3/8/22).

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

In addition, relying on a non-imminent trial date for a finding of no prejudice is contrary to an important purpose of section 668.11—to allow early resolution of cases and protect professionals from spending "time, effort and expense" in defense. *Hantsbarger*, 501 N.W.2d at 504. The 668.11 deadline is early in the case and it allows early dispositive motions. In other words, a dispositive motion based on noncompliant expert disclosures under section 668.11 will often be well in advance of trial. It makes no sense to excuse the noncompliant expert designation based on a lack of prejudice since the trial date is far off.

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

As fully explained in the statement supporting further review, the district court and Court of Appeals rulings that placed responsibility for Plaintiffs' untimely disclosures on the defense is contrary to a growing trend of Court of Appeals decisions. This factor—consideration of actions or inactions of the defense—should be re-evaluated to resolve the conflicting law and return the burden to prove good cause to plaintiffs.

D. Other issues.

1. Plaintiffs also failed to timely produce their expert's report.

The Court of Appeals did not address Plaintiffs' second failure—to timely serve a signed expert report. The untimely disclosure was not substantially justified under Rule 1.517(3)(a) for the same reasons there was not good cause under section 668.11(2). It was not harmless for the same reasons there was prejudice under the 668.11(2) analysis.

Plaintiffs should be barred from introducing expert testimony for two reasons: 1) the failure to establish good cause under 668.11(2), 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). A failure to comply with either requirement bars the expert from testifying.

2. The Court of Appeals' reliance on an interrogatory answer that copied certificate of merit information is misplaced.

The Court of Appeals compounds the confusion over the good cause analysis by relying upon Plaintiffs' discovery responses in which Plaintiffs copied the content of their certificate of merit from their expert. Decision at 10.[9] The certificate of merit is not relevant to the 668.11(2) or Rule 1.500(2) analysis.

First, the discovery response provides essentially no information that was not provided in the certificate of merit. There is no certification as required by section 668.11(1). There is no signed opinion as required by Rule 1.500(2). Nor does it include specific opinions that would have been helpful to the Hospital in retaining its own experts. It simply provides expert Beerman will "testify, generally" that the nurses breached the standard of care. *See* Exh. 1 at 10. The discovery did nothing to diminish the prejudice to the Hospital.

[9] Plaintiffs' discovery response quotes Plaintiffs' certificate of merit that expert Beerman is "'familiar with the standard of care required of registered nurses working in a post operative setting'" and the "'nurses, agents, and employees, working at [SMC] breached the standard of care in caring for and treating Douglas Wilson following his December 30, 2019, right hip replacement procedure.'" *Compare* Exh. 1 at 10 *with* D0026, MSJ exh B, Certificate of Merit (11/30/22).

Second, the discovery response is a regurgitation of the content of Plaintiffs' certificate of merit. But compliance with that statute does not excuse or substitute for compliance with other expert disclosure requirements. *See* Iowa Code section 147.140(3) ("The parties shall comply with the requirements of section 668.11 and all other applicable law governing certification and disclosure of expert witnesses."); *McHugh v. Smith*, 966 N.W.2d 285, 288 (Iowa Ct. App. 2021) ("Nor does section 147.140 supplant the requirements of Iowa Code section 668.11"); *Reyes,* 2022 Iowa App. Lexis 431 *4-5 (holding plaintiff "did not substantially comply with section 668.11 simply by filing their certificate of merit").

Conclusion

For the reasons set forth above, the Hospital requests that the Court grant further review of the Court of Appeals July 24, 2024 Decision; the district court and Court of Appeals Decision be reversed; and the case be remanded for further proceedings.

/s/Nancy J. Penner
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Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(5) because:

[x] this application has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point and contains 4721 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(5)(a).

/s/Nancy Penner 8/13/24

Signature Date

Certificate of filing and service

The undersigned certifies this Application was electronically filed and served on the 13th day of August, 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):

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