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.

On appeal from Iowa District Court for Scott County
Order of The Honorable Stewart P. Werling
Law No. LACE131149

DEFENDANTS-APPELLEES' BRIEF

Ian J. Russell, AT0006813
Alexander C. Barnett, AT0012641
LANE & WATERMAN LLP
220 North Main Street, Suite 600
Davenport, IA 52801
Telephone: 563-324-3246
Facsimile: 563-324-1616
Email: irussell@l-wlaw.com
Email: abarnett@l-wlaw.com
ATTORNEYS FOR DEFENDANTS-APPELLEES
ORTHOPAEDIC SPECIALISTS, P.C. and
JOHN HOFFMAN, M.D.

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ROUTING STATEMENT

Defendants/Appellees, Orthopaedic Specialists, PC and John Hoffman, MD, agree this case should be transferred to the Iowa Court of Appeals because it involves the application of existing legal principles and issues appropriate for summary disposition. Iowa R. App. P. 6.1101(3)(a)-(b).

STATEMENT OF THE CASE

Ms. Sondag filed this medical malpractice action seeking damages in tort from Defendants' alleged negligent medical care. (Plaintiffs' Petition filed on January 7, 2019, D0001). Ms. Sondag's claims raise technical issues relating to medical diagnosis, treatment, and causation, which require expert evidence. (D0135 Transcript from 10/26/23 Motion Hearing – Original (page 8 line 13 – page 9 line 4); *see also* Ruling on Defendants' Motion for Summary Judgment, D0030, p. 5). Iowa Code section 668.11 establishes a 180-day deadline for a plaintiff to certify expert witnesses in a medical malpractice case from the date the defendant's answer is filed. IOWA CODE § 668.11.

Ms. Sondag failed to comply with Iowa Code Section 668.11, the Trial Scheduling and Discovery Plan, the Order Setting Trial and Approving Plan, and the Iowa Rules of Civil Procedure for certifying experts. (Plaintiffs' Responses to Defendants' Statement of Undisputed Material Facts, D0022, ¶14). Without expert testimony to establish the standard of care and causation, Ms. Sondag cannot

establish a *prima facie* case of medical malpractice. (D0135 Transcript from 10/26/23 Motion Hearing – Original (page 8 line 13 – page 9 line 4). Accordingly, in September 2019, the Defendants moved for summary judgment requesting the District Court to dismiss Ms. Sondag's lawsuit on account of her failure to timely designate an expert witness under Iowa law and the Order Setting Trial and Approving Plan. (Defendants' Motion for Summary Judgment, D0014).

In November 2019 the District Court denied Defendants' Motion for Summary Judgment. (Ruling on Defendants' Motion for Summary Judgment, D0030). When the District Court denied Defendants' Motion for Summary Judgment, the District Court did not have the benefit of three more recent Iowa Court of Appeals decisions, which confirm Ms. Sondag cannot establish "good cause" for her failure to timely designate an expert witness. (*See* Defendants' Motion in Limine No. 17, D0110). Based upon those newly decided authorities, the Court correctly granted Defendants' Motion in Limine No. 17, decertified Dr. Bal as an expert witness, and dismissed Ms. Sondag's lawsuit. (Order of Dismissal, D0120).

STATEMENT OF FACTS

This lawsuit arises out of a left hip surgery Dr. Hoffman performed on Plaintiff, Ms. Sondag, on February 13, 2017 at Orthopaedic Specialists, P.C. (*See* Plaintiffs' Responses to Defendants' Statement of Undisputed Material Facts,

D0022, ¶¶2-7).[1] It is undisputed Ms. Sondag requires expert testimony in this case to establish a *prima facie* case of medical malpractice. (D0135 Transcript from 10/26/23 Motion Hearing – Original (page 8 line 13 – page 9 line 4); *see also* Ruling on Defendants' Motion for Summary Judgment, D0030, p. 5).

Ms. Sondag's deadline for certifying the identity of her expert(s), the subject matter of their testimony and their qualifications was July 24, 2019, and the accompanying disclosures required by Iowa R. Civ. P. 1.500(2)(b), *i.e.*, written expert opinions, were due by August 26, 2019. (Plaintiffs' Responses to Defendants' Statement of Undisputed Material Facts, D0022, ¶14). Prior to these deadlines expiring, Defendants served written discovery requesting Ms. Sondag to identify each expert she expects to call and each expert's qualifications and opinions. (D0022, ¶25-27). Ms. Sondag's attorney requested an extension of time to July 19, 2019 to respond to said discovery, and Defendants agreed to this extension. (D0022, ¶28).

