

IN THE IOWA SUPREME COURT  
Supreme Court No. 23-2113

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JENNA SONDAG,  
Plaintiff-Appellant,

vs.

ORTHOPAEDIC SPECIALISTS, P.C. and JOHN HOFFMAN, M.D.,  
Defendants-Appellees.

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APPEAL FROM IOWA DISTRICT COURT FOR SCOTT COUNTY  
THE HONORABLE STEWART P. WERLING  
Law No. LACE131149

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BRIEF FOR APPELLANT  
(Oral Argument Requested)

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## STATEMENT OF THE ISSUES

- I. *Defendants' Motion in Limine Number 17 Seeking to Decertify Dr. Sonny Bal Functioned as an Untimely Motion to Reconsider and Therefore Should Have Been Denied.*
  
- II. *Plaintiff Met the "Good Cause" Standard under Iowa Code Section 668.11 and the Lower Court Abused its Discretion When it Reversed Itself on the Eve of Trial.*

## **ROUTING STATEMENT**

This appeal asks the Court to decide whether (i) Defendants' Motion in Limine Number 17 qualified as an untimely Motion to Reconsider under Iowa Rule of Civil Procedure 1.904 and (ii) whether the District Court abused its discretion when it first found "good cause" under Iowa Code Section 668.11 existed to extend the expert deadlines in this case and then reversed itself on the eve of trial. Transfer to the Iowa Court of Appeals is appropriate.

## **NATURE OF THE CASE**

Plaintiff filed this medical negligence action on January 7, 2019, arising out of a left hip surgery Defendant Dr. Hoffman performed on Plaintiff Jenna Sondag in February of 2017. D0001, Pet. at Law and Jury Demand, Jan. 7, 2019. On September 6, 2019, Defendants filed their Motion for Summary Judgment, specifically arguing that Plaintiff failed to timely serve her expert certifications and disclosures. D0014, Defs.' Mot. for Summ. J., Sept. 6, 2019.

On October 7, 2019, Plaintiff filed her Motion for Extension of Time to Name Expert Witnesses, Resistance to Defendants' Motion for Summary Judgment, and accompanying argument and materials. D0021, Mot. for Ext. of Time to Name Expert Witnesses, Oct. 7, 2019; D0020, Resist. to Defs.' Mot. for Summ. J., Oct. 7, 2019; D0019, Memo. in Resist. to Defs.' Mot. for Summ. J. and in Supp. of Pl.'s Mot. for Ext. of Time to Name Exp. Witnesses, Oct. 7, 2019;

D0022, Pl.'s Resps. to Defs.' Statement of Undisputed Material Facts, Oct. 7, 2019.

Relevant to this appeal, Plaintiff argued that she could establish the “good cause” requirement under Iowa Code Section 668.11 to file her expert materials outside the deadlines set forth in Section 668.11 and the Trial Scheduling and Discovery Plan. D0021, Mot. for Ext. of Time to Name Expert Witnesses at ¶ 6 Oct. 7, 2019. These issues were heard by the Honorable Stuart P. Werling on November 5, 2019, and on November 12, 2019, the Court denied Defendants’ Motion for Summary Judgment and granted Plaintiff’s Motion for Extension of Time to Designate an Expert. D0030, Ruling on Defs.’ Mot. for Summ. J. & Pl.’s Mot. for Ext. of Time to Designate an Expert at p. 8, Nov. 12, 2019.

On December 12, 2019, Plaintiff filed her Designation of Expert Witnesses, specifically naming Dr. B. Sonny Bal. D0031, Pl.’s Designation of Expert Witnesses, Dec. 12, 2019. On January 8, 2020, Plaintiff filed her Expert Witness Disclosures. D0033, Pl.’s Rule 1.500(2) Expert Witness Disclosures, Jan. 8, 2020.

