IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 24-0205
Pottawattamie County No. LACV121621

JAHN PATRIC KIRLIN AND SARA LOUISE KIRLIN,

Plaintiffs-Appellants,

vs.

Dr. BARCLAY A. MONASTER, M.D., and Dr. CHRISTIAN WILLIAM JONES, MD, and PHYSICIANS CLINIC INC., d.b.a. METHODIST PHYSICIANS CLINIC – COUNCIL BLUFFS,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
HON. MICHAEL D. HOOPER

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ROUTING STATEMENT

Defendant Monaster agrees that this appeal should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2)(c)-(d). The issue on appeal presents substantial issues of first impression, and/or fundamental and urgent issues of broad public importance requiring ultimate determination by the Supreme Court. Specifically, how does a reversal of a previously dismissed case impact subsequent expert disclosure deadlines from a court order after jurisdiction is returned to the District Court.

NATURE OF THE CASE

This is a medical malpractice complaint requiring expert testimony. *See generally* D0001, Compl. (Medical Negligence) and Demand for Jury Trial (04/14/21). The case was originally dismissed for failure to comply with Iowa Code section 147.140 in a first action that was voluntarily dismissed but subsequently reversed and remanded following a ruling by the Iowa Supreme Court. *See Kirlin v. Monaster*, 984 N.W.2d 412, 417 (Iowa 2023) [hereinafter *Kirlin I*]. Following the reversal and remand of *Kirlin I*, the Kirlins failed to timely designate experts pursuant to the deadlines of Iowa Code section 668.11, a deadline that was agreed to in the trial scheduling and discovery plan [hereinafter TSDP], and placed in the court's original scheduling order. *See* D0140, Ruling on Mot. for Summ. J. filed by Defs.' Christian Williams

Jones, M.D. and Methodist Physicians Clinic – Council Bluffs and Mot. for Summ. J. Filed by Def. Barclay A. Monaster, M.D. at 5–6 (11/17/23). The District Court determined that the Kirlins failed to establish good cause to excuse untimely designation testimony in accordance with Iowa Code section 668.11 and subsequently entered summary judgment, as the Kirlins could not pursue their case without an expert. *Id.* at 5–7. The District Court upheld its second summary judgment ruling following the Kirlins' motion to reconsider. *See* D0149, Order Regarding Pls.' Mot. to Reconsider, Enlarge and/or Amend (01/16/24). The Kirlins appeal the entry of this summary judgment. *See* D0150, Pl.s' Notice of Appeal (02/05/24).

STATEMENT OF THE FACTS

The Kirlins filed their complaint on April 14, 2021, claiming medical negligence by Dr. Barclay A. Monaster during his care and treatment of Jahn Kirlin on April 16, 2019. D0001, Compl. (Medical Negligence) and Demand for Jury Trial at ¶ 11 (04/14/21). Dr. Monaster filed an answer on August 20, 2021. *See generally* D0044, Def. Dr. Barclay A. Monaster's Answer and Jury Demand (08/20/21).

The parties agreed on a TSDP on June 23, 2021. *See* D0036, Trial Scheduling and Disc. Plan (06/23/21). The TSDP provided the following expert disclosure deadlines at paragraph 8:

8. Expert witnesses

A. A party who intends to call an expert witness, including rebuttal expert witnesses, shall certify to the court and all other parties the expert's name, subject matter of expertise, and qualifications, within the following time period, unless the Iowa Code requires an earlier designation date (*see, e.g.*, Iowa Code section 668.11):

(1) Plaintiff: 210 days before trial or by _____.

(2) Defendant/Third Party Plaintiff: 150 days before trial or by _____.

(3) Third Party Defendant/Others/Rebuttal: 90 days before trial or by _____.

B. Any disclosures required by Iowa Rule of Civil Procedure 1.500(2)(*b*) will be provided:
Check each that applies

(1) [X] At the same time the expert is certified.

(2) [ ] According to the following schedule:

a. Plaintiff: 210 days before trial or by _____.

b. Defendant/Third Party Plaintiff: 180 days before trial or by _____.

c. Third Party Defendant/Others/Rebuttal: 150 days before trial or by _____.

C. This section does not apply to court-appointed experts.

The deadlines listed in paragraphs 5, 6, 7, *and* 8 *may be amended, without further leave of court, by filing a Stipulated Amendment to this Plan listing the dates agreed upon and signed by all attorneys and self-represented litigants. Such Stipulated Amendment may not override any requirement of the Iowa Court Rules and cannot serve as a basis for a continuance of the trial date or affect the date for pretrial submissions.*

This plan and its provisions were incorporated into the Court's order on June 28, 2021. *See* D0040, Order Setting Trial and Approving Plan (06/28/21).

On January 21, 2022, the District Court dismissed this case for plaintiffs' failure to comply with Iowa Code section 147.140 in a previous lawsuit that they had voluntarily dismissed prior to a dispositive ruling. *See* D0091, Order on Defs.' Mots. for Summ. J. (01/18/22). This ruling was 151 days after Dr. Monaster filed his answer. *See* D0140 at 6.

This order, following a motion to reconsider and subsequent ruling on that motion, was appealed. *See* D0096, Order (02/23/22); *see also* D0097,

Pl.'s Notice of Appeal (02/25/22). On January 6, 2023, the Iowa Supreme Court issued their opinion reversing the District Court's ruling on the certificate of merit affidavit issue and remanded the case for further proceedings. *See Kirlin I*, 984 N.W.2d at 417. Procedendo issued on February 20, 2023. *See* D0106, Procedendo (02/20/23).

