

**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.

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

Defendants-Appellees.

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POTTAWATTAMIE COUNTY
HON. MICHAEL HOOPER**

**Brief for Defendants-Appellees CHRISTIAN WILLIAM JONES, M.D. and
PHYSICIANS CLINIC, INC. d/b/a METHODIST PHYSICIANS CLINIC –
COUNCIL BLUFFS**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Did the District Court properly rule that Plaintiffs are unable to establish a prima facie case after failing to substantially comply with Iowa Code § 668.11?
 - A. Iowa Code § 668.11 applied to this case following an appeal to the Iowa Supreme Court.
 - B. Good cause to extend the deadline for Plaintiffs' expert disclosure did not exist.
 - C. Without expert testimony, Plaintiffs are unable to establish a prima facie case entitling Defendants to summary judgment.

ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2)(c)-(d) as it presents substantial issues of first impression and fundamental and urgent issues of broad public import requiring ultimate determination by the Iowa Supreme Court.

NATURE OF THE CASE

The issue on appeal is whether Plaintiffs substantially complied with Iowa Code § 668.11 in certifying an expert witness. The District Court correctly ruled Plaintiffs failed to timely certify an expert witness and good cause to extend the time for disclosure did not exist. D0140, Ruling on M. Summary Judgment at 7 (11/17/2023). Iowa Code § 668.11 is clear and prohibits an untimely disclosed expert from testifying. Without any experts allowed to testify, the District Court correctly

dismissed the case as Plaintiffs are unable to establish a prima facie case. D0140 at 7.

Plaintiffs' Petition asserts a medical malpractice claim against Christian William Jones, M.D. (hereinafter, "Dr. Jones") and Barclay A. Monaster, M.D. (hereinafter, "Dr. Monaster"), along with their employer, Physicians Clinic, Inc. d/b/a Methodist Physicians Clinic – Council Bluffs (hereinafter, "Physicians Clinic"), in their treatment, or failure to treat, Plaintiff, Jahn Kirlin. D0001, Petition (4/14/2021). The Trial Scheduling and Discovery Plan provides a party who intends to call an expert witness must certify the expert to the court and all other parties within the following time period, unless the Iowa Code requires an earlier designation date, listing Iowa Code § 668.11 as an example. D0036, Trial Scheduling and Disc. Plan at 3 (6/23/2021). Iowa Code § 668.11 provides that a plaintiff who intends to call an expert witness shall certify the expert to the court and all other parties within one hundred eighty days of the defendant's answer. Plaintiffs failed to substantially comply with this section.

Pursuant to Iowa Code § 668.11, any experts on behalf of Plaintiffs are now prohibited from testifying in the action. Therefore, Plaintiffs cannot demonstrate a prima facie case against Defendants. The District Court properly dismissed Plaintiffs' case, and this Court should affirm that decision.

STATEMENT OF FACTS

Plaintiffs, Jahn and Sara Kirlin, filed a Petition on April 14, 2021, against Defendants, Dr. Monaster, Dr. Jones, and Physicians Clinic. D0001. Plaintiffs alleged Dr. Jones and Dr. Monaster were negligent by failing to use the care, skill, and knowledge ordinarily possessed and used by family physicians in their care and treatment of Jahn Kirlin resulting in compensatory damages and loss of consortium. D0001 at 3. Plaintiffs' claims against Physicians Clinic alleged common law vicarious negligence arising from the acts or omissions of its employed physicians, Dr. Monaster and Dr. Jones. D0001 at 3.

Plaintiffs filed a Trial Scheduling and Discovery Plan on June 23, 2021, which was agreed to by all parties. D0036. The Trial Scheduling and Discovery Plan was incorporated into the Order Setting Trial and Approving Plan entered on June 28, 2021. D0040, Order Setting Trial at 1 (6/28/2021). Dr. Jones and Physicians Clinic filed their Answer to Plaintiffs' Petition on August 19, 2021. D0043, Dr. Jones and Physicians Clinic's Answer (8/19/2021). Dr. Monaster filed his Answer to Plaintiffs' Petition on August 20, 2021. D0044, Dr. Monaster's Answer (8/20/2021).