Trial was set to begin on October 30, 2023. D0025, Order Setting Trial and Approving Plan at ¶ 2, Mar. 1, 2022. On October 23, 2023, in their Motion in Limine Number 17, Defendants sought to decertify Plaintiff’s retained expert, Dr. Sonny Bal, arguing that the Court erred when it previously found “good cause”



existed for the expert witness deadline extension years earlier in November 2019. D0110, Defs.' Mots. in Limine at pp. 30-33, Oct. 23, 2023. On October 26, 2023, the Court heard argument on Defendants' Motion in Limine number 17, granted it, reversed its November 12, 2019 Ruling, decertified Plaintiff's expert Dr. Bal, and dismissed Plaintiff's case on the eve of trial. D0120, Order of Dismissal, Oct. 26, 2023. It is from this decertification and dismissal that Plaintiff appeals.

### **STATEMENT OF THE FACTS**

Plaintiff filed this medical negligence and loss of consortium action on January 7, 2019, arising out of a left hip surgery Dr. Hoffman performed on Plaintiff in February of 2017. D0001, Pet. at Law and Jury Demand, Jan. 7, 2019. Plaintiff's Counsel agreed to file this action for Plaintiff as Plaintiff's statute of limitations was about to expire and to ensure Plaintiff's access to the court system was not barred. D0019, Mem. in Resist. to Defs.' Mot. for Summ. J. and in Supp. of Pls.' Mot. for Extension of Time to Name Expert Witnesses at p. 3, Oct. 7, 2019. At that time, Plaintiff's Counsel's office had only two lawyers, Attorney Conlin and Attorney Kelly. *Id.* On January 25, 2019, Defendants filed their Answer. D0007, Answer, Jan. 25, 2019. Per Iowa Code Section 668.11 and the Trial Scheduling and Discovery Plan, Plaintiff was to certify her expert witnesses by July 24, 2019 and serve her Rule 1.500(2) expert disclosures by August 23, 2019. *See* Iowa Code § 668.11(1)(a); D0009, Trial Scheduling and Discovery Plan

¶¶ 8(A)(1) and (8)(B)(a).

On February 13, 2019, Plaintiff's Counsel's Office (hereafter "Counsel") reached out to Dr. Jesse Otero, the surgeon who performed Plaintiff Jenna Sondag's remedial surgery subsequent to Defendant Hoffman's malpractice, requesting a time to speak with Dr. Otero. D0019, Mem. in Resist. to Defs.' Mot. for Summ. J. and in Supp. of Pls.' Mot. for Extension of Time to Name Expert Witnesses at p. 3, Oct. 7, 2019. Receiving no response, Counsel followed up on this email on February 21. *Id.* Also on February 21, Attorney Devin Kelly contacted a prospective expert witness, Dr. Sonny Bal, to review the matter. *Id.* Subsequently, Dr. Bal was sent a retainer as well as the relevant medical records for his review. *Id.* On March 19, Counsel again followed up on attempts to reach Dr. Otero, this time using a different email address. *Id.* On March 26, Attorney Kelly and Dr. Bal spoke via telephone. *Id.* Based on this call, it was confirmed that it would be prudent for Counsel to speak with Dr. Otero. *Id.*

On March 27, 2019, the University of Iowa Health Care's legal department (hereafter "University of Iowa") responded to Counsel's requests to speak with Dr. Otero, setting forth different criteria it would require before arranging a call. *Id.* Attorney Conlin was out of the country during all of this time but returned on April 8, 2019. *Id.* Also, during this time, the docketing software and staff which Counsel's firm uses incorrectly calendared the expert deadlines in this case to the

typical deadlines of other civil-tort based claims. *Id.* at pp. 3-4. Counsel provided the necessary material, including an authorized release, to the University of Iowa on April 22. *Id.* at p. 4. On April 25, Counsel was informed additional information would be required to be exchanged prior to the scheduling of the call. *Id.*

Thereafter, Plaintiff's Counsel's office entered a month-long trial prep period for what would end up being a six-week jury trial in *Godfrey v. State of Iowa*. *Id.* This trial began on June 3, 2019. *Id.*