The parties had trial setting conferences on March 30, 2023, and April 4, 2023. *See* D0108, Notice of Civil Trial-Setting Conference (02/21/23); *see also* Notice of Telephonic Hr'g (03/30/23). Following the conference, the District Court issued an order establishing a new trial date. *See* D0113, Order (04/04/23). The District Court noted that this order did not amend any deadlines from the previous order incorporating deadlines from the agreed upon trial scheduling and discovery plan. *See* D0140, at 2; *see also* D0040.

"The record shows that counsel of the parties had discussions following procedendo (and the expiration of the 180-day deadline) that included whether a new Trial Scheduling and Discovery Plan was necessary and possible setting forth new deadlines for experts." D140 at 6. For Dr. Monaster's part, his counsel preferred that they agree on "dates certain for experts" on March 30, 2023. *See* Attachment to D0120, Emails (Exhibit M – Correspondence, Defendant Monaster's MSJ) at 2 (07/31/23). The Kirlin's counsel countered with the position that "[i]f we can reach agreement to a date specific for

experts and the Court agrees to take them out of [the] order, then he will order it." *Id.* at 1. No further correspondence appears in the record regarding dates certain for expert designation by either party. *See generally* Docket.

Dr. Monaster filed his summary judgment on July 31, 2023, for failure to comply with Iowa Code section 668.11. *See generally* D0120, Dr. Monaster's Mot. for Summ. J. (07/31/23). Dr. Monaster explained that upon procedendo, the time to designate experts pursuant to Iowa Code section 668.11 resumed. *Id.* at ¶ 7. This made the Kirlins' expert designation date March 21, 2023, or 29 days following procedendo in this matter. *Id.* As the Kirlins failed to timely designate experts, Dr. Monaster requested the court enter summary judgment as the Kirlins failed to demonstrate good cause to justify their untimely designation in accordance with Iowa Code section 668.11 and the lack of experts was fatal to establishing their prima facie case. *Id.* at ¶¶ 8–9. The Kirlins resisted and Dr. Monaster filed a reply. *See* D0125, Combined Resistance to Defs.' (All Defs.) Mots. for Summ. J. (08/14/23); *see also* Dr. Monaster's Reply to Pls.' Resistance to Mot. for Summ. J. (08/22/23).

The District Court sided with Dr. Monaster. *See generally* D0140. The District Court concluded that a reversal leaves the parties as if the original order and subsequent appeal never happened. *Id.* at 5. This meant that the 668.11 deadline, that was never modified, remained in place and required the

plaintiff to designate their expert witnesses in March of 2023. *Id.* at 6. The Court further found that no good cause existed as their untimely designation was a serious deviation from the establish deadline, prejudiced Dr. Monaster, and Dr. Monaster's counsel did not contribute to the deviation. *Id.* at 6–7. The Court further determined that expert testimony was required and dismissed the case pursuant to the mandates of Iowa Code section 668.11.

The District Court upheld its decision following the Kirlins' motion to reconsider. *See generally* D0149, Order Regarding Pls.' Mot. to Reconsider, Enlarge and/or Amend (01/16/24). The Kirlins appeal. *See generally* D0150.

ARGUMENT

I. Iowa Code section 668.11 Applied Following Procedendo.

A. Error Preservation.

Dr. Monaster generally agrees that the Kirlin's preserved error on whether Iowa Code section 668.11 applied following procedendo. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is fundamental doctrine of appellate review that issues ordinarily be raised and decided by the district court before we will decide them on appeal.").

B. Standard of Review.

Dr. Monaster generally agrees that a summary judgment is reviewed for errors at law. *33 Carpenters Constr. Inc. v. State Farm Life & Ins. Cas.*

Co., 939 N.W.2d 69, 75 (Iowa 2020). For the purposes of this argument section, how a reversal, remand, and procedendo of an originally dismissed case impact statutory deadlines incorporated into an unaltered discovery plan is likely errors of law analysis. *Cf. Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 479 (Iowa 2004) ("To the extent that we are required to interpret Iowa Code section 668.11, our review is for correction of errors at law.").

C. The Initial Scheduling Order Was Left In Place Following Reversal on Remand. The Kirlins' Clock to Designate Experts Resumed Under Section 668.11 Continued after Procedendo was Issued.

Iowa Code section 668.11 requires the parties to designate experts to the Court and the opposing party "in a professional liability case brought against a licensed professional." Iowa Code § 668.11(1). Plaintiffs must designate the experts they expect to testify at trial within 180 days of the defendants' answer. *Id.* § 668.11(1)(a). Failure to timely designate an expert "prohibit[s] [them] from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown." *Id.* at § 668.11(2).

Iowa Code section 668.11 provides "an element of certainty in professional liability cases." *Cox v. Jones*, 470 N.W.2d 23, 26 (Iowa 1991). This certainty ensures "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, 505 (Iowa 1993) (en banc). The "[e]arly disposition of

potential nuisance cases, and those which must ultimately be dismissed for lack of expert testimony, would presumably have a positive impact on the cost and availability of medical services." *Thomas v. Fellows*, 456 N.W.2d 170, 173 (Iowa 1990).