Defendants filed Motions for Summary Judgment which the District Court sustained in an Order issued on January 18, 2022. D0047, Dr. Monaster's M. for Summary Judgment (10/15/2021); D0063 Dr. Jones and Physician Clinic's M. for Summary Judgment (10/15/2021); D0091, Order on Defendants' M. for Summary

Judgment at 6 (1/18/2021). After the District Court denied Plaintiffs’ Motion to Reconsider, Plaintiffs filed a Notice of Appeal on February 25, 2022. D0097, Notice of Appeal (2/25/2022). Following an appeal, the Iowa Supreme Court reversed the District Court’s order granting summary judgment and remanded the case for further proceedings. D0107, Supreme Court Opinion (2/20/2023).

On February 20, 2021, the Iowa Supreme Court filed a Procedendo directing the District Court to proceed in the manner required by law and consistent with the opinion of the Court. D0106, Procedendo (2/20/2023). Following a status hearing on April 4, 2023, the District Court entered an Order scheduling this case for a seven-day jury trial commencing on March 18, 2024. D0113, Order Setting Trial (4/4/2023). The only Trial Scheduling and Discovery Plan agreed to by the parties in this matter was the one filed on June 23, 2021. D0036. The Trial Scheduling and Discovery Plan provides a party who intends to call an expert witness shall certify the expert to the court and all other parties “within the following time period, unless the Iowa Code requires an earlier designation (*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 _____.” D0036 at 3.

On July 31, 2023, Defendants filed Motions for Summary Judgment based on Plaintiffs’ failure to substantially comply with Iowa Code § 668.11. D0118, Dr.

Jones and Physicians Clinic’s M. for Summary Judgment (7/31/2023); D0120, Dr. Monaster’s M. for Summary Judgment (7/31/2023). Plaintiffs served Defendants with Certification and Disclosure of Expert Testimony Pursuant to Iowa Code § 668.11 and Iowa R. Civ. P. 1.500(2)(b) and 1.500(2)(c) on August 8, 2023. D0123, Plaintiffs’ Certification and Disclosure (8/8/2023). On November 17, 2023, the District Court entered an Order granting summary judgment in Defendants’ favor and dismissing Plaintiffs’ Petition. D0140 at 7.

Plaintiffs timely filed a motion to reconsider before the District Court, which Defendants resisted. D0141, Plaintiffs’ M. to Reconsider (11/28/2023); D0145, Dr. Jones and Physicians Clinic’s Resistance (12/8/2023); D0146, Dr. Monaster’s Resistance (12/8/2023). On January 16, 2024, the District Court denied Plaintiffs Motion to Reconsider and Plaintiffs timely filed this appeal. D0149, Order Regarding Plaintiff’s M. to Reconsider at 4 (1/16/2024); D0150, Notice of Appeal (2/5/2024).

ARGUMENT

I. Issue Preservation

These Defendants agree that Plaintiffs’ arguments have been preserved.

II. Scope and Standard of Review

These Defendants agree with Plaintiffs’ statement of the scope and standard of review.

III. The District Court properly ruled that Plaintiffs are unable to establish a prima facie case after failing to substantially comply with Iowa Code § 668.11.

A. Contrary to Plaintiffs' argument, Iowa Code § 668.11 applied to this case following an appeal to the Iowa Supreme Court.

Plaintiffs' assumption that Iowa Code § 668.11 did not apply after the appeal to the Iowa Supreme Court is incorrect. This Court has generally held a reversal leaves the case as if the judgment or decree had never been entered. *Sleeper v. Killion*, 164 N.W. 241, 245 (Iowa 1917) Following the appeal, the District Court properly placed the parties back into the same position they were in before the dismissal.

Iowa Code § 668.11(1) provides:

A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:

a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.

Plaintiffs argue section 668.11 did not apply to this case following the appeal to the Iowa Supreme Court and the District Court cannot continue a deadline beyond its dismissal. However, Plaintiffs' cite no case, rule, or Code section to support this contention. In fact, case law supports that the parties returned to the positions they were in prior to the appeal.

