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

JENNA SONDAG,

Plaintiff-Appellant,

vs.

ORTHOPAEDIC SPECIALISTS, P.C. and JOHN HOFFMAN, M.D.,

Defendants-Appellees.

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

APPELLANT'S REPLY BRIEF

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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.***

ARGUMENT

I. The Central Issue of This Case is not the Inherent Authority Judges Have to Reverse Their Decisions; It is the Perverse Nature of Defendants' Motion in Limine.

Plaintiff does not controvert the inherent authority of judges to make corrections to their prior rulings, however Plaintiff does call into question the perverse nature of Defendants Motion in Limine. Defendants cite an abundance of authority demonstrating that judges have the inherent authority to revise their prior rulings *sua sponte*. *See* Appellee Brief at 13-15. However, this case was not dismissed upon a *sua sponte* decision by the judge, it was dismissed upon motion by the Defendants. D0120, Order of Dismissal at 1 (10/26/2023). Thus, the authorities Defendants cite in their brief do little to support its argument. In particular, *Madden v. City of Eldridge* and *Hoefer v. Wis. Educ. Ass'n Ins. Tr.* are both distinguishable because in both cases summary judgment was revisited after being raised *sua sponte*, whereas here, the court did not act *sua sponte* and only took action following the Defendants' motion in limine. *See Madden v. City of Eldridge*, 661 N.W.2d 134, 137 (Iowa 2003); *Hoefer v. Wis. Educ. Ass'n Ins. Tr.*, 470 N.W.2d 336, 339 (Iowa 1991).

Defendants' Motion in Limine, by law, should not have been heard to begin with. There is no controverting that Defendants' Motion in Limine 17 filed on October 23, 2023, a week before trial was scheduled to begin, plainly requests that

the district court reverse its 2019 ruling on their previous Motion for Summary Judgment. *See* D0110, Defs.' Mots. in Limine at 30 (8/23/2023) ("Based upon the below-cited authority, which was issued after the Court denied Defendants' Motion for Summary Judgment, Defendants respectfully request the Court to prohibit Dr. Bal from testifying at trial.").

The Iowa Rules of Civil Procedure assert that a motion for summary judgment "shall be filed not less than 60 days prior to the date the case is set for trial, unless otherwise ordered by the court." Iowa R. Civ. P. 1.981(3) (2024). The Rules also provide that a party has 15 days after the filing of an order, judgment or decree to file a timely motion to reconsider. Iowa R. Civ. P. 1.904(3) (2024). Defendants failed to timely file a motion to reconsider following the district court's denial of the original motion for summary judgment on November 12, 2019. *See* Appellant Brief, p. 15; D0030, Ruling on Defs.' Mot. for Summ. J. & Pl.'s Mot. for Ext. of Time to Designate an Expert at 8 (11/12/2019). Defendants assert in their brief that they were under no obligation to file a motion to reconsider the district court's denial of its motion for summary judgment. *See* Appellee Brief at 14. While Defendants were not required to file a motion to reconsider, nor an interlocutory appeal, the act of not doing so should have closed the door for Defendants to bring up the issue again to the court. Defendants had statutorily authorized opportunities for both a second and third "bite at the apple" but failed to take those opportunities.

Rather, they snuck in a motion to reconsider in the form of their motions in limine on the eve of trial. *See* D0110 at 30.

This is a key procedural difference between the present case and the authorities Defendants rely on. *See* Appellee Brief at 27. Notably, Defendants rely on *Stanton v. Knoxville Cmty. Hosp., Inc*., in which the lower court, having denied summary judgment after finding "good cause" had been met for noncompliance with Section 668.11, was reversed by the Court of Appeals. No. 19-1277, 2020 WL 4498884, at *6 (Iowa Ct. App. Aug. 5, 2020). The key procedural difference between *Stanton* and the present case is the defendants in *Stanton* did not sit on this denial until the eve of trial, but rather followed the proper procedural steps and sought interlocutory review shortly thereafter. *Id.* at *2. From there, the Court of Appeals was able to make a fair finding as to whether the Plaintiff had met their burden for establishing "good cause" for deviation from Section 668.11. *Id.* at *3.

Iowa case law has made clear the importance of complying with procedural steps as outlined by the Iowa Rules of Civil Procedure. *See DSM Inv. Grp., LLC v. City of Des Moines*, No. 21-1887, 2022 Iowa App. LEXIS 738, at *7 (Sept. 21, 2022) (declining to allow a party to use its failure to comply with Iowa's civil procedure and electronic-filing rules to gain a tactical advantage, and thus holding that the district court had no obligation to grant the party's motion in limine). In this case, allowing a renewed motion for summary judgment disguised as a motion

in limine to be raised as late as the week before trial violates and fundamentally undermines the State's rules of civil procedure. *See* D0110 at 30; D0120, Order of Dismissal (8/23/2023).