The parties do not dispute that Iowa Code section 668.11 applied from the outset of the filing of the petition, and the clock on plaintiffs' expert designation began to tick after Dr. Monaster filed an answer. *See* Appellant's Brief at 18, 20 (06/10/24) [hereinafter Kirlins' Br.]. As many Iowa Court of Appeals decisions have held, when the parties do not choose separate dates under section 8A of the TSDP, the plain language of the TSDP requires the application of Iowa Code section 668.11 deadlines. *See, e.g., Owen v. Hunziker*, No. 22-0282, 2022 Iowa App. LEXIS 959, at *7 (Iowa Ct. App. Dec. 21, 2022) ("Thus, the plan expressly notes that section 668.11 controls the schedule."); *Newell v. State*, 21-0273, 2022 Iowa App. LEXIS 56, at *3, 8-10 (Iowa Ct. App. Jan. 12, 2022) (applying 668.11 deadlines when plan did not provide other dates); *In re Est. of Wanek*, No. 14-1887, 2015 Iowa App. LEXIS 933, at *10 (Iowa Ct. App. Oct. 14, 2015) ("Wanek's estate first counters that the scheduling order referenced section 668.11 so the 180-day deadline applied . . . We agree with Wanek's estate."). The deadlines for expert designation under the Iowa Rules of Civil Procedure 1.500 never

applied in this matter. *See In re Est. of Wanek*, 2015 Iowa App. LEXIS 933, at *10.

The Kirlins argue that after the summary judgment on the certificate of merit affidavit issue was entered, the designation deadlines pursuant to Iowa Code section 668.11 were "lost" or "expired." *See* Kirlins' Br. at 18, 20. The Kirlins believe that after reversal and remand the only expert designation and disclosure deadline that applied was Iowa Rule of Civil Procedure 1.500, based on their interpretation of the TSDP.

The Kirlins fail to appreciate how the appellate doctrines of reversal, remand, and procedendo operate on scheduling orders. Furthermore, the Kirlins' argument that section 668.11 no longer applied following the first appeal is contrary to the legislature's scheme for early designation and disclosure of expert witnesses in medical malpractice cases.

"[A]n opinion issued by an appellate court in the exercise of its jurisdiction often requires further action to be performed to properly execute the judgment and decision." *City of Okoboji v. Iowa Dist. Ct.*, 744 N.W.2d 327, 331 (Iowa 2008). "Often . . . the appellate mandate will simply instruct the district court to proceed consistently with the appellate court decision." *Id.* at 331–32. The Iowa Supreme Court opinion in *Kirlin I* concluded that "[t]he district court's order granting summary judgment is reversed, and the case is

remanded for further proceedings." *Id.* at 415; *see also* D0106 at 1 (explaining in the procedendo that the District Court was "directed to proceed in the manner required by law and consistent with the opinion of the court."). "The language 'we remand for further proceedings' in an appellate opinion signals the appellate court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case." 5 Am. Jur. 2d *Appellate Review* § 669 (2024).

Several courts agree with the basic principle that a reversal and remand leaves the previous orders, such as scheduling orders, in place unless superseded. *See Douglas v. Burley*, 134 So. 3d 692, 697 (Miss. 2012) ("[U]pon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court."); *DeChambeau v. Balkenbush*, 431 P.3d 359, 363 (Nev. Ct. App. 2018) ("Normally, any order issued by the court on any matter is deemed to remain in effect until expressly superseded by another order on the same question."); *Greenawalt v. Sun City W. Fire Dist.*, 250 F. Supp. 2d 1200, 1203 (D. Ariz. 2003) (original scheduling order deadline for filing dispositive motions remained in effect when post-remand scheduling order did not set a new deadline); *Shields v. Credit One Bank, N.A.*, No. 2:19-cv-00934-JD-NJK, 2023 U.S. Dist. LEXIS 6576, at *3 (D. Nev. Jan. 13, 2023) ("Plaintiff cites no

legal authority for the proposition that a case being remanded upon appeal automatically vacates prior orders in that case."). And as the District Court expressly acknowledged, its new order setting trial "did not modify any deadlines" previously left in place by the original scheduling order, including the timeline to designate experts pursuant to Iowa Code section 668.11. *See* D0140 at 2; *see also* Iowa R. Civ. P. 1.604 ("This order shall control subsequent course of the action unless modified by a subsequent order.").

Seeing that the District Court did not modify the deadline under Iowa Code section 668.11, incorporated into its previous scheduling order, and that scheduling order remained in place after reversal and remand, the question remains as to when the plaintiffs' experts needed to be designated.[1] The Iowa Supreme Court has held that "a general and unqualified reversal of judgment or decree, without order or direction, is to nullify it completely, and to leave the case standing as if such judgment or decree had never been entered." *Sleeper v. Killion*, 164 N.W. 241, 245 (Iowa 1917); *Taylor v. Burgus*, 262

[1] The Kirlins derive the District Court's ruling as "perplexing" "unsound," a "fail[ure] to articulate" reasoning, "imagining [the] March 21, 2023 date," and "elementary." Kirlins Br. at 20, 24, 37. Yet, the Kirlins provide no authority to the contrary about doctrines of reversal, remand, or procedendo and their application to this case. *See Nelson v. Mercy Med. Servs.-Iowa Corp.*, No. 13-0361, 2014 Iowa App. LEXIS 21, at *12 (Iowa Ct. App. Jan. 9, 2014) ("Setting aside counsel's disrespectful tone, [the Court should] find the substance of [their] argument unpersuasive.").