Within a week of the *Godfrey* trial starting, Attorney Conlin was hospitalized. *Id.* Attorney's Conlin's sudden and serious illness required her firm to engage the legal services of an entirely separate Des Moines legal practice to assist with the jury trial in Attorney Conlin's absence. *Id.* After spending the night in the hospital, Attorney Conlin was released to her home, where she started recovery and remained unavailable for the next week. *Id.* During the remainder of the trial, Attorney Conlin still worked to recover and returned to court. *Id.* Due to the conditions at the Polk County Courthouse, the *Godfrey* jury trial was moved to Jasper County by agreement of the parties. *Id.* Attorney Conlin's sudden illness and the need for a new firm to learn a seven-year-in-the-making case during the jury trial made an already high-stress, all-consuming process even more complicated. *Id.*

Attorney Kelly, who was aiding on the *Godfrey* case and who was also

overseeing the firm's other responsibilities, had to redirect much of his attention to solely that of *Godfrey* and took over responsibility for portions of *Godfrey* that were unanticipated. *Id.* *Godfrey* was decided on July 15, leaving only 9 days before Plaintiffs were to certify their experts in this case. *Id.* The unanticipated two-week extension of the *Godfrey* trial caused Plaintiff's Counsel to reschedule numerous other commitments in other cases, including jury trials in the subsequent months. *Id.* at p. 5.

On August 7, 2019, Attorney Kelly reached back out to the University of Iowa regarding a call with Dr. Otero. *Id.* Attorney Kelly was then informed that Dr. Otero was no longer employed at the University of Iowa. *Id.* It took until August 20, and additional back-and-forth with the University of Iowa, for Counsel to finally arrange a call between Attorney Conlin and Dr. Otero. *Id.* The call was scheduled for the evening of September 11, 2019, five days after Defendants filed their Motion for Summary Judgment. *Id.* Based on Attorney Conlin's call with Dr. Otero, Counsel believed they had sufficient information to proceed with certifying and designating their expert in this case. *Id.*

On October 7, 2019, Plaintiff filed her Motion for Extension of Time to Name Expert Witnesses, a Memorandum in Resistance to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Extension of Time to Name Expert Witnesses, and other accompanying materials. D0021, Mot. for Ext.

of Time to Name Expert Witnesses, Oct. 7, 2019; D0020, Resist. to Defs.’ Mot. for Summ. J., Oct. 7, 2019; D0019, Memo. in Resist. to Defs.’ Mot. for Summ. J. and in Supp. of Pl.’s Mot. for Ext. of Time to Name Exp. Witnesses, Oct. 7, 2019; D0022, Pl.’s Resps. to Defs.’ Statement of Undisputed Material Facts, Oct. 7, 2019.

On November 5, 2019, Defendants’ Motion for Summary Judgment and the Plaintiff’s Motion for Extension of Time to Designate an Expert came before the court for argument. D0030, Ruling on Defs.’ Mot. for Summ. J. & Pl.’s Mot. for Ext. of Time to Designate an Expert, Nov. 12, 2019. After reviewing all the pleadings on the issues, and hearing arguments from Counsel for all parties, the court expressly found that Plaintiff satisfied the “good cause” test to justify an extension to the expert designation deadline. *Id.* at p. 8.

The lower court’s November 12, 2019 Ruling remained unchallenged and Dr. Bal served as Plaintiff’s lead expert for 1,441 days, or until October 23, 2023. D0110, Defs.’ Mots. in Limine at pp. 30-33, Oct. 23, 2023. It was then that Defendants requested the Court reconsider its November 12, 2019 Ruling via a Motion in Limine with only one week before this case was to proceed to jury trial. *Id.*

On October 26, 2023, after hearing arguments on the issue, the Court reversed itself, granted Defendants’ Motion in Limine Number 17, de-certified Plaintiff’s

Expert Dr. Sonny Bal, and dismissed Plaintiff's action entirely in a single order. D0120, Order of Dismissal, Oct. 26, 2023. On November 9, 2023, Plaintiff filed a timely Iowa Rule of Civil Procedure 1.904 Motion to Reconsider. D0122, Pl.'s Rule 1.904 Mot. to Reconsider, Nov. 9, 2023. A timely filed brief in support of the Rule 1.904 Motion was filed on November 17, 2023. D0124, Pl.'s Br. in Supp. of Her Rule 1.904 Mot. to Reconsider, Nov. 17, 2023.