The first time this case was on appeal, the issue was whether a plaintiff could voluntarily dismiss a case without prejudice in the face of a dispositive motion. *Kirlin v. Monaster*, 984 N.W.2d 412 (Iowa 2023). Specifically, Plaintiffs filed a certificate of merit affidavit but voluntarily dismissed the case after Defendants challenged the qualifications of the expert witness who signed the affidavit. *Id.* at 413. Plaintiffs refiled their case and provided a certificate of merit affidavit signed by a different expert witness. *Id.* Defendants argued Plaintiffs were bound by the alleged deficient affidavit from the first case. *Id.* The District Court agreed and granted summary judgment in the second case. *Id.* The Iowa Supreme Court held the District Court erred when granting summary judgment based only on a certificate of merit affidavit provided in the dismissed case. *Id.* at 417. The Iowa Supreme Court noted “[w]hen the [Plaintiffs] voluntarily dismissed their first suit, it became ‘nonexistent’ and ‘unreviewable’.” *Id.* “When the [Plaintiffs] refiled their suit, section 147.140 applied anew...” *Id.* Accordingly, the Iowa Supreme Court reversed the District Court’s order and remanded for further proceedings. *Id.*

The situation in this appeal is different, in that Plaintiffs did not voluntarily dismiss and refile a new lawsuit. We continue to deal with Plaintiffs’ second suit which the Iowa Supreme Court reversed and remanded. D0107 at 13. On February 20, 2023, the Iowa Supreme Court issued a procedendo instructing the District Court to proceed in the manner required by law and consistent with the opinion of the

Court. D0106 at 1. A procedendo notifies the lower court the case is being transferred back to that court. *See In re M.T.*, 714 N.W.2d 278, 282 (Iowa 2006); *State v. Banning*, 218 N.W. 572, 574 (Iowa 1928). Iowa law holds “that a general and unqualified reversal of a judgment or decree, without other 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*, 164 N.W. at 245. Accordingly, when the Iowa Supreme Court reversed the District Court’s dismissal without instructions as to discovery, the parties returned to the positions they were in as of January 18, 2022. At that time, Plaintiffs had 29 days remaining to certify an expert pursuant to Iowa Code § 668.11 - or agree with defense counsel to new deadlines or seek an extension from the trial court.

In this case, the only Trial Scheduling and Discovery Plan agreed to by the parties and submitted to this Court was filed on June 23, 2021, which provides:

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 _____.

D0036 at 3.

Based on the trial start date of March 18, 2024, the 210-day deadline listed in the form version of the Trial Scheduling and Discovery Plan would be August 21,

2023. D0113 at 1; D0036 at 3. However, Iowa Code § 668.11 requires an earlier designation.

Dr. Jones and Physicians Clinic filed an Answer to Plaintiffs' Complaint on August 19, 2021, while Dr. Monaster filed his Answer on August 20, 2021. D0043; D0044. Pursuant to Iowa Code § 668.11, Plaintiffs' expert disclosure deadline would be February 16, 2022. Before that deadline, Defendants filed Motions for Summary Judgment which the District Court granted on January 18, 2022. D0090, Order on Defendants' M. for Summary Judgment at 6 (1/18/2022). Between the filing of Defendants' Answers and when the District Court dismissed the case, 151 days had elapsed. Plaintiffs subsequently appealed all Orders entered in the matter. D0097.

Following the appeal, when the case was transferred back to the District Court on February 20, 2023 and the parties returned to the positions they were in as of January 18, 2022, the 180-day deadline provided in section 668.11 expired on March 21, 2023. Since section 668.11 requires an earlier deadline than the 210-day deadline of August 21, 2023, provided in the form version of the Trial Scheduling and Discovery Plan, the March 21, 2023 deadline applied to this case.

The District Court properly found Plaintiffs did not disclose their experts within the 180-day period pursuant to Iowa Code § 668.11 and Plaintiffs never argued that they complied with this section.

B. Good cause to extend the deadline for Plaintiffs' expert disclosure did not exist.

The only exception to Iowa Code § 668.11 is if good cause exists to extend the time of expert disclosure, which the District Court properly found there was not in this case. D0140 at 7.

For purposes of section 668.11, “good cause” is 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 [act] and took steps to do so, but because of some misunderstanding, accident, mistake, or excusable neglect failed to do so. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them.