[1] Ms. Sondag's husband Timothy Sondag and the Sondag's minor children, C.S. and B.S., originally filed loss of consortium claims arising from the same care and treatment Dr. Hoffman performed on Ms. Sondag at Orthopaedic Specialists, P.C. (Plaintiffs' Petition filed on January 7, 2019, D0001 (loss of consortium claims jointly filed under Count II)). Ms. Sondag's husband and minor children voluntarily dismissed their loss of consortium claims without prejudice on October 22, 2023. (D0083). Accordingly, at the time the District Court granted Defendants' Motion in Limine No. 17, Ms. Sondag was the only plaintiff in this lawsuit and Defendants will refer to her only throughout this appeal.

Ms. Sondag, however, failed to respond to Defendants' written discovery requests as agreed and failed to designate any expert witnesses as required under Iowa Code Section 668.11 and the parties' Trial Scheduling and Discovery Plan. (Plaintiffs' Responses to Defendants' Statement of Undisputed Material Facts, D0022, ¶29). On September 6, 2019, Defendants moved for summary judgment requesting the Court to bar Ms. Sondag from certifying an expert witness. (Defendants' Motion for Summary Judgment, D0014). When Defendants filed their Motion for Summary Judgment, Ms. Sondag had not responded to Defendants' written discovery requests regarding her expert witnesses, despite having had more than four months to do so. (Plaintiffs' Responses to Defendants' Statement of Undisputed Material Facts, D0022, ¶29). Similarly, Ms. Sondag had not designated an expert witness—or even prepared a partial designation of an expert witness—despite having retained Dr. Bal as an expert witness in March of 2019. (*See* D0124, Plaintiff's Motion to Reconsider the District Court's ruling to decertify Dr. Bal as an expert witness, p. 2 (identifying the date Ms. Sondag retained Dr. Bal as an expert witness); Plaintiffs' Memorandum in Resistance to Defendants' Motion for Summary Judgment, D0019, p. 2 (*accord*)).

The Honorable Stuart Werling heard oral argument on Defendants' Motion for Summary Judgment on November 5, 2019. (*See* Order Setting Hearing, D0025; Ruling on Defendants' Motion for Summary Judgment, D0030). On the date of oral

argument, Ms. Sondag still had not designated an expert witness nor had she responded to Defendants' written discovery requests. (*See* Plaintiffs' Notice of Discovery Response, filed on December 18, 2019, D0032). Notwithstanding, on November 12, 2019, the District Court denied Defendants' Motion for Summary Judgment. (*See* Ruling on Defendants' Motion for Summary Judgment, D0030). In doing so, the District Court held: "Plaintiffs' satisfy the good cause test. First, the deviation has not been severe since the delay for disclosure has been minimal (less than 3 months since the deadline to certify experts and less than 2 months since Rule 1.500(2) were due)." (*Id.* at p. 5). In finding good cause, the District Court stated further: "Plaintiffs' Counsel also provides multiple legitimate reasons for the missed deadline, including the scheduling software error and her hospitalization." (*Id.* at p. 6).

Defendants moved in limine to exclude Dr. Bal from testifying at trial based upon his untimely designation as an expert witness. (Defendants' Motion in Limine No. 17, D0110). In doing so, Defendants cited case law issued after the District Court denied Defendants' Motion for Summary Judgment. (*Id.*). The newly decided case law confirms Ms. Sondag could not and did not satisfy her burden of establishing good cause for her untimely designation of Dr. Bal. (*Id.*). The Honorable Stuart Werling, who was also the assigned trial judge, correctly analyzed these newly decided authorities and granted Defendants' Motion in Limine No. 17. (Order of

Dismissal, D0120). As a result, the District Court correctly decertified Dr. Bal as an expert witness and dismissed Ms. Sondag's lawsuit. (*Id.*).