The Court denied Plaintiff's motion to reconsider, and this appeal was timely filed on December 27, 2023. D0128, Order, Dec. 11, 2023; D0129, Notice of Appeal, December 27, 2023.

Further factual record may be included below as pertinent to Plaintiff's arguments.

## **ARGUMENT**

### ***I. Defendants' Motion in Limine Number 17 Seeking to Decertify Dr. Sonny Bal Functioned as an Untimely Motion to Reconsider and Therefore Should Have Been Denied.***

This issue was raised by Plaintiff in her Response to Defendants' Motions in Limine, dated October 25, 2023, argued at hearing on October 26, 2023, and addressed by the Court. D0115, Pl.'s Resp. to Defs.' Mots. in Limine at pp. 16-17, Oct. 25, 2023; D0120, Order of Dismissal, Oct. 26, 2023; D0122, Pl.'s Rule 1.904 Mot. to Reconsider at ¶ 5(a), Nov. 9, 2023; D0128, Order, Dec. 11, 2023; D0133, Ct. Rep. Tr. of Oct. 26, 2023 Hr'g, pp. 6:18-7:17, Oct. 26, 2023.

This Court reviews the District Court’s decision for abuse of discretion. *McElroy v. State*, 637 N.W.2d 488, 493 (Iowa 2001) (decisions by a district court to allow untimely filings reviewed for abuse of discretion).

On November 12, 2019, the lower court denied Defendants’ motion for summary judgment and granted Plaintiff’s motion for extension of time to name expert witnesses. D0030, Ruling on Defs.’ Mot. for Summ. J. & Pl.’s Mot. for Ext. of Time to Designate an Expert at p. 8, Nov. 12, 2019. Defendants did not file a motion to reconsider after the November 2019 Order, but rather, improperly re-raised the issue of this ruling 1,441 days later and within a motion in limine requesting the decertification of Dr. Bal on the eve of trial. D0110, Defs.’ Mots. in Limine at pp. 30-33, Oct. 23, 2023. While Iowa courts have provided limited guidance to the scope of matters that can be brought under a motion in limine, they have consistently held that “the motion in limine is not ordinarily employed to choke off an entire claim or defense . . . .” *Lewis v. Buena Vista Mut. Ins. Ass’n*, 183 N.W.2d 198, 201 (Iowa 1971); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 379 (Iowa App. 1989).

Rather than stretching the bounds of what can be considered under a motion in limine, the Iowa Rules of Civil Procedure expressly provide litigants with an avenue to formally request a court reconsider a prior ruling—Rule 1.904 Motion to Reconsider, Enlarge, or Amend. Iowa R. Civ. P. 1.904(2) (2024). Litigants have

fifteen (15) days to file such a motion. *Id.* (“[A] rule 1.904(2) motion to reconsider, enlarge, or amend another court order, ruling, judgment, or decree will be considered timely if filed within 15 days after the filing of the order, judgment, or decree to which it is directed.”). While Defendants raised this issue as a motion in limine, for all intents and purposes, their Motion in Limine Number 17 was in fact a motion to reconsider. *See Iowa Elec. Light and Power Co. v. Lagle*, 430 N.W.2d 393, 395 (Iowa 1988) (“The label attached to a motion is not determinative of its legal significance; we will look to its content to determine its real nature.”); *Peoples Tr. & Sav. Bank v. Baird*, 346 N.W.2d 1, 2 (Iowa 1984). Analyzing Motion in Limine Number 17 in its proper light, as a motion to reconsider, gives rise to the same flaw that is the subject of this current appeal; a filing being untimely without a showing of good cause.

Defendants waited 1,441 days, or 1,426 days after the deadline for a reconsideration motion at the trial court level of their denial of summary judgment. Since Defendants did not raise the issue of reconsideration before the expiration of the deadline to do so, they must show their failure to do so “was the result of excusable neglect.” Iowa R. Civ. P. 1.443(1)(b). “‘Excusable neglect’ has been defined as ‘that neglect which might have been an act of a reasonably prudent person under the circumstances.’” *McElroy v. State*, 637 N.W.2d 488, 494 (Iowa 2001). No such justification or “excusable neglect” was presented by Defendants at



any point in the proceedings.

