IN THE SUPREME COURT OF IOWA
No. 23-0509

Page County No. LACV105820

DOUGLAS B. WILSON and JANE WILSON,
Plaintiffs/Appellees

v.

SHENANDOAH MEDICAL CENTER,
Defendant/Appellant

APPELLEES' RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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ANSWERS TO QUESTIONS PRESENTED FOR FURTHER REVIEW

1. No. Iowa Code section 668.11 does not require "good cause" for having *missed* the expert deadline; it only requires "good cause" for the court to *extend* the deadline.

2. No. Iowa Code section 668.11 does not dispositively require defense counsel to "urge compliance", but their silence is a *factor* in a district court's analysis whether there is "good cause" to *extend* a missed expert deadline.

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The plain text of Iowa Code section 668.11, and Iowa Supreme Court cases interpreting it, only require a party to establish "good cause" for an *extension* of the expert designation deadline. Those authorities do *not* require an additional showing of "good cause" why there was a missed deadline in the first place. Shenandoah's insistence to the contrary ignores the text of the statute and this Court's binding precedent, and is solely premised upon distinguishable, unpersuasive, unpublished Court of Appeals' opinions, so further review should be denied.

As a matter of further review rules, Iowa Rule of Appellate Procedure 6.1103's parameters do not support this Court giving Shenandoah a third chance to repeat its arguments in what essentially boils down to a discovery dispute. Because Shenandoah's application does not satisfy the text of the appellate rule, nor offer any other good argument in favor of further review, the request for a third try should be denied, and this case should be remanded to allow the parties to complete discovery and go to trial.

There are four main grounds for further review. Summarized, they are: 1) conflict with prior decisions of this Court or the Court of Appeals, 2) constitutional issues or issues of first impression, 3) new or changing laws, and 4) publicly

important issues. Iowa R. App. P. 6.1103(1)(b)(1)-(4). The rule also leaves the door open for cases of a different character to be granted further review, but an application will "not be granted in normal circumstances." Iowa R. App. P. 6.1103(b).

In this case, Shenandoah did not allege any conflict with (actual) precedent. Shenandoah also did not raise any constitutional questions or legal issues of first impression. Any asserted whiff of changing legal principles is erroneously reliant upon other unpublished, distinguishable Court of Appeals' opinions with faulty logic. Last, since this discovery dispute and the judge's discretion are both fact-specific, the public could not be less affected by or interested in this case being ultimately decided by this Court. So, further review should be denied.

The only scratch to the surface of Iowa Rule of Appellate Procedure 6.1103 in Shenandoah's application is when it claims this case is important because it involves a statute, and since the Legislature intends all of its statutes to be enforced, that makes this case "important" and therefore, further review is warranted. But that argument would make further review the rule, rather than the exception, because *most* cases involve a rule, or statute. The argument is also tautological; it presupposes that "enforcement" of the statute can *only* mean a win for Shenandoah. It ignores the alternative: that enforcement was properly had in

this case when the court found "good cause" existed to allow Wilsons' expert to be designated out of time.

Further review should also be denied because Iowa's judicial norms and traditions support the opinion of the Court of Appeals. Its opinion honors Iowa's plethora of cases which defer to district court discovery-related rulings which is essentially at the heart of this case. Its opinion also favors Iowa's preference for a trial on the merits, rather than a case dismissed by artifice, loophole, trick, or device. And, as crass as it might seem, further review should be denied in order to avoid rewarding Shenandoah for skipping the 1.517 discovery phone call process. Since it is undisputed that there was *never* an Iowa Rule of Civil Procedure 1.517 phone call by defense counsel before seeking to exclude Wilsons' expert under Iowa Rule of Civil Procedure 1.500(2), and that issue has been properly raised and preserved as an alternative basis to affirm in Wilsons' favor throughout this process, further review should be denied.