N.W. 808, 810 (Iowa 1935) (same). "[T]he reversal should generally be regarded as dating back to the time the reversed order or judgment was entered." 5 Am. Jur. 2d *Appellate Review* § 742 (2024); *see also State v. Davis*, No. 06-0013, 2006 Iowa App. LEXIS 1180, at *7 (Iowa Ct. App. Oct. 11, 2006) (explaining that following procedendo of a discretionary appeal, the State had only twenty-seven days to comply with the speedy trial rule).

One hundred and fifty-one (151) days to designate an expert pursuant to Iowa Code section 668.11 had elapsed when Dr. Monaster's first summary judgment was granted. *See* D0140 at 6. The reversal of that summary judgment following appeal left the case standing as if no summary judgment had been entered and returned the parties to their original position. *See Taylor*, 262 N.W.2d at 810; *see also Davis*, 2006 Iowa App. LEXIS 1180, at *7. Prior to the entry of the first summary judgment, the Kirlins' original position, and Dr. Monaster's expectation, was that the Kirlins had twenty-nine (29) days left to designate an expert under Iowa Code section 668.11.

"The entire purpose of procedendo is to notify the lower court that the case is transferred back to that court." *In the Interest of M.T.*, 714 N.W.2d 278, 282 (Iowa 2006). "By the procedendo th[e appellate] court relinquishes its jurisdiction, and commands the trial court to proceed." *State v. Banning*, 218 N.W. 572, 574 (Iowa 1928). In interpreting the concepts of reversal,

remand, and procedendo together, the plaintiff's expert designation deadline began to run again following procedendo. *See, e.g.*, *Davis*, 2006 Iowa App. LEXIS 1180, at *7. Plaintiffs failed to make their designation on March 21, 2023. *See generally* Docket.

Defendants' argument is similarly supported by other courts assessing late disclosures after remand. For example, in *Douglas*, the Mississippi Supreme Court held that the district court abused its discretion by allowing the plaintiff to designate an untimely expert following remand. *Douglas*, 134 So.2d at 697 ("Furthermore, the plaintiffs are incorrect that, when this Court remands a case, it completely starts over as with a 'clean slate.' "); *see also Spin Doctor Golf, Inc. v. Paymentech, L.P.*, No. 05-11-01014-cv, 2013 Tex. App. LEXIS 8121, at *4 (Tex. Ct. App. July 2, 2013) (rejecting new experts following remand after no new discovery plan was entered and agreed upon). Surely, it would be illogical to suggest that if the Kirlins' deadline to designate experts prior to the entry of the first summary judgment expired, the Defendants could not pursue a summary judgment on this issue following procedendo.

Notably, Dr. Monaster's interpretation that the expert designation deadline under Iowa Code section 668.11 resumed following procedendo is more consistent with the legislature's scheme for expert disclosure

requirements in medical malpractice. Iowa's certificate of merit affidavit "incorporates by reference, and works in tandem with, the expert disclosure requirements in Iowa Code section 668.11." *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 541 (Iowa 2022); *see McHugh v. Smith*, 966 N.W.2d 285, 290 (Iowa Ct. App. 2021) (explaining that the certificate of merit affidavit statute is "layered over the existing mandates of section 668.11"). The Kirlins claims that the section 668.11 deadlines were "lost" and "expired," and that only the Iowa Rules of Civil Procedure 1.500(2) deadlines, applied thwarts the legislatures' statutory scheme of providing early certainty to defendant healthcare providers in litigation. *See* Kirlins' Br. at 18, 20; *see also Cox*, 470 N.W.2d at 26.

The Kirlins pose the argument that the legislature created 1.500(2) deadlines for this exact situation. Kirlins' Br. at 37. The legislature is presumed to understand appellate procedure, and consequently, a risk that a District Court may incorrectly dismiss a case under the certificate of merit affidavit statute. *Cf. Ronnfeldt v. Shelby Cty.*, 984 N.W.2d 418, 425 (Iowa 2023) (explaining that the Iowa legislature is aware of our rules of civil procedure). Yet, the Iowa legislature still contained the explicit language that compliance with section 668.11 must occur even after a certificate of merit affidavit is served. *See* Iowa Code § 147.140(3); *see also Ronnfeldt v. Shelby*

Cty., No. 22-1442, 2024 Iowa App. LEXIS 198, at *6 n.4 (Iowa Ct. App. Mar. 6, 2024) (noting that the plaintiff may have to provide expert testimony pursuant to Iowa Code section 668.11 following reversal and remand of a dismissal based on a certificate of merit affidavit issue). Following this logic, the statutory text indicates that the Iowa legislature anticipated that section 668.11 would still apply following a potential reversal and remand on a certificate of merit affidavit issue.

To conclude, the reversal and remand of *Kirlin I* placed the parties back to their original position as if the first summary judgment had been denied. The Kirlins position, and Dr. Monaster's expectation, was that the Kirlins would designate their expects twenty-nine (29) days. Procedendo allowed the District Court to assume jurisdiction and the deadlines for the Kirlins' designation of experts resumed. The District Court correctly applied fundamental appellate principles in its order in concluding that the expert designation deadline pursuant to Iowa Code section 668.11 was still in effect.