Defendants' request for the lower court to reconsider its November 2019 denial of summary judgment disguised as a motion in limine should not have been entertained by the lower court, much less granted. The lower court should have refused the motion as untimely and abused its discretion by failing to do so. *See Madden v. City of Elridge*, 661 N.W.2d 134 (Iowa 2003).

***II. Plaintiff Met the “Good Cause” Standard under Iowa Code Section 668.11 and the Lower Court Abused its Discretion When it Reversed Itself on the Eve of Trial.***

This issue was raised by Plaintiff in her Response to Defendants' Motions in Limine, dated October 25, 2023, argued at hearing on October 26, 2023, and addressed by the Court. D0115, Pl.'s Resp. to Defs.' Mots. in Limine at pp. 16-17, Oct. 25, 2023; D0120, Order of Dismissal, Oct. 26, 2023; D0122, Pl.'s Rule 1.904 Mot. to Reconsider at ¶ 5(b), Nov. 9, 2023; D0128, Order, Dec. 11, 2023; D0133, Ct. Rep. Tr. of Oct. 26, 2023 Hr'g, pp. 6:18-7:17, Oct. 26, 2026.

This Court reviews the District Court's decision for abuse of discretion. *Iowa Elec. Light and Power Co.*, 430 N.W.2d at 396; *Hill v. McCartney*, 590 N.W.2d 52, 54-55 (Iowa 1998) (“[The court's decision] will not be disturbed unless it was exercised on clearly untenable grounds or to an extent clearly unreasonable.”).

“Good cause” has been defined as “a sound, effective, truthful reason,”

something more than Plaintiff’s mere “negligence or want of ordinary care or attention, or to his carelessness or inattention.” *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)). To show good cause, Plaintiff “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.” *Id.* The *Donovan* and *Dealers Warehouse Co.* standards are still the governing law in Iowa.

Specifically analyzing good cause in relation to Section 668.11, courts tend to consider three factors: (1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant’s counsel’s actions. *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505–506 (Iowa 1993). In denying Defendants’ motion for summary judgment, and granting Plaintiff’s motion for extension of time back in November of 2019, the lower court correctly weighed all three of these factors. It did not abuse its discretion back in November 2019.

However, the District Court *did* abuse its discretion when it reversed itself on the eve of trial in October 2023 as doing so was “clearly untenable” and “clearly unreasonable.” *Donovan*, 445 N.W.2d at 766.

***a. The Severity of the Deviation from the Required Deadline Under Section 668.11 Was Minimal Considering the Circumstances.***

The lower court relied solely on three unpublished court of appeal opinions

cited by Defendants in granting Defendants' Motion in Limine Number 17. *See* D0110, Defs.' Mots. in Limine at pp. 30-33, Oct. 23, 2023. These opinions are hardly persuasive because of how distinguishable each cited case is from the facts at hand.

The lower court primarily relied on *Stanton v. Knoxville Community Hosp., Inc.* as authority on the severity of plaintiff's deviation from Section 668.11 in the present case. 2020 WL 4498884 (Iowa App. 2020) (unpublished opinion); D0133, Ct. Rep. Tr. of Oct. 26, 2023 Hr'g, p. 9:4-16, Oct. 26, 2026. Notably, *Stanton* did not proclaim that expert designations filed and served a specific number of days, weeks, or months after the expiration of a deadline mandates against a finding of "good cause." Rather, *Stanton* reiterated the *Donovan* standard still applies.

*Stanton*, 2020 WL 4498884 at \*3. In analyzing the Plaintiff's four-month deviation from the 668.11 deadline, the court in *Stanton* seldom mentions the amount of time between the deadline and when the expert disclosures took place and rather focuses on the surrounding circumstances. *Id.* at \*4. Of note, the factors that the court heavily emphasized in reversing a finding of good cause was that in the trial scheduling and discovery plan, the expert designation disclosure and deadlines were explicitly stated (January 12, 2019, and February 12, 2019, respectively). *Id.* In the present case, no such explicit deadline was communicated, but rather the Trial Scheduling and Discovery Plan just stated the "deadline set forth in ICA

668.11.” D0009, Trial Scheduling and Discovery Plan ¶¶ 8(A)(1), Feb. 6, 2019. The present facts of the deadline being missed in part due to case-management software imputing a traditional civil-tort deadline seems much more akin to the “sound, effective, truthful reason” for delay than was present before the *Stanton* court. *Stanton* 2020 WL 4498884 at \*4 (quoting *Donovan*, 445 N.W.2d at 766).