ARGUMENT & AUTHORITIES

I. FURTHER REVIEW SHOULD BE DENIED BECAUSE IOWA RULE OF APPELLATE PROCEDURE 6.1103 AND JUDICIAL NORMS FAVORING DEFERENCE, TRIAL ON THE MERITS, AND GOOD FAITH DISCOVERY PHONE CALLS ALL SUPPORT AFFIRMING THE COURT OF APPEALS' OPINION.

A. The Opinion of the Court of Appeals is Not in Conflict with Any Decision of the Supreme Court or any Precedential Decision of the Court of Appeals.

1. Supreme Court precedent supports the Court of Appeals' opinion.

In this case, the Court of Appeals cited two main Supreme Court decisions in support of its ruling: Hantsbarger v. Coffin, 501 N.W.2d 501 (Iowa 1993) and Nedved v. Welch, 585 N.W.2d 238 (Iowa 1998). Hantsbarger was a medical malpractice case where Plaintiffs had engaged in voluminous discovery about their expert, but they technically failed to comply with the designation requirement on time under Iowa Code section 668.11. Hantsbarger, 501 N.W.2d at 505-06. The district court excluded the expert finding a lack of good cause. Id. at 504. However, the Iowa Supreme Court reversed, reasoning that because Hantsbargers had "complied with discovery" and "had their experts in hand" *before* the deadline, there was no "measurable harm or prejudice" caused by delay, and the district court *should have* allowed the expert out of time. Id. at 505. In reaching its conclusion, this Court also found it *relevant*, though not dispositive, whether opposing counsel's actions or lack thereof contributed to the delay. Id. at 506.

Nedved was another medical malpractice case with facts and a result almost opposite of Hantsbarger. In Nedved, Plaintiff's counsel had done almost nothing pre-deadline to locate an expert or participate in discovery about the expert. Nedved, 585 N.W.2d 238 (Iowa 1998). Right before the deadline was about to run, counsel for Nedveds sought an extension for good cause claiming it had been "impossible" to schedule depositions. Id. at 239. However, defense counsel denied the claim of impossibility, insisting that the defense had never been contacted about scheduling depositions at all. Id. at 240. At the hearing, counsel for Nedved retreated from its proffered no-depositions reason, instead offering a new reason: that counsel planned to withdraw, and new counsel would need more time. Id. After waiting even longer for the originally-requested extension time period to pass with Nedveds *still* not having designated their expert, the district court granted Dr. Welch's motion for summary judgment. Id. at 241. This Court affirmed. This Court determined that the district court was not required to accept the deposition excuse asserted by Nedved because "good cause" must be comprised of a truthful reason, and the claim about depositions was "contradicted" and "without evidentiary support". Id. at 240-41. Implied in the analysis was that a lack of depositions can constitute good cause for an extension *if* it is a legitimate reason for needing more time. Id. at 241. But since Nedved's proof was lacking, the failure to grant an extension was upheld.

The Court of Appeals' opinion in the case at issue neatly applies the principles of both Hantsbarger and Nedved. Like in Hantsbarger, the Wilson plaintiffs participated extensively in discovery about their expert, and the timeline shows they did so early on, not belatedly. (Opinion, p. 9-10) (explaining Wilsons' participation in the discovery process and copy/pasting on their Answer to Interrogatory No. 16). Wilsons' case was filed in December, 2021 and by mid-June, 2022, less than six months into the case, Wilsons had already provided discovery responses including a long, detailed answer to interrogatories about their expert. (Opinion, p. 9).

And even more than the Hantsbarger plaintiffs, the Wilson plaintiffs here also filed a Certificate of Merit providing additional designation-like information about their expert to Shenandoah. (Opinion, p. 2) (noting the certificate of merit being filed twelve days after the Answer, five times sooner than required under Iowa Code section 147.140 which establishes a sixty-day, post-Answer deadline). That was filed a mere twelve days after Shenandoah answered the petition which shows that Wilsons, like the Hanstbargers and unlike the Nedveds, had been working hard along the way to progress the case forward, and thus, there was good cause for an extension.