II. The Kirlins did not Establish Good Cause to Excuse Their Untimely Expert Disclosure.

A. Error Preservation.

Dr. Monaster generally agrees that the Kirlins preserved error on whether "good cause" existed to excuse their untimely disclosure pursuant to Iowa Code section 668.11(2). *See Meier*, 641 N.W.2d at 537. However, the

Kirlins make various factual assertions throughout their appellate brief that are just not supported by the record or adequately preserved. *See* Iowa R. App. P. 6.801 (defining the record); *see also* Iowa R. App. P. 6.904(4) (requiring "a citation to the record for each material statement of fact").[2] Some, but not all, of these factual assertions include:

- "This trial scheduling conference was a failure as counsel for defense was now lobbying for doubling the length of the trial, and plaintiff not conceded as that meant a long delay to schedule a two week trial on the Court's schedule." Kirlins' Br. at 22.
- "Updating initial disclosures shortly after remand, responding early to discovery requests, requesting deposition dates of the defendants, supplying dates that the Kirlins could be deposed." Kirlins' Br. at 28.
- "These defendants have certainly had their experts ready, retained, and reviewing the medical records since the first Kirlin case was filed in 2020." Kirlins' Br. at 32.
- "[C]ounsel for Kirlins cannot spend $50,000 on expert opinions." Kirlins' Br. at 36.
- "Kirlins had a good record of complying with discovery in this case." Kirlins' Br. at 38.
- "Defendant Jones and Clinic continued to engage in discovery. Defendant Monaster did not participate in discovery." Kirlins' Br. at 39.

[2] It is true that the Kirlins' resistance to the summary judgment does make some of these claims. *See* Attachment to D0125, Plfs.' Mem. of Authorities in Supp. of Plfs.' Combined Resistance to Defs.' (All Defs.) Mots. for Summ. J. at 11 (08/14/23) [hereinafter Attachment to D0125, Kirlins' Memo.]. However, there is no factual evidence submitted within the record that make these statements factually supported. *See also In the Int. of M.M.*, No. 02-22-00279-CV, 2023 Tex. App. LEXIS 1150, at *15–16 (Tex. Ct. App. 2023) (explaining that briefing is not evidence); *DirecTV, LLC, v. White*, 844 S.E.2d 289, 292 n.3 (Ga. Ct. App. 2020) (same).

The Appellate Court should reject using these alleged factual statements with no factual support in deciding whether the Plaintiffs established good cause. *See Est. of Hazen v. Gensis Health Sys.*, No. 23-0335, 2024 Iowa App. LEXIS 474, at *2 n. 2 (Iowa Ct. App. June 19, 2024). ("We reiterate, any outside-the-record factual statements provided in appellate briefs or during oral argument will be disregarded by our court.").

B. Standard of Review.

Dr. Monaster disagrees that the scope of review for whether good cause exists is for errors at law. The scope of review for good cause determinations under Iowa Code section 668.11 is for abuse of discretion. *See Hantsbarger*, 501 N.W.2d at 505; *accord Stanton v. Knoxville Cmty. Hosp. Inc.*, No. 19-1277, 2020 Iowa App. LEXIS 775, at *5 (Iowa Ct. App. Aug. 5, 2020) (explaining the difference between the standard of review of a summary judgment ruling and ruling based on good cause). "The exercise of that discretion will not be disturbed unless it was exercised on clearly untenable grounds or to an extent clearly unreasonable." *Nedved v. Welch*, 585 N.W.2d 238, 239–40 (Iowa 1998).

C. The Kirlins have Not Established Good Cause Under Iowa Code section 668.11.

Iowa Code section 668.11 identifies that "if a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for

discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown." Iowa Code § 668.11(2) (emphasis added). Good cause requires a

> sound, effective, truthful reason, something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, *but because of some misunderstanding, accident, mistake or excusable neglect* failed to do so.

Donovan v. State, 445 N.W.2d 763, 766 (Iowa 1989) (quoting *Dealers Warehouse Co. v. Wahl & Assocs.*, 216 N.W.2d 391, 394–95 (Iowa 1974)) (emphasis added).

Iowa's appellate courts have effectively boiled this test down to three different factors to assess whether good cause for an untimely expert designation has been established: the seriousness of the deviation, prejudice, and counsel's actions. *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998); *but see Tamayo v. Debrah*, No. 17-0971, 2018 Iowa App. LEXIS 893, at *6 (Iowa Ct. App. Oct. 10, 2018) (explaining that these "factors are not mandatory considerations in a good cause analysis").

1. The Kirlin's Five-Month Long Deviation was Serious.

The District Court correctly assessed that the deviation was 140 days, nearly five months. D0140 at 6. The Iowa courts have consistently held that

month long delays to designate experts constitute a serious deviation. *See, e.g.*, *Reyes v. Smith*, No. 21-0303, 2022 Iowa App. LEXIS 431, at *6 (Iowa Ct. App. May 25, 2022) ("A delay of sixty-six days is substantial."); *Sadler v. Primus*, No. 18–1198, 2019 Iowa App. LEXIS 840, at *7 (Iowa Ct. App. Sept. 11, 2019) (holding that a deviation of four months was "serious" for good cause analysis under section 668.11); *Tamayo*, 2018 Iowa App. LEXIS 893, at *6 (holding that a two month delay was significant). This serious deviation can be dispositive. *See Munoz v. Braland*, No. 09-0011, 2009 Iowa App. LEXIS 1442, at * 3–4 (Iowa Ct. App. Oct. 7, 2009) (explaining that a delay of four months may be dispositive).