Nedved v. Welch, 585 N.W.2d 238, 240 (Iowa 1998) (quoting *Donovan v. State*, 445 N.W.2d 763 (Iowa 1989)). The court considers three factors in determining whether good cause exists: “(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, 505-506 (Iowa 1993)).

Pursuant to Iowa Code § 668.11, Plaintiffs’ expert disclosure deadline was March 21, 2023. Plaintiffs did not produce expert certifications and disclosures until August 2, 2023, 140 days after the deadline. D0123, Plaintiffs’ Certification and Disclosure (8/8/2023). This is a serious deviation. *See Reyes v. Smith*, No. 21-0303, 2022 WL 1656238 (Iowa Ct. App. May 25, 2022) (finding a delay of sixty-six days

in designating experts is substantial); *Nedved*, 585 N.W.2d 238 (affirming the rejection of an expert filed three months late).

Plaintiffs' serious deviation caused great prejudice to Defendants. Plaintiffs were over four months late with their expert disclosures. That is four months in which Defendants should have known the identity of Plaintiffs' experts, their qualifications, and their specific opinions. This information impacts ongoing discovery, strategy, and motion practice. Defendants' ability to work with experts of their own is prejudiced, as without specific, timely opinions from Plaintiffs' expert witnesses, Defendants are left to guess what Plaintiffs' experts' theories of Defendants' specific negligence might be. Moreover, Defendants are further prejudiced as they are squeezed on the deadlines within which to depose Plaintiffs' experts, and if need be, file timely motions to exclude such experts. Based on the trial date of March 18, 2024 and Plaintiffs finally providing expert disclosures on August 8, 2023, Defendants only had seven months to work with this information, rather than eleven months had Plaintiffs properly complied with Iowa Code § 668.11.

Plaintiffs did file certificate of merit affidavits with respect to the issue of standard of care in compliance with Iowa Code § 147.140. D0017, Certificate of Merit Monaster (5/13/2021); D0018, Certificate of Merit Jones (5/13/2021); D0019, Certificate of Merit Physicians Clinic (5/13/2021). However, the filing of a

certificate of merit affidavit does not satisfy the certification requirement in section 668.11. Section 147.140(3) explicitly states “The parties shall comply with the requirement of section 668.11 and all other applicable law governing certification and disclosure of expert witnesses.” Accordingly, Plaintiffs’ certificate of merit affidavits do not satisfy Iowa Code § 668.11 and Plaintiffs still had to comply with section 668.11 certification requirements.

Plaintiffs’ serious deviation and the prejudice to Defendants is not due to Defendants’ counsels’ actions. Following procedendo, counsel exchanged email correspondence regarding a new Trial Scheduling and Discovery Plan. D0125, Attachment A to Plaintiffs’ Resistance (8/14/2023). Counsel for Defendants were in favor of dates certain for experts. D0125, Attachment A at 1-2. This shows Defendants were agreeable to discussing new expert disclosure deadlines, something consistently rejected by Plaintiffs’ counsel. However, there was no further discussion or agreement made between the parties regarding new expert deadlines and Plaintiffs’ counsel did not raise any deadline issues at the trial scheduling conference. Accordingly, expert disclosure deadlines were still controlled by Iowa Code § 668.11.

When Defendants filed Motions for Summary Judgment, Plaintiffs were 132 days late on disclosing expert witnesses. Defendants afforded Plaintiffs ample time prior to filing their Motions for Summary Judgment, during which Plaintiffs could

have substantially complied with Iowa Code § 668.11 by disclosing experts, requesting an extension of expert deadlines from counsel for Defendants, or seeking an extension of time from the District Court. However, Plaintiffs operated under the assumption that section 668.11 did not apply on remand. There is no evidence that counsel for Defendants acted in bad faith or did anything to cause confusion or Plaintiffs failure to timely comply with section 668.11.