Likewise, as in Nedved, the Wilson plaintiffs made the same deposition argument, only here, their reason is truthful and supported by substantial, written

evidence in the record: emails between the lawyers and staff. (D0030, p. 4-8). The record shows Wilsons' lawyer tried to schedule depositions of the parties and defense witnesses as early as May 9, 2022, by email, long before their expert designation and disclosure deadlines would have lapsed, but defense counsel were too busy to participate. (D0030, p. 5) (May email). Instead, defense counsel affirmatively, expressly, and in writing proposed postponing depositions until "fall", which, as per a 2022 calendar, would have been *after* Wilsons' expert deadline passed. (D0030, p. 4). Not realizing that bait would later be switched, Wilsons agreed to the requested delay. They reasonably believed their agreement to extend depositions of the parties and fact witnesses also created an *implied* agreement that other deadlines lapsing prior to "fall" would also have to, by necessity, be extended. Since even Shenandoah agreed in its Application that "misunderstanding", "mistake" and "excusable neglect" are all "good cause" reasons, and the facts in this case show much more than a plain "want of ordinary care or attention" or "carelessness", the Court of Appeals and district court were correct to apply the Nedved principles and grant Wilsons an extension. Thus, further review is not warranted.

2. The Court of Appeals' opinion does not conflict with that court's precedent.

The dissenting opinion in the instant case, authored by Judge Langholz, primarily relies on an unpublished case called Stanton v. Knoxville Community

Hospital, Inc., No. 19-1277, 2020 WL 4498884 (Iowa Ct. App. Aug. 5, 2020). But there are several reasons to reject to Stanton's applicability in this case.

First, Stanton is unpublished. As per Iowa Rule of Appellate Procedure 6.904, "unpublished opinions or decisions of a court or agency do not constitute controlling legal authority…". At *best* an unpublished opinion "may" be relied upon if it is "persuasive." Iowa R. App. P. 6.904(2)(a)(2). But, neither the dissent's reliance upon Stanton, nor Stanton itself, is persuasive when applied to this case because the facts are grossly dissimilar and Stanton unreasonably expanded section 668.11 beyond its text.

First, the Stantons ignored discovery requests about their experts for *months*, whereas Wilsons fully complied with discovery very early on. Stanton, 2020 WL at *1. Second, the Stantons compounded the harm by ignoring emails from the defense about their experts. Defense attorney, Nancy Penner (also counsel here), asked counsel for Stantons in an email dated April 26, 2018 as follows:

> We served requests for production and interrogatories on February 13th. I do not believe you have answered and responded. Please let me know when we can expect answers and responses. **I am especially interested in** a list of medical providers, an authorization to receive copies of Mr. Stanton's medical and **information about your experts** and claimed damages. My client is understandably putting pressure on me to move this matter along.

Id. (emphasis added). By contrast, the emails in the instant case show it was Shenandoah's side of the case which was unprepared and unavailable, not Wilsons'

side of the case. Third, as Judge Langholz acknowledged, the trial date was more near in Stanton, and farther away in this case—more than two years away, and that impacts the prejudice analysis. (Court of Appeals Opinion, p. 16). Since there is Iowa Supreme Court precedent affirming a district court's allowance of a new expert a mere week before a trial date in one case, the Court of Appeals and district court did not abuse authority here when two *years* still remained available to cure prejudice. See Preferred Marketing Associates Co. v. Hawkeye, Nat. Life Ins. Co., 452 N.W.2d 389, 392 (Iowa 1990) (allowing new expert one week before trial in this "close case" of discretion).

Judge Langholz's dissent also fails to appreciate other distinctions between this case, Hantsbarger, Nedved, and Stanton. For one thing, the dissent *only* evaluated the severity of the delay temporally; it gave no weight to the rest of the discovery already exchanged. Yet, in Hantsbarger, the entire premise of this Court's reversal was due to all the other discovery which had been exchanged. Judge Langholz did not weigh the impact of all the other discovery exchanged, so his dissent is not "persuasive" because it violates Hantsbarger.

Judge Langholz also critiqued Wilsons for not having designated their expert sooner when the record showed Wilsons already knew their expert's name, and that they planned to use her. (Court of Appeals Opinion, p. 12). Yet, in Hantsbarger, the fact that Plaintiffs obtained their expert early *favored* them, it didn't hurt them.