The Kirlins argue that their misinterpretation of the law regarding the effect of procedendo and subsequent deadlines constitutes "good cause." Kirlins' Br. at 28. The Iowa Appellate Courts have rejected similar scenarios in which the Plaintiffs misinterpreted Iowa Code section 668.11 as an attempt to establish "good cause." In *Thomas*, the Iowa Supreme Court rejected that good cause exists when the plaintiffs' attorney "was unaware of the designation requirements of section 668.11 because this statutory provision is not located in our rules of civil procedure governing discovery." 456 N.W.2d at 171–72; *see also Kublik v. Burk*, 540 N.W.2d 60, 63 (Iowa Ct. App. 1995) ("A claim that an attorney was unaware of section 668.11 has not been

accepted as a sufficient good cause for failing to comply with that section."). Similarly, in *Laden & Pearson, P.C. v. McFadden*, the Iowa Court of Appeals affirmed the district courts' ruling that no good cause existed for a one-day late designation based on plaintiffs' misinterpretation that Iowa Code section 4.1(34)'s extension provision applied to Iowa Code section 668.11. No. 20-0093, 2021 Iowa App. LEXIS 498, at *9 (Iowa Ct. App. June 16, 2021).

The District Court did not abuse its discretion in determining that the Kirlins' untimely disclosure was a serious deviation.

2. The Kirlin's Delay was Prejudicial to the Defendants.

Prejudice is "presumed to occur when experts are not designated by the statutory deadline." *Nedved*, 585 N.W.2d at 241. Notwithstanding, "[l]ack of prejudice, by itself, does not excuse the [Kirlins]' late designation." *Id*. The District Court correctly noted that the "significant delay in certification has frustrated th[e] purpose [of section 668.11] and hindered Defendants and their experts in responding to Plaintiffs and their experts." D0140 at 6; *see also* D0149 at 2–3 (explaining that the late delay impacted other litigation strategies such as motions to dismiss and summary judgment). Iowa Appellate Courts have upheld these rationales. *See, e.g., Tamayo*, 2018 Iowa App. LEXIS 893, at *7 ("We conclude the defendants sustained some prejudice by virtue of the delay in gleaning the merits of Tamayo's case."); *Miller v.*

Morales, No. 09-1717, 2011 Iowa App. LEXIS 18, at *15–16 (Iowa Ct. App. Jan. 20, 2011) ("But there would have been some prejudice – at a minimum additional work required of defense counsel and defense experts.").

The Kirlins argue that prejudice does not exist because they served a timely certificate of merit affidavit in this litigation. Kirlins' Br. at 31–32, 35. The plain text certificate of merit affidavit statute mandates 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). Indeed, the Iowa Appellate Courts have rejected the notion that a certificate of merit affidavit can satisfy a party's obligations under Iowa Code section 668.11 because the expert who signs the certificate of merit affidavit might not be the expert who is designated to testify at trial. *Reyes*, 2022 Iowa App. LEXIS 431 at *4; *see also Jackson v. Catholic Health Init. Iowa Corp.*, No. 22-1911, 2023 Iowa App. LEXIS 683, at *4–7 (Iowa Ct. App. Aug. 30, 2023).

The Kirlins also argue that because Dr. Monaster's counsel made a different argument regarding prejudice in a completely different case, with different clients, means they cannot be prejudiced in this matter. Kirlins' Br. at 33. What an attorney argues one case with different facts is not binding or persuasive evidence in another case. The Kirlins do not cite any caselaw or

secondary sources that suggest a previous filing in a separate case is binding on that attorney in all other cases and their clients. *See NevadaCare, Inc., v. Dep't of Human Servs.*, 783 N.W.2d 459, 465-66 (Iowa 2010) (explaining it is an essential duty of the judicial branch of government to "articulate the controlling law and apply the controlling law to the facts"). Courts "have an independent duty to decide the matter before [them] according to law. And the parties' agreement about or stipulation to a particular view of the law does not absolve [them] of that duty." *United States v. Perez*, 943 F.3d 1329, 1332 (11th Cir. 2019). Thus, the arguments made in a different case by one counsel, have no bearing on this appeal.

The District Court did not abuse its discretion in determining that Dr. Monaster suffered prejudice by the Kirlins' untimely disclosure.

3. Defense Counsel's Actions Did Not Contribute to Plaintiffs' Delay.

The Kirlins contend the Court should find "good cause" because defense counsel preferred certain dates on expert designation and disclosure following remand. Kirlins' Br. at 29–31. The simple statement that the defense counselors preferred certain dates cannot be construed as a waiver of their right have timely expert designations pursuant to the statute. Moreover, there was no agreement as to certain dates as the Kirlins' counsel effectively made a counteroffer on certain dates contingent on agreement as to those dates

and that the Court had to independently approve "to take them out of order." Kirlins' Br. at 24.