Another factor analyzed by the court in *Stanton* was that the plaintiff did not start looking for an expert until a year and a half after his lawsuit was filed and after the expert designation deadline had already passed. 2020 WL 4498884 at \*3. Conversely, Plaintiff Sondag and her Counsel reached out to Dr. Sonny Bal within two months of Plaintiff’s lawsuit being filed and within one month of the Defendants’ Answer. D0019, Mem. in Resist. to Defs.’ Mot. for Summ. J. and in Supp. of Pls.’ Mot. for Extension of Time to Name Expert Witnesses at pp. 3-4, Oct. 7, 2019.

Defendants also relied on *Jackson v. Catholic Health Initiatives, Inc.* and *Reyes v. Smith* in support of their argument before the lower court. However, both of these cases are easily distinguishable, both factually and legally. In *Jackson*, the plaintiff never filed her expert certifications. 2023 WL 5602830 at \*1 (Iowa Ct. App. 2023) (unpublished opinion). That is not the case here. Additionally, the plaintiff in *Jackson* was asserting that her Iowa Code Section 147.140 certificate of merit meant she substantially complied with Iowa Code Section 668.11. *Id.* at \*3.

In this case, no party has requested the Court apply the “substantial compliance” test relevant to Iowa Code 147.140 to the issue at hand, and this case predates the certificate of merit requirement outlined in 147.140.

Furthermore, in *Reyes*, the defendants filed their expert designations prior to the plaintiffs filing theirs. 2022 WL 1656238 at \*1 (Iowa Ct. App. 2022) (unpublished opinion). As a result, the Court found that the Defendants did suffer prejudice. *Id.* at 2 (“Thus, Reyes’s late filing deprived Smith of their strategic advantage under section 668.11[.]”). In addition, the plaintiffs in *Reyes* had shown “little more than want of ordinary care or attention” for missing the deadline, justifying the district court’s decision to deny those plaintiffs’ motion for additional time to designate an expert witness. *Id.* In this case, Plaintiff and her Counsel have carefully detailed the circumstances as to why the deadline was missed and the steps they had taken in advance to meet that deadline.

Thus, the Section 668.11 deviation found in *Stanton*, *Jackson*, and *Reyes* were drastically more severe than the deviation in the case at hand, and therefore the lower court did not abuse its discretion in denying summary judgment and allowing an extension of the expert deadlines back in November of 2019.

***b. Defendants Suffered Little to No Prejudice in the Delay of Expert Witness Designation.***

In 2019, Defendants cited no authority nor included any facts in their brief in support of summary judgment that suggests they suffered any tangible prejudice

beyond the inherent prejudice of any statutory deadline being extended. *See generally* D0015, Defs.’ Mem. of Law in Supp. of Their Mot. for Summ. J. at p. 12, Sept. 6, 2016. It was well within the lower court’s discretion to allow the extension of Plaintiff’s expert deadlines in November 2019. Between November 2019 and October 2023, both sides continued to work up the case, discovery was conducted, experts were designated and disclosed, and depositions were completed. It was actually the lower court’s decision to essentially reverse its November 2019 ruling that prejudiced the parties. All of this previously noted work up of the case was for naught. While Plaintiff takes no issue in conceding that the good cause standard requires more than a mere showing of lack of prejudice, it is still a factor that must be considered in analyzing good cause—an analysis that the lower court failed to undertake when reversing itself.