Hantsbarger, 501 N.W.2d at 505 (noting plaintiffs had found their expert *before* the deadline ran). Judge Langholz's analysis, on the other hand, would punish plaintiffs who sought out experts early and would discourage them from informal information-sharing between lawyers. Judge Langholz's analysis should be rejected because it encourages sandbagging, rather than disclosure.

Additionally, Judge Langholz's dissent overemphasized the Hantsbarger rule against having to be another lawyer's keeper, and underemphasized the Hantsbarger rule mandating analysis of the actions of defense counsel. Hantsbarger, 501 N.W.2d at 505-06. Judge Langholz's dissent purports to immunize silence from the "good cause" analysis, on lawyer-ethics grounds, which *nobody* raised or cited. But even presuming anyone raised lawyer ethics in this case, ignoring defense silence plainly violates the third prong of the Hantsbarger test. And while, to be sure, silence is not dispositive of "good cause", it *is* still relevant.

Finally, the dissent violates Hantsbarger by presuming prejudice exists in every late-designation case without requiring any showing of *actual* prejudice. Hantsbarger required "measurable" prejudice which it found lacking in that case due to all the discovery which had been exchanged. Id. at 505. But if prejudice is supposed to be measured, yet Judge Langholz would find prejudice exists in every case by virtue of the lateness itself, then his analysis functionally reads out the prejudice prong of the "good cause" test in Hantsbarger. And this Court does not,

and should not, interpret its own precedent and well-established tests as useless *dicta*. And it *certainly* should not be grounds for further review; no one has asked to overrule Hantsbarger.

B. The Court of Appeals Has Not Decided a Substantial Question of Constitutional Law or Any Important Question of Law That Has Not Been, But Should Be, Settled by the Supreme Court.

1. Any constitutional gloss in this case supports the Court of Appeals' opinion.

Shenandoah does not assert any constitutional implications flowing from the Court of Appeals' ruling nor from a grant or denial of further review. That makes sense since there is nothing in either the Iowa or federal constitutions which guarantee tortfeasors the right to escape liability through procedural technicalities and loopholes.

On the other hand, there are constitutional rubs on Wilsons' side of the case. Primarily is their right to a civil jury trial. While, to be sure, states are free to enact reasonable procedures to promote the orderly, fair administration of justice, the limits of a state's power are not absolute. Some might reasonably question whether it violates equal protection for doctors to be shielded by Iowa Code section 668.11 when *no other* tortfeasor gets such protection. Others might also question whether it violates fair trial rights to dismiss an entire case when other remedies, shy of dismissal, are available. Alas, no one has raised any

constitutional implications in this case, so further review is not warranted on this ground.

2. There are no new important questions of law which need settled by this Court.

The issue of "good cause" and its application in the context of Iowa Code section 668.11 is well-settled, going back to at least 1993 in the Hantsbarger case and 1998 with Nedved. There are more cases in the universe about section 668.11, of course, in this and other statutory contexts, but going back thirty-years is sufficient to call the test well-settled. And since the Court of Appeals correctly applied Hantsbarger and Nedved, further review is not necessary and the Application should be denied.

Defense counsel, Rinden and Penner, in this case admitted in related court cases that Hantsbarger and Nedved are still good law. They cited to and relied upon both of those cases in their own further review resistance in the Stanton case. Stanton was *their* case; they defended it and got the expert removed. (See Stanton v. Knoxville, No. 19-1277, "Joint Resistance to Plaintiff-Appellee's Application for Further Review of Court of Appeals Decision of August 5, 2020", filed 8/4/2020, p. 16) (available on EDMS). Attorney Geis is new here, yes, but Rinden and Penner remain the same as from Stanton.