Ms. Sondag filed a timely Motion to Reconsider under Iowa Rule of Civil Procedure 1.904 requesting the District Court to reverse its decision to decertify Dr. Bal as an expert witness. (Plaintiff's Motion to Reconsider, D0122; Plaintiff's Brief in Support of Her Motion to Reconsider, D0124). Defendants filed a written resistance to Ms. Sondag's Motion to Reconsider. (Defendants' Resistance to Plaintiff's Motion to Reconsider, D0127). The District Court, "after careful consideration" of the parties' respective briefs, denied Plaintiff's Motion to Reconsider "for the reasons set forth in Defendant's resistance and brief in support of their resistance thereto." (Order Denying Plaintiff's Motion to Reconsider, D0128).

ARGUMENT

I. The District Court Had Inherent Authority To Decertify Dr. Bal As An Expert Witness Any Time Prior To A Final Judgment.

A. Error Preservation.

Defendants agree this issue was properly preserved. (Order of Dismissal, D0120; Defendants' Resistance to Plaintiff's Motion to Reconsider, D0127; Order Denying Plaintiff's Motion to Reconsider, D0128).

B. Scope and Standard of Review.

Defendants agree the District Court's decision to reconsider a prior summary judgment ruling is reviewed for an abuse of discretion. The decision to revisit and reconsider a prior interlocutory ruling is committed to the trial court's discretion. *Madden v. City of Eldridge,* 661 N.W.2d 134, 137 (Iowa 2003) (affirming the trial judge's decision "[a]t the start of trial" to *sua sponte* reconsider an earlier denial of the defendant's motion for summary judgment. Stating "[t]he trial court's action in reconsidering a motion for summary judgment is discretionary."); *Hoefer v. Wis. Educ. Ass'n Ins. Tr.*, 470 N.W.2d 336, 339 (Iowa 1991) (en banc) (holding a trial court acted within its discretion when it *sua sponte* reconsidered a prior summary judgment ruling of another judge).

C. The District Court Correctly Exercised Its Discretion To Decertify Dr. Bal To Avoid An Unnecessary Two-Week Jury Trial.

Prior rulings on summary judgment are not final and binding, and a trial court can revisit, review, and change its summary judgment rulings at a later date. *See Madden,* 661 N.W.2d at 137 (Iowa 2003). As the *Madden* Court stated:

> The trial court had authority to review the motion for summary judgment....The trial court did not err in revisiting the motion to ensure the issues were suitable for a trial on the merits. As long as the trial court has jurisdiction over the case and the parties, it has authority to correct its own perceived errors. The action of one judge, sitting as the court, may have the effect of altering or setting aside a previous ruling

> by another judge sitting as the same court. The trial court's action in reconsidering a motion for summary judgment is discretionary.

Id. The District Court correctly exercised its discretion to decertify Dr. Bal to avoid an unnecessary two-week jury trial, and the Defendants were under no obligation to file a motion to reconsider the District Court's earlier denial of their Motion for Summary Judgment.

Ms. Sondag emphasizes the District Court's November 12, 2019 Ruling denying Defendants' Motion for Summary Judgment remained unchanged for 1,441 days. (*See* Appellant Brief, p. 15). However, neither the "law of the case" nor "issue preclusion" doctrines alter the general principle that a trial court retains authority to modify or correct any of its prior rulings. *See City of Davenport v. Shewry Corp.,* 674 N.W.2d 79, 86 n.4 (Iowa 2004); *see also Ahls v. Sherwood/Division of Harsco Corp.,* 473 N.W.2d 619, 624 (Iowa 1991) ("An interlocutory order is not the law of the case because the court is free to change it at a later time."); *Kendall/Hunt Pub. Co. v. Rowe,* 424 N.W.2d 235, 240 (Iowa 1988) ("A trial judge may usually correct his or her own rulings or that of another judge of the same court any time before final judgment."); *Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 395-96 (Iowa 1988) (gathering cases discussing the court's inherent authority to reconsider a prior ruling); *Mason City Prod. Credit Ass'n v. Van Duzer*, 376 N.W.2d 882, 885 (Iowa 1985) (until trial is completed and final order rendered, Iowa courts have power to correct any of their prior rulings or orders); *Hoefer*, 470 N.W.2d at 339

(acknowledging the district court's ability to change a prior interlocutory ruling "enhances the court's integrity by refusing to give either party a 'vested right to require the court to perpetuate its mistake.'" (quoting *Kuiken v. Garrett*, 51 N.W.2d 149, 154 (Iowa 1952)).