The Iowa Supreme Court has held that "[t]he primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel declaring a mistrial." *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971). The motion in limine in this case was not aimed at this purpose, but instead acted as a renewed motion for summary judgment. D0110 at 30. Defendants do not contest this, having referred to the motion as a summary judgment motion throughout their brief. *See e.g.*, Appellee Brief at 11. Furthermore, the Iowa Supreme Court has stated, "[t]he motion in limine is a useful tool, but care must be exercised to avoid indiscriminate application of it lest parties be prevented from even trying to prove their contentions." *Lewis v. Buena Vista Mut. Ins. Ass'n*, 183 N.W.2d 198, 200 (Iowa 1971). The *Lewis* Court further stated, "[a] motion [in limine] should be used, if used at all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial." *Id.* at 201.

American Jurisprudence makes clear the importance of distinguishing between motions in limine and motions for summary judgment:

> The use of motions in limine to summarily dismiss a portion of a claim has been condemned, and the *trial courts are cautioned not to allow motions in limine to be used as unwritten and unnoticed motions for summary judgment or motions to dismiss*. Neither should the motion be used to perform the

> function of a directed verdict or as a sweeping means of testing issues of law. Moreover, deficiencies in pleadings or evidence are not appropriately resolved by a motion in limine. Clearly, a motion in limine may not properly be used as a vehicle to circumvent the requirements of rules of procedure.

75 Am. Jur. 2d *Trial* § 42 (2024) (emphasis added). Outside jurisdictions have adopted similar holdings, giving additional guidance as to the bounds of a motion in limine. *See Buy-Low Save Ctrs., Inc. v. Glinert*, 547 So. 2d 1283, 1284 (Fla. Dist. Ct. App. 1989) (holding "where the motion [in limine] is used to do more than merely exclude irrelevant or improper prejudicial evidence, the use of the motion begins to become improper"); *Aden v. Lay*, No. 2022 CA 000480, 2023 Fla. Cir. LEXIS 2988, at *2 (Oct. 9, 2023); *Daiker v. Bd. of Regents of the Univ. of Colo.*, No. 2017 CV 31185, 2019 Colo. Dist. LEXIS 1246, at *4-8 (Mar. 13, 2019) (denying motions in limine after finding that the motions were motions for summary judgment in disguise.).

Other jurisdictions have even interpreted Iowa case law in determining that motions in limine cannot be used as a substitute for a dispositive motion. *See Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 404 (Mo. Ct. App. 1994) ("[A motion in limine] should not be employed indiscriminately. It is not a substitute for a summary judgment motion. Nor should it 'ordinarily [be] employed to choke off an entire claim or defense.'" (quoting *Lewis* 183 N.W.2d at 201)).

Similarly, the Minnesota Court of Appeals has held that a motion in limine filed a week before the start of trial functioned as a motion for summary judgment and

was improper. *See Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. Ct. App. 2003) (finding that appellee's motion in limine filed only seven days before the trial date, functioned as a motion for summary judgment and because "there [was] no evidence in the record indicating that appellant waived the notice requirement, . . . [the] motion was improperly noticed and should not have been considered by the district court."). Thus, in the present case, the lower court should not have entertained much less granted Defendants' Motion in Limine #17. Trial was set to begin only a week after the motion in limine was filed and no timely motion to reconsider nor interlocutory appeal for the original denial of Defendants' motion for summary judgment was ever filed. The renewed motion for summary judgment disguised as a motion in limine made by Defendants on October 23, 2023, was egregiously improper. D0110 at 29–30.

If the district court's ruling is upheld, a precedent will be set allowing dispositive motions, even if already decided, to be brought without proper notice on the eve of trial in the form of motions in limine. If such a precedent stands, it renders the Iowa Rules of Civil Procedure's proscribed deadlines for summary judgment and motions to reconsider effectively useless. Further, this precedent incentivizes counsel to call into question any adverse ruling throughout the course of litigation on the eve of trial, a troubling development when considering judicial efficiency and ensuring justice and fairness in the legal process.

II. "Good Cause" analysis factors in the totality of the circumstances, not just whether one factor amounts to excusable neglect.

In dismissing Plaintiff's claim on the eve of trial, the lower court appears to have neglected to engage in a "good cause" analysis beyond merely looking at the delay in time. *See generally* D0135, Transcript; Order, (12/11/2023), Att. 2. The analysis as to whether "good cause" exists cannot start and stop solely based on the deviation from the proscribed timeline, it must factor in a totality of circumstances. *See Hantsbarger v. Coffin*, 501 N.W.2d 501, 505–06 (Iowa 1993) (analyzing a totality of circumstances and factors in making a ruling on "good cause."). Further, the lower court erred by failing to acknowledge that the deviation from Section 668.11 is seldom acknowledged as the most important factor in "good cause" analysis; it is the resulting prejudice, or lack thereof. *See id.* at 505 ("'[T]he crucial question is whether defendant has been prejudiced to any appreciable degree by the late disclosure.'" (quoting *Dennie v. Metro. Med. Ctr*, 387 N.W.2d 401, 405 (Minn. 1986)). Defendants have failed to show any cognizable prejudice beyond merely the inherent prejudice of missing a statutory deadline. *See generally,* Appellee Brief at 22-23. While certainly there is some prejudice associated with late designation, Defendants' brief fails to account for the bizarre procedural history of the present case.