In their Stanton filing, Rinden and Penner cited to and relied upon Hantsbarger and Nedved, and agreed in their further review resistance that actions

of defense counsel *are a relevant inquiry*. (See Stanton v. Knoxville, No. 19-1277, "Joint Resistance to Plaintiff-Appellee's Application for Further Review of Court of Appeals Decision of August 5, 2020", filed 8/4/2020, p. 18) (available on EDMS). That would include "silence", something they now claim is immune from review in this case. Which is it?

Rinden and Penner also admitted in their Stanton further review resistance that "responsiveness to discovery requests" impacts "good cause". (See Stanton v. Knoxville, No. 19-1277, "Joint Resistance to Plaintiff-Appellee's Application for Further Review of Court of Appeals Decision of August 5, 2020", filed 8/4/2020, p. 19) (available on EDMS). And this is obvious; it affects severity and prejudice. Yet, in this case, Shenandoah ignores all the discovery which was exchanged, and claims the basis for initial delay is dispositive. But, ignoring all the discovery, like they suggest, functionally overrules Hantsbarger, and since no one has asked for any cases to be overruled, Shenandoah's new legal theory should be rejected, and further review should be denied.

C. The Court of Appeals Has Not Decided a Case Where There is an Important Question of Changing Legal Principles.

1. Well-settled, unchanging law supports the Court of Appeals' opinion.

As explained above, Hanstbarger and Nedved are still good law, and no case or statute has overruled them. To the extent Stanton might have suggested new

changes to the "good cause" analysis, those suggestions would not dictate further review here because the Court of Appeals in this case didn't adopt Stanton and Stanton was unpublished. Thus, there is no *precedent*, either a Supreme Court opinion or a *published* Court of Appeals' opinion, in conflict with the Court of Appeals' opinion in this case. So, further review should be denied.

2. The opinions cited by Shenandoah do not establish any trend of changing legal principles.

The Stanton case, arguably, could potentially represent an attempt to *change* the law by adding new requirements that do not exist in the statute, to wit: requiring a showing of "good cause" for being late, *and* "good cause" for an extension of the time period, too. But the statue only examines for the latter, not the former, so Stanton's analysis is extra-statutory and should be rejected.

Iowa Code section 668.11 says plaintiffs must designate an expert by a certain deadline "unless the court **for good cause not ex parte extends** the time of disclosure" and that "if a party fails to disclose…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 (emphasis added). On its face, the statute asks merely whether there is good cause for an extension. It does not ask whether there is good cause for being late. Stanton's seeming addition of the new element, therefore, is a judicial re-write of the statute, and should be rejected.

The most likely culprit for why Stanton seems to add a new "good cause for delay" element is the 2017 Certificate of Merit statute, Iowa Code section 147.140. That statute has a "good cause" test, too, but by contrast to section 668.11, section 147.140 requires a showing of good cause *before* being late and for seeking an extension, too. The Certificate of Merit statute says: "The parties by agreement or the court for good cause shown and in response to a motion filed prior to the expiration of the time limits…may provide for extensions of time limits." Iowa Code § 147.140 (emphasis added). The statute then explains: "Good cause shall include but not be limited to the inability to timely obtain the plaintiff's medical records…when requested prior to filing the petition." Understood in comparison then, section 147.140 requires good cause *before* missing a deadline, i.e. "good cause for *delay*", whereas section 668.11 merely requires "good cause" for an *extension*, but has no requirement to explain a delay.

Hence, when cases like Stanton and the dissent herein advance a new requirement to show "good cause" for missing a deadline, they are most likely innocently, but mistakenly, borrowing from the "good cause" analysis in similar, but distinct, section 147.140 cases, without giving effect to the textual distinctions between the two statutes. And, like Shenandoah urges in its Application: all statutes are important, and the Legislature wants them enforced. So *too*, then, does the Legislature intend the *differences among statutes* to have meaning and to

be enforced, too. And since Stanton was wrong to implant a new "good cause *for delay*" requirement into Iowa Code section 668.11, rather than merely focusing on "good cause" for an *extension*, Stanton, and other cases like it, should not be followed, and further review should be denied. The district court and the Court of Appeals correctly applied the statute at issue, and their opinions should stand.