The Kirlins also blame defense counsel for remaining silent[3], and not providing specific certain dates after an initial email exchange. Kirlins' Br. at 29–31. However, as the Kirlins rightfully acknowledge, "opposing counsel [does not need to] act as his or her 'brother's keeper.' " *Hantsbarger*, 501 N.W.2d at 505. In this matter, the Kirlins stuck with what was a faulty interpretation of paragraph 8 of the TSDP: that template 1.500 deadlines applied instead of Iowa Code section 668.11. As the District Court explained, the Kirlins did not establish "that defense counsel acted in bad faith or did anything to cause Plaintiffs to fail to timely disclose . . . and there is no evidence that the[ir] misunderstanding of the law is due to the conduct of defense counsel." D0140 at 6–7.

[3] In particular, the Kirlins blame the defendants for not raising the issue at the trial scheduling conference. First, there is no transcript from the trial scheduling conference or statement of evidence to support this assertion. *See Mumm v. Jennie Edmundson Mem'l Hosp.*, 924 N.W.2d 512, 520 (Iowa 2019) ("It is the appellant's duty to provide a record on appeal affirmatively disclosing the alleged error relied upon."). Second, the purpose of a trial scheduling conference is to set a trial date, not to rehash preexisting deadlines that were previously agreed to and set by previous court order. *See* Iowa R. Civ. P. 1.906. Lastly, the Kirlins would also share the same blame of not inquiring about their expert deadlines at this trial setting conference.

Ultimately, Kirlins' counsel bears the same blame they seek to place on defense counsel. The record is devoid of them following up to identify dates certain after their "counter-offer" email to counsel on March 31, 2023. *See generally* Docket. Furthermore, Kirlins' counsel never filed a motion with the District Court to clarify expert deadlines, despite apparently acknowledging that section 668.11 applied prior to entry of the first summary judgment, and that the TSDP from June 23, 2021, was still in effect. *See* D0149 at 3; *see* Kirlins' Br. at 24.

The District Court did not abuse its discretion in determining that the defense counsel's actions did not support a finding of good cause.

4. Other Factors do not Support the Kirlins.

The Kirlins' imply that only having twenty-nine (29) days following procedendo to consult and prepare with expert witnesses was not possible. Kirlins' Br. at 24, 36. The Kirlins do not provide evidentiary support for this assertion. *See Nedved,* 585 N.W.2d at 240 (explaining plaintiffs have the evidentiary burden of establishing good cause); *cf. Spin Doctor*, 2013 Tex. App. LEXIS 8121 at *5–6 ("Yet nothing in the record indicates it was impossible or even difficult for Spin Doctor to designate its experts by the deadline."). Regardless, the Kirlins knew for certain on January 6, 2023, when the Iowa Supreme Court issued *Kirlin I*, that the case was going to be

remanded back to the District Court. Between the release of *Kirlin I* and the issuance of procedendo, the Kirlins had forty-five (45) days to re-organize their case for further proceedings. *Compare* D0107 *with* D0106. This was more than ample time to organize their expert designation, particularly considering the Kirlins designated an expert, albeit untimely, that signed the certificate of merit affidavit. One could even argue that the result of the appeal provided the Kirlins with an even longer than usual window then allowed under Iowa Code section 668.11 to continue researching their case and consult with different experts during the appeal. The Kirlins have no basis to argue that the appeal and procedendo prevented them from adequately assessing next steps in their litigation.

The Kirlins also declare that their case is meritorious and should proceed to trial irrespective of the untimely expert disclosure. *See* Kirlins' Br. 31. As the District Court aptly noted, a trial of the merits "does not supersede or take precedence over statutory requirements." *See* D0149 at 4. "The fact that a plaintiff can belatedly show the litigation was not frivolous is not an exception in the statute." *See Butler v. Iyer*, No. 21-0976, 2022 Iowa App. LEXIS 291, at *15–16 (Iowa Ct. App. Apr. 13, 2022).

The Kirlins failed to establish that good cause existed for the untimely disclosure. Their late disclosure was serious, caused prejudice to Dr.

Monaster, and was not caused by his counsel. The District Court did not abuse its discretion in determining that the Kirlins did not establish good cause to extend their deadline.

III. Summary Judgment Was Appropriate Due to the Lack of Expert Testimony.

A. Error Preservation.

Dr. Monaster generally agrees that whether summary judgment was appropriate was preserved by the Kirlins. *See Meier,* 641 N.W.2d at 537.

B. Standard of Review.

Dr. Monaster generally agrees that a summary judgment is reviewed for errors at law. *33 Carpenters Constr. Inc.*, 939 N.W.2d at 75.

C. Summary Judgment was Appropriate Due to Plaintiffs' Failure to Timely Designate.

The Kirlins argue that summary judgment was inappropriate because the District Court should have utilized less lethal remedies rather than preventing Plaintiffs' experts from testifying. Kirlins' Br. at 35. The plain text of Iowa Code section 668.11(2) prevents this result. Specifically, this section provides that "[i]f a party fails to disclose an expert pursuant to subsection 1 . . . the expert *shall be prohibited* from testifying in the action." *Id.* (emphasis added). The word "shall" imposes a duty. *See* Iowa Code § 4.1(30)(*a*); *see also In re Det. of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) ("[T]he word