The reality of the procedural history is that at the time of the lower court's dismissal on the eve of trial, all expert reports had been disclosed, all depositions

had been conducted, and all experts were ready to testify at trial. D0120; D0124, Pl.'s Br. in Supp. of Mtn to Reconsider at 10 (11/17/2023). At the time of the lower court's granting of Defendants' motion to reconsider disguised as a motion in limine, there was absolutely no cognizable prejudice as a result of the late designation of Dr. Bal. No facts were uncovered, nor binding case law reported, that warranted an eleventh-hour reversal of a "good cause" finding that Plaintiff had relied on throughout the four years of litigating this case.

A. The prejudice Plaintiff suffered from a last-minute reversal of a "good cause" finding that remained untouched for nearly four years cannot be overstated.

The prejudice to Plaintiff in these proceedings was astronomical. Defendants, and by proxy, the lower court, relied heavily on the deviation from the proscribed timeline of Section 668.11 when arguing against a finding of good cause. *See* Appellee Brief at 18 ("At the time the District Court denied Defendants' Motion for Summary Judgment . . . Ms. Sondag had yet to certify a single expert or opinion."). This doesn't factor in the nature of the procedural history, as Plaintiff had filed a Motion for Extension of Time along with her resistance to Summary Judgment on October 7, 2019. 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.

Plaintiff and her counsel relied on this finding of "good cause" and the granting of their motion for extension of time to continue litigating the case, retaining an expert, engaging in lengthy discovery, deposing experts, etc. While Defendants assert a four-month deviation from Section 668.11, more than two of those months were spent pending the lower court's ruling on whether good cause existed to where Plaintiff could actually designate an expert. *Compare* D0030, at 8 *with* D0015, Defs.' Mem. of Law in Supp. of Their Mot. for Summ. J. at 12 (9/6/2019). In reality, 44 days elapsed between the Section 668.11 deadline, and when Defendants moved for summary judgment. *See generally* D0009,Trial Scheduling and Discovery Plan (02/06/2019); D0015. No case law Defendants cite suggests that 44 days is an impermissible deviation from Section 668.11. *See, e.g., Stanton,* 2020 WL 4498884, at *5-6 (Finding no good cause when Plaintiff didn't start looking for an expert to designate until nearly three months after the deadline; yet ultimately hinging the analysis upon Defendant designating their experts before Plaintiff, stating "Defense counsel's actions do not support a finding of 'good cause.'").

While the present procedural history is certainly bizarre, the overwhelming case law suggests that the lower court should not have reversed its decision on good cause. *See Hill v. McCartney,* 590 N.W.2d 52, 54 (Iowa Ct. App. 1998)

("Trial courts have broad discretion in ruling on whether to extend the time allowed for parties to designate expert witnesses under [section] 668.11, and the exercise of that discretion will not be disturbed unless it was exercised on clearly untenable grounds or to an extent clearly unreasonable.").

B. Whether a party intends to appeal an adverse verdict after trial has no bearing on whether a trial is "unnecessary".

Defendants' Brief makes a bizarre and unsubstantiated assertion that the lower court's decision was in furtherance of the underlying purpose of Section 668.11 and was unnecessary because they "intended to appeal the Court's denial of Defendants' Motion for Summary Judgment in the event of an adverse judgment at trial." *See* Appellee Brief at. 34-35. Defendants set forth the argument that Section 668.11 more or less stands for a blanket protection on medical providers, and by dismissing the case on the eve of trial, it saved a medical professional accused of negligence the cost of trial. *Id*. This is not what Section 668.11 stands for. In fact, one of the primary objectives of 668.11 is "[p]reventing last minute dismissals . . . ." *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998). Defendants are not asserting that the two-week trial was "unnecessary" based on any of the merits or facts of the case, but merely was "unnecessary" because of their intent to appeal any adverse verdicts. Appellee Brief at 35. While there are several things wrong with this line of reasoning, it portrays Defendants fundamental misunderstanding of the purpose of Section 668.11. Section 668.11's predominant purpose is to

dispel frivolous litigation at an early stage. *Nedved* 585 N.W.2d at 240. The notion that a trial is "unnecessary" because if a jury were to rule adversely against Defendants on the merits, Defendants would appeal a denial of their summary judgment on a procedural statute aimed at preventing frivolous litigation, is an attenuated position to hold, at best.

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, attachment 1; D0128, Order, (12/11/2023), attachment 2.

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:

[X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size and contains 2,737 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Devin C. Kelly *07/05/2024*
Devin C. Kelly Date

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 5, 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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