D. This Case Does Not Present any Issue of Broad Public Importance That the Supreme Court Should Ultimately Determine.

1. The Court of Appeals' opinion is very fact-specific, not widely applicable to others.

As a review of Hanstbarger, Nedved, and even Stanton show, the outcomes of these types of discovery dispute cases are highly fact-specific and fact-dependent. For example, there was a lot of discovery exchanged in Hantsbarger and in this case before a deadline got missed, but *no* discovery was exchanged in Nedved or in Stanton. Sometimes, a late designation is corrected only a few days after the issue becomes apparent, like in Hanstbarger and in this case, whereas in other cases like Nedved even a *de facto* extension cannot motivate some lawyers to file the designation on time. And then there are situations with false good cause reasons, like Nedved, where extensions should rightfully be denied, and other situations, like here, where discovery *really was delayed* by defense counsel's actions, and it is fair, in context, to extend deadlines. The point is that further review should not be wasted on cases where the outcome is fact-dependent and

where there are no new legal principles being advanced. This Court rightfully should reject further review and save its judicial capital and resources for cases which actually impact the public. That is not this case.

2. The only "public" issue is the abuse of discretion standard, but it was properly applied.

The only aspect of this case which is widely applicable is the abuse of discretion standard. That standard applies in *many types* of cases, and so it is important that its application by the district courts and Court of Appeals be consistent, lest an outlier opinion have unintended ripple effects into other areas of the law and crack the solid foundation of that standard.

Those jurists and attorneys with a family law background, for example, well-understand the significance of the district court's broad discretion over trial court level matters such as the decision whether to award alimony, or which value to settle upon when dividing property in a case where there is a range of admissible evidence. Breadth of judicial discretion is almost *everything* in those cases; the standard for reviewing discretionary decisions can make or break the chances of success on appeal. Abuse of discretion is, rightfully, *hard* to show.

Just last year this Court explained why judicial non-interference with cases involving discretion is important: "The institutional deference afforded the district court…counsels against undue tinkering…. Otherwise, '[w]hen appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby

foster appeals in hosts of cases, at staggering expense to the parties wholly disproportionate to any benefit they might hope to realize. In re Marriage of Sokol, 985 N.W.2d 177, 182 (Iowa 2023). Notably, the Court espoused a preference for institutional deference *even when* the standard of review was *de novo*, a much less deferential standard than abuse of discretion. Hence, if undue tinkering is not even warranted in *de novo* cases, then it certainly is not warranted in abuse of discretion cases either. See also: In re Marriage of Baedke, No. 23-0219, 2024 WL 3688448 (Iowa Ct. App. August 7, 2024) (reciting preference against undue tinkering when judgment calls are at issue).

Beyond the flood of appeals which would ensue if this Court were to signal a new willingness to intervene in pure discretion-based cases, the abuse of discretion should be left alone because it is well-known, and well-settled. Every first-year lawyer knows that discretionary decisions are almost always upheld unless they are "clearly unreasonable" or are exercised on "untenable" grounds and discretion has been "manifestly abused" to the "prejudice" of the complaining party. Bell v. Community Ambulance Service Agency for Northern Des Moines County, 579 N.W.2d 330, 338 (Iowa 1998). Changing that standard by undue tinkering in this case can upend the standard and send shockwaves through the legal community. And when the law loses its predictability, chaos can ensue. This

Court should strive to reduce chaos, not invite more of it. And so, further review should be denied.

Since, in this case, the well-known abuse of discretion standard was properly applied, and undue tinkering in highly fact-specific cases might send the wrong message to too many other disgruntled litigants, this Court should deny further review and allow the Court of Appeals' well-reasoned opinion to stand.

E. Judicial Norms Support the Court of Appeals' Opinion.

Because the text of Iowa Rule of Appellate Procedure 6.1103 is not exhaustive, it is important to consider other factors which militate against further review in this case. Those factors include giving respectful deference to district court judges in matters of discretion. Also, Iowa prefers trial on the merits, a principal which finds support in the state and federal constitutions. And finally, the simple concept of a phone call counsels against further review; indeed, it likely would have solved all these problems two years ago without all the waste.