'shall' generally connotes a mandatory duty."). The District Court had no discretion in preventing experts from testifying on behalf of the Kirlins in this action. *See Venard v. Winter*, 524 N.W.2d 163, 168 (Iowa 1994) ("The only penalty the sections spells out is that the undesignated or late designated experts cannot testify."); *Smith v. Billsby*, No. 02-1863, 2003 Iowa App. LEXIS 1052, at *6 (Iowa Ct. App. Nov. 26, 2003) ("If subsection (1) is not complied with, the expert will not be allowed to testify absent leave by the court for good cause."). The Kirlins' cited cases are inapposite or do not involve Iowa Code section 668.11. *See, e.g., State v. Tipton*, 897 N.W.2d 653, 690 (Iowa 2017) (involving abuse of discretion standard for evidentiary rulings); *In re Marriage of Williams*, 595 N.W.2d 126, 139 (Iowa 1999) (involving "default judgment as a sanction for . . . failure to comply with the discovery requests."); *Marketing Associates Co. v. Hawkeye Nat. Life Ins. Co.*, 452 N.W.2d 389, 393 (Iowa 1990) (involving rules of civil procedure related to expert disclosures).

The Kirlins claim the "Defendants fail to provide this Court with any documentary evidence to support their conclusions." Kirlins' Br. at 15. Dr. Monaster relied primarily on the filings previously made in the docket, established legal principles, and an email to show that the Kirlins had not timely filed their expert designation under Iowa Code section 668.11. *See*

generally Attachment to D0120, Dr. Monaster's Statement of Undisputed Facts in Supp. of His Mot. for Summ. J. (07/31/23); Attachment to D0120, Ex. M (Emails) (07/31/23). From the docket filings, distinct legal principles, and simple math, Dr. Monaster established, and the District Court determined, that the Kirlins failed to timely designate their experts. *See* D0140 at 6. Subsequently, the burden of establishing "good cause" for their untimely expert designation shifted to the Kirlins. *See Nedved*, 585 N.W.2d at 240; *accord Reyes*, 2022 Iowa App. LEXIS 431, at *7 (explaining that plaintiffs failed to provide documentary evidence to establish their good cause of a computer glitch). And the Kirlins mainly presented "self-serving affidavit[s] by an interested party to support" their alleged good cause. Kirlins' Br. at 15; *see, e.g.*, Attachment to D0125, Affidavit of John Patric Kirlin (08/14/23); Attachment to D0125, Affidavit of Sara Louise Kirlin (08/14/23); Attachment to D0125, Affidavit of Dean T. Jennings, August 9, 2023 (08/14/23); Attachment to D0125, Affidavit of Kelly N. Wyman, August 9, 2023 (08/14/23).

The Kirlins also generically argue that they had "32 disputed facts for the Court." Kirlins' Br. at 16. Yet, the Kirlins do not explain how any of these thirty-two (32) disputed facts should have prevented the eventual holding in this case, beyond their pure legal conclusions that "the court cannot take

judicial notice of a deadline in a nonexistent case that it dismissed" and the "Court cannot rewrite, edit or amend section 668.11" masquerading as alleged statements of facts. *See* Kirlins' Br. at 16; *see also* Attachment to D0125, Plfs.' Statement of Disputed Facts in Supp. of Plfs.' Combined Resistance to Defs.' (All Defendants) Mots. for Summ. J. (08/14/23). As explained above, the District Court applied binding Iowa precedent and appellate doctrines on how the reversal, remand, and procedendo impacted previously agreed to scheduling deadlines. The Kirlins' failure to explain how the other thirty (30) disputed statement of facts should have prevented summary judgment is sufficient to constitute waiver of this argument. Iowa R. App. P. 6.903(2)(*a*)(8)(3); *see State v. Louewrens*, 792 N.W.2d 649, 650 n. 1 (Iowa 2010) ("Moreover, passing reference to an issue, unsupported by authority or argument, is insufficient to raise the issue on appeal.").

The Kirlins agree[4] that expert testimony is required to prove their case. *See Struck*, 973 N.W.2d at 539 (explaining that expert testimony is generally required in medical malpractice cases). As the plaintiff cannot prove their case

[4] At the very minimum, the Kirlins have not preserved in the District Court or argued in their appellate brief that expert testimony is not required. *see Struck*, 973 N.W.2d at 539 ("Struck did not raise that issue in district court and therefore waived it."); *see also Jorgenson v. Smith*, 2 N.W.3d 868, 875 (Iowa 2024) (applying the party presentation rule); *see generally* Attachment to D0125, Kirlins' Memo., Kirlins' Br.

without expert testimony, summary judgment was properly entered. *Nedved*, 585 N.W.2d at 241 ("The Nedveds do not dispute that expert testimony is necessary for them to establish their claims against Dr. Welch. Accordingly, they concede that if the district court properly denied their motion for extending the time to designate experts, summary judgment was appropriate."); *see also Reyes*, 2022 Iowa App. LEXIS 431 at *7 (same).

IV. Dr. Monaster joins any Applicable Arguments Made by Defendant Jones and Physicians Clinic Appellate Brief as their Own.

CONCLUSION

The Kirlins failed to adequately calculate their deadlines following reversal, remand, and procedendo of *Kirlin I*. The District Court did not abuse its discretion in explaining that the Kirlins did not adequately establish good cause for their extension of time. As expert testimony was required to prove the Kirlins case, summary judgment was appropriate. The Appellate Court should affirm the District Court.

REQUEST FOR ORAL ARGUMENT

Dr. Monaster requests oral argument.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type and contains 6,846 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theodore T. Appel	7/10/24
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