***c. Defendants Sat Silent on This Case Until the Deadline Under Section 668.11 Had Passed and Until the Eve of Trial to Re-Raise the Expert Deadline Issues.***

While Plaintiff can certainly acknowledge that Defendants generally have no duty to babysit their opposing counsel's deadlines, this Court has long considered defendant’s actions and omissions around the time of the deadline in determining if good cause exists. *See Hantsbarger*, 501 N.W.2d at 505–06 (“[W]e believe it is appropriate to consider defendant’s counsel’s actions, or lack thereof, in determining good cause . . .”). Defendants’ Counsels’ lack of action in the present

case is particularly compelling in finding good cause existed back in November 2019 and for denying the issue once again raised in Defendants' Motion in Limine Number 17. Namely, before the 668.11 deadline, Defendants' Counsel provided no professional courtesy, nor hinted to Plaintiff's Counsel, that Defendants were being prejudiced in the delay in expert disclosures. Rather, they sat silent until the deadline passed to file their Motion for Summary Judgment. D0014, Defs.' Mot. for Summ. J., Sept. 6, 2019. Once their Motion for Summary Judgment was denied, they failed to raise the issue of this ruling for 1,441 days and on the eve of trial. D0110, Defs.' Mots. in Limine at pp. 30-33, Oct. 23, 2023. At any point during these years, Defendants could have re-raised the issue if they felt they were being prejudiced or had new legal grounds to justify a reversal of the extension of Plaintiff's expert deadlines. They did not do so.

***d. The Lower Court's Reversal of Itself Contradicts and Undermines the Underlying Purpose of Iowa Code Section 668.11.***

The underlying objectives of Section 668.11 are clear and have been repeatedly emphasized in case law. The two primary objectives are “[p]reventing last minute dismissals when an expert cannot be found . . . [and] to require plaintiffs to have their proof prepared at an early stage in litigation in order to protect professionals from having to defend against frivolous suits.” *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998). Further, this Court has long held that Section 668.11 is a procedural regulation that must be liberally interpreted to accomplish its purpose.

*See Hantsbarger*, 501 N.W.2d at 504; *State v. Green*, 470 N.W.2d 15, 18 (Iowa 1991). The lower court's decision to reverse itself on the eve of trial undermines both of the primary objectives of Section 668.11.

First, the lower court's decision is substantively the opposite of the first objective of preventing last-minute dismissals in want of an expert. An expert had been retained for years, had produced an expert report, had been deposed, and was prepared to testify at trial up until Dr. Bal was decertified on the eve of trial. *See* D0120, Order of Dismissal, Oct. 26, 2023. Next, the objective of having plaintiffs provide proof at an early stage to prevent frivolous lawsuits is similarly not accomplished by the lower court's reversal. This case had been ongoing for nearly five years before the lower court's reversal of itself. Depositions and discovery were complete, the jury pool had been notified, proposed jury instructions were submitted, and other final pretrial matters were underway. *See generally* D0073, Mot. for Special Jury Panel and to Distribute a Jury Questionnaire, Oct. 18, 2023; D0085, Pl.'s Witness List, Oct. 22, 2023; D0079, Pl.'s Proposed Final Jury Instruction and Verdict Form, Oct. 22, 2023; D0109, Defs.' Ex. List, Oct. 23, 2023; D108, Defs.' Witness List, Oct. 23, 2023.

Defendant had not filed a renewed Motion for Summary Judgement indicating their belief that Plaintiff's claims were frivolous and warranted dismissing as a matter of law.



Dismissing on the eve of trial does not encourage gathering proof at an early stage, but rather disincentivizes retaining experts and gathering proof in fear of incurring substantial costs and years of work for naught if a plaintiff has to worry that the lower court will suddenly reverse itself on a legal matter decided years earlier.

Simply put, the District Court's decision to reverse itself in October 2023 is contrary to the underlying purpose of Section 668.11.

### **CONCLUSION**

Plaintiff respectfully requests that the Court reverse the District Court's order granting Defendants' Motion in Limine Number 17, decertifying Dr. Bal as Plaintiff's expert witness, and dismissing Plaintiff's action on the eve of trial. *See* D0120, Order of Dismissal, Oct. 26, 2023, attachment 1; D0128, Order, Dec. 11, 2023, attachment 2.

### **REQUEST FOR ORAL SUBMISSION**

Plaintiff-Appellant respectfully requests oral argument.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. 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 font size and contains 4,588 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Devin C. Kelly  
Devin C. Kelly

04/12/2024  
Date

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on April 12, 2024, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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