1. Iowa traditionally respects its district court judges by avoiding undue tinkering with their discovery orders.

As mentioned in the preceding sub-heading, (D), above, Iowa accords deference to district court judges in matters left to their discretion. And the deference is not blind, or for no reason. In addition to what is explained above, deference is also given because district court judges have firsthand opportunities to observe witnesses, take testimony, and view live evidence, whereas the record on

appeal is limited to mostly paper, where much is lost. Some decisions, literally, can come down to a witness's demeanor or credibility, especially where, as here, good cause reasons must be "truthful" under Nedved. Allowing the Court of Appeals' opinion to stand, therefore, which deferred to the district court's discretion, honors the institutional deference necessary for the judicial system to function properly, and further review should thus be denied.

2. Iowa traditionally prefers a trial on the merits over a procedurally related dismissal.

This Court explained in No Boundary, LLC v. Hoosman, 953 N.W.2d 696 (Iowa 2021) that there is a preference for trial on the merits rather than dismissal. "…[T]here is a longstanding policy in our state favoring the resolution of legal disputes on the merits." No Boundary, LLC, 953 N.W.2d at 699. At least as far back as the middle of the twentieth century, Iowa courts have looked "with favor upon trials and the rights of a litigant should not be denied proper hearing by strict application of legal formalities." Id. at 700 (citing Newell v. Tweed, 40 N.W.2d 20, 23 (Iowa 1949)). Iowa recognizes that "[c]ourts almost universally favor a trial on the merits, and, when there has been a reasonable excuse shown for the default, there should be no objection to such a trial to those who are reasonably diligent." Id. (citing Barto v. Sioux City Elec. Co., 93 N.W.2d 268, 271 (1903)).

The text of Iowa Code section 668.11 and Iowa Rule of Civil Procedure 1.517 both have language built in recognizing that lawyers aren't perfect in their

management of every deadline for every case all the time. Section 668.11 has a "good cause" exception, and the civil procedure rules have a harmlessness prong, and give broad discretion to impose a range of sanctions, too. See Iowa R. Civ. P. 1.517(2) (expressing a panoply of remedies including: contempt, exclusion of evidence, deemed admissions, issue or claim preclusion, attorney fees, and dismissal). Because the dismissal and exclusion remedies are harsh and result in the deprivation of a trial on the merits, a court's discretion to impose those remedies is narrower than it is to impose the other remedies. In re Marriage of Williams, 595 N.W.2d 126, 129 (Iowa 1999). That is why willfulness, bad faith, or prejudice is usually a required showing, too. Williams, 595 N.W.2d at 139.

In this case, the Court of Appeals' opinion affords the Wilsons their day in court so the merits of their claim can be heard by a jury of their peers. This is the universal, long-standing preference of almost all courts, in every jurisdiction, and as such, it militates against further review. Thus, Shenandoah's application should be denied.

3. Iowa traditionally prefers lawyers to communicate first and seek court intervention last.

Just last year, in the case of In the Matter of Dethmers Manufacturing Company, 985 N.W.2d 806 (Iowa 2023), Justice Waterman, joined by Justice Mansfield, in concurrence, authored a legitimate, rules-based critique at the

lawyers in the case for not engaging in an Iowa Rule of Civil Procedure 1.517 phone call *before* bringing their dispute to the courts:

> I join the court's opinion in full. I write separately to comment on the lack of a good-faith effort by counsel to resolve this dispute without court intervention. The full court doesn't discuss the issue because it wasn't raised by the parties to this appeal or addressed by the district court. Fair enough. But this Louisiana case has consumed considerable court time in our state and will consume more on remand. In my view, most discovery disputes can and should be resolved by counsel without court intervention. Our rules of civil procedure generally require lawyers to make a good-faith personal effort to resolve or narrow discovery disputes before filing a motion with the court. That didn't happen in this case…Perhaps if Dethmers's attorney had picked up the phone, all of this time and trouble could have been avoided by a discussion with Mittapallis's lawyer. Perhaps discussions would have been fruitless. We don't know because Dethmer's lawyer didn't try. One expects that at least their discussions would have further narrowed the dispute before taking up Iowa court time. In my view, counsel shouldn't stonewall and put the full dispute to the court for business reasons when our rules require good-faith negotiations.