Plaintiffs allege they are the only ones who are prejudiced by their own late expert disclosure. Not only is that untrue, but prejudice to the plaintiff is not a factor in assessing whether good cause exists. Plaintiffs were not left without options following remand. As stated above, Plaintiffs could have disclosed experts or requested an extension from Defendants or the District Court. Plaintiffs note this case has been pending since April of 2021 and Defendants should have known Plaintiffs had experts based on their Certificate of Merit Affidavits filed on May 13, 2021. D0017; D0018; D0019. If Plaintiffs had experts, as they claim, they should not have had any issue substantially complying with Iowa Code § 668.11. Moreover, the Certificate of Merit Affidavit does nothing more than make a conclusory statement of breach by one expert – one who may not even testify at trial. Instead, Plaintiffs delayed well beyond their deadline under Section 668.11, thereby squeezing Defendants’ timeframe to secure experts knowing the actual claims of breach and causation to which Plaintiffs’ medical experts would testify.

Based on an analysis of the three factors, the District Court did not err in finding good cause to extend Plaintiffs' expert disclosure deadline did not exist. Section 668.11 requires substantial compliance which is "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Hantsbarger*, 501 N.W.2d at 504. The Iowa Supreme Court has held Section 668.11 "is designed to require a plaintiff to have his or her proof prepared at an early stage in the litigation in order that the professional does not have to spend time, effort and expense in defending a frivolous action." *Id.*

Based on their own actions, Plaintiffs' expert disclosure was 140 days late. This negates the entire purpose of Iowa Code § 668.11 at the prejudice of Defendants. As will be described below, Plaintiffs' untimely disclosed expert witnesses are prohibited from testifying and the District Court appropriately dismissed Plaintiffs' claims.

C. Without expert testimony, Plaintiffs are unable to establish a prima facie case entitling Defendants to summary judgment.

Plaintiffs argued to the District Court that there was broad discretion in crafting a remedy for failing to comply with the Iowa Code § 668.11 deadline. The District Court properly found section 668.11 prohibits an untimely disclosed expert from testifying and that Plaintiffs were unable to establish a prima facie case.

Iowa Code § 668.11(2) provides "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.” (emphasis supplied) The use of the word “shall” imposes a duty. *See* Iowa Code § 4.1(30)(a). As explained above, Plaintiffs cannot show good cause as to why expert certification did not occur timely. Accordingly, Plaintiffs’ untimely disclosed experts shall be prohibited from testifying in this action.

Without expert testimony, Plaintiffs are unable to prove a prima facie case against Defendants. “It is well settled that expert testimony is required to prove professional negligence claims against healthcare providers.” *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 539 (Iowa 2022). “Ordinarily, evidence of the applicable standard of care – and its breach – must be furnished by an expert.” *Id.* (quoting *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990)).

The Iowa Supreme Court has held expert testimony is not required for medical malpractice cases in a limited set of circumstances. The first is when “the physician’s lack of care is so obvious as to be within the comprehension of a lay[person] and requires only common knowledge and experience to understand.” *Id.* (quoting *Oswald*, 453 N.W.2d at 636.) Examples include when a sponge or instrument is left in the body or when a doctor operates on the wrong patient or body part. *See Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*, 987 N.W.2d 834, 841 (Iowa 2023).

The second set of circumstances that does not require expert testimony is when a plaintiff's allegations concern "non-medical, administrative, ministerial, or routine care." See *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 101 (Iowa 1971). The Iowa Supreme Court and Iowa Court of Appeals have held such care includes helping patients shower or assisting patients to the restroom. See *Id.*; *Davis v. Montgomery Cnty. Mem'l Hosp.*, No. 05-0865, 2006 WL 1896217 (Iowa Ct. App. July 12, 2006); *Landes v. Women's Christian Ass'n*, 504 N.W.2d 139 (Iowa Ct. App. 1993). In contrast, the Iowa Court of Appeals has held expert testimony is required regarding alleged medical malpractice when an unattended patient fainted after a physician unwrapped an injured finger. *Miller v. Trimark Physicians Grp., Inc.*, No. 03-0055, 2003 WL 22346933 (Iowa Ct. App. Oct. 15, 2003). The Iowa Supreme Court has also held nonmedical or routine care includes properly repositioning patients to prevent pressure injuries, but expert testimony is required when forcing patients to reposition against their will to prevent pressure injuries. *Thompson v. Embassy Rehab. & Care Ctr.*, 604 N.W.2d 643 (Iowa 2000).

In determining whether expert testimony is required, the Iowa Supreme Court has applied the following test:

[I]f all the primary facts can be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation, [expert testimony is not required].

Struck, 973 N.W.2d at 543 (alterations in original) (quoting *Thompson*, 604 N.W.2d. at 646).

Here, Plaintiffs allege on April 1, 2019, Plaintiff, Jahn Kirlin began to experience headaches and right-sided neck pain and intense pressure behind his right eye. D0001 at 2. Dr. Jones saw him three days later for those conditions and provided medications, referred Jahn Kirlin to a pain management specialist, and discussed the possibility of a future MRI. D0001 at 2. Plaintiffs further allege that twelve days later Jahn Kirlin suffered a stroke during a chiropractic manipulation, and that subsequent imaging confirmed the presence of bilateral distal cervical vertebral artery dissections with high-grade stenoses, and small thrombus in the proximal basilar artery. D0001 at 2.

It is most certainly not within the common knowledge of lay people to appreciate whether cervical vertebral artery dissections can persist over twelve days, nor could lay people possibly comprehend the presenting signs and symptoms of vertebral artery dissections. Assessing a patient's complaints like Jahn Kirlin's on April 4, 2019, deciding on which tests and imaging studies to pursue in response to those complaints, and developing a diagnosis and treatment plan does not fall into the category of "non-medical, administrative, ministerial, or routine care."

The allegations of professional negligence pled by Plaintiffs against Dr. Jones certainly require expert testimony well-versed in the standard of care for internal

medicine physicians in providing care, treatment, and referral options to patients with the same or similar complaints as Jahn Kirlin. Without expert testimony, Plaintiffs are unable to establish a prima facie case of negligence.

The affidavit of Dr. Jones establishes that he met the applicable standard of care in evaluating, providing care for, and in providing services and treatment to Jahn Kirlin. D0054, Affidavit of Dr. Jones (10/15/2021). Without expert testimony to rebut Dr. Jones' showing that he met the standard of care, there is no disputed fact issue. Therefore, Dr. Jones and Physicians Clinic are entitled to summary judgment. *See Iowa R. Civ. P. 1.981(3).*

The Iowa Supreme Court has previously affirmed a trial court in granting motions for summary judgment due to untimely expert disclosures based on Iowa Code § 668.11. *See Donovan*, 445 N.W.2d 763. The Iowa Court of Appeals has also affirmed trial courts in granting motions for summary judgment based on Iowa Code § 668.11 due to lack of or untimely expert disclosures. *See Kubik v. Burk*, 540 N.W.2d 60 (Iowa Ct. App. 1995); *Bulmer v. UnityPoint Health*, No. 17-2084, 2019 WL 2144627 (Iowa Ct. App. May 15, 2019); *Reyes*, 2022 WL 1656238. The Iowa Court of Appeals has also reversed a trial court's order in denying a defendant's motion for summary judgment based on failure to comply with section 668.11. *See Stanton v. Knoxville Cmty. Hosp., Inc.*, No. 19-1277, 2020 WL 4498884 (Iowa Ct. App. Aug. 5, 2020).

Although these cases do not involve situations in which a case was remanded from the Iowa Supreme Court for further proceedings, Plaintiffs were still obligated to timely comply with Iowa Code § 668.11, which they failed to do. Accordingly, as the above cited cases establish, dismissal of Plaintiffs' claims is the appropriate remedy. The District Court did not err in granting summary judgment to Defendants and dismissal of Plaintiffs' claims must be affirmed.

CONCLUSION

Plaintiffs' failure to substantially comply with Iowa Code § 668.11 required dismissal and the court did not err in granting Defendants' motions for summary judgment. Dr. Jones and Physicians Clinic respectfully request that this Court affirm the District Court's judgment in Defendants' favor and for such other relief as the Court deems just and equitable.

REQUEST FOR ORAL ARGUMENT

Defendants, Dr. Jones and Physicians Clinic, hereby request oral argument on the case as this is the second time this case is before an appellate court.

CHRISTIAN WILLIAM JONES, M.D. and
PHYSICIANS CLINIC, INC.,
Defendants/Appellees,

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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)(e) and 6.903(1)(i)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point type and contains 4,273 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

/s/ Robert A. Mooney
Signature

7/10/2024
Date

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The undersigned certifies this brief was electronically filed and served on the 10th day of July, 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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