Dethmers, 986 N.W.2d at 821-22. Those same concerns are present here, but in this case, Wilsons actually raised the issue, so it *is* still ripe for discussion if further review were granted. See (D0031, P. 7). Thus, if further review is granted at all, it should only be to hammer home the notion that under Iowa Rule of Civil Procedure 1.517, phone calls are mandatory, not optional. And since that did not happen in this case, the district court's ruling to allow more time to designate an expert was still the correct one. Thus, further review should be denied.

Iowa Rule of Civil Procedure 1.517(5) requires, on its face, that before *any* motion seeking a discovery sanction is filed, the lawyer filing the motion has to

first certify that an attempt was made to resolve the dispute without court intervention. The motion actually has to recite the date and time of the attempted phone call. Iowa R. Civ. P. 1.517(5). Yet, Shenandoah never made the required phone call. Shenandoah instead skipped that step and moved straight to summary judgment. Skipping steps resulted in a months'-long summary judgment process, which Shenandoah lost, an interlocutory appeal request, a briefing process, an appellate ruling, which Shenandoah again lost, and now the instant further review application. What a waste of resources. *Worse*, even *if* Judge Langholz in his dissent is right, and there was no "good cause for *delay*", the case *still* has to be remanded back anyway to determine whether an expert is even required!

This case could have, and should have, been tried in July, 2024. Instead, the parties have each spent dozens of hours on briefs, and the injured victims have endured nearly two years of procedural games and delay, and almost five years past the original injury, to get to the point of *hoping* they can finally take some depositions and get their day in court. That kind of delay is not "justice." It is a noticeable stain on the judicial branch carelessly placed there by defense counsels' failure to pick up the phone before picking up the pen.

Further review should be denied to reinforce a collegial lesson: pick up the phone, and start working *together*. While the justice system may be designed as an adversarial process, it still takes teamwork.

CONCLUSION

Shenandoah's application for further review should be denied. Iowa Code section 668.11 *only* requires a showing of "good cause" for an *extension*; it does not require a showing of "good cause" for *delay*. Because Shenandoah's success in this case would depend upon this Court judicially re-writing the statute, and functionally overruling its own precedent in favor of unpersuasive Court of Appeals' opinions, further review should be denied. If further review is granted, it should only be to *reject* the Stanton line of reasoning once and for all, and reinforce Iowa's "good faith" phone call requirement, too.

The district court correctly determined, and the Iowa Court of Appeals correctly affirmed, that Wilsons established good cause for an extension. They strongly participated in discovery and did so early on, trial was more than two years away still, at Shenandoah's request, and Shenandoah requested an extension of discovery depositions. *Even if* Wilsons had done everything right to meet their deadline, defense counsel was still unavailable to actively participate in the case anyway. Thus, under Iowa Code section 668.11, Hantsbarger and Nedved, that is all "good cause" for an extension, and so the underlying rulings should stand. Further review should be denied.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2024, I electronically filed this document with the Clerk of the Iowa Supreme Court using the Appellate EDMS system which will serve the following parties or their attorneys:

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CERTIFICATE OF COMPLIANCE

Pursuant to Iowa Rule of Appellate Procedure 6.906(4), the undersigned states that this Resistance complies with rule 6.903(1)(g) as cross-referenced by Iowa Rule of Appellate Procedure 6.1103. This Resistance is prepared in Times New Roman, a proportionally spaced typeface, and contains 5,791 words (not counting certificates, the table of contents, or table of authorities, which is less than half the length permitted pursuant to Iowa R. Civ. P. 6.903(1)(g) (permitting 14,000 words for a proportionally spaced typeface for appeals filed before the rule changed to 13,000 words).

/s/ Jessica A. Zupp 8/21/24