Under these well-established authorities, the District Court had inherent authority to correct any of its own perceived errors so long as it retained jurisdiction over the case, and the District Court correctly determined Dr. Bal should be decertified as an expert witness based on Ms. Sondag's inability to establish good cause for her untimely expert designation. The District Court's decision to decertify Dr. Bal also served a fundamental purpose of Iowa Code section 668.11 as the District Court's Ruling avoided an unnecessary two-week jury trial for the named Defendant, Dr. Hoffman. The two-week jury trial would have been unnecessary because Defendants intended to appeal the District Court's denial of Defendants' Motion for Summary Judgment in the event of an adverse judgment at trial. To preserve judicial and party resources, the District Court correctly analyzed a narrow and discrete legal issue in advance of trial. Overall, the District Court correctly considered whether Ms. Sondag had good cause to justify her untimely designation of Dr. Bal when the District Court granted Defendants' Motion in Limine No. 17 and decertified Dr. Bal as an expert witness.

II. The District Court Correctly Determined Ms. Sondag Cannot Establish Good Cause For Her Untimely Designation Of Dr. Bal

A. Error Preservation.

Defendants agree this issue was properly preserved. (Order of Dismissal, D0120; Defendants' Resistance to Plaintiff's Motion to Reconsider, D0127; Order Denying Plaintiff's Motion to Reconsider, D0128).

B. Scope and Standard of Review.

Defendants agree the District Court's "good cause" determination under Iowa Code section 668.11 is reviewed for abuse of discretion. *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505 (Iowa 1993).

C. Ms. Sondag Cannot Satisfy Good Cause For Her Untimely Designation Of Dr. Bal.

Under Iowa Code section 668.11(2), if a party fails to timely designate his or her expert, "the expert *shall* be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown." IOWA CODE § 668.11(2) (emphasis added). To establish good cause for her failure to timely certify her experts and opinions, Ms. Sondag must demonstrate there was a

> sound, effective, truthful, reason something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. [Ms. Sondag] must show that [her] failure [to designate an expert] was not due to [her] negligence or want of ordinary care or attention, or to [her] carelessness or inattention. [She] must show affirmatively [she] did intend to [designate an expert] but because of some

> misunderstanding, accident, mistake or excusable neglect failed to do so.

Donovan v. State, 445 N.W.2d 763, 766 (Iowa 1989) (quoting *Dealers Warehouse Co. v. Wahl & Assocs.*, 216 N.W.2d 391, 394-95 (Iowa 1974)). In determining whether good cause exists, "the court considers three factors: (1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) the defendant's counsel's actions." *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998). Under these factors, Ms. Sondag cannot establish good cause for her failure to timely certify Dr. Bal and his opinions. Recent Iowa Court of Appeals decisions confirm this conclusion. Prior to discussing the recent appellate decisions the District Court relied upon to grant the Defendants' Motion in Limine No. 17, Defendants will separately analyze the three factors Iowa courts must consider when determining whether a plaintiff can establish good cause for failing to timely designate an expert under Iowa Code section 668.11.

1. Ms. Sondag Failed To Comply With Iowa Code Section 668.11 In A Serious And Significant Manner.

First, Ms. Sondag deviated from Iowa Code section 668.11 in a material way. She filed her lawsuit on January 7, 2019 and the medical issues in the present matter have been known to her since the beginning of the case. (*See* Petition, D0001); *Morales v. Miller*, No. 09-1717, 2011 WL 222527 at *4-5 (Iowa Ct. App. Jan. 20, 2011) (finding no good cause because, in part, the medical issues were known from

the beginning of the case); *Fields v. Iowa Dist. Court for Polk Cty.*, 468 N.W.2d 38, 39-40 (Iowa 1991) (observing "medical malpractice counsel must come to court armed with sound written medical opinion" and noting "the highly specialized subject matter of [plaintiff's] suit plainly was not within [the attorney's] understanding, a fact which should have been readily apparent to him."). Ms. Sondag's deadline for certifying the identity of her expert(s), the subject matter of their testimony and their qualifications was July 24, 2019, and their disclosures, required by Iowa R. Civ. P. 1.500(2)(b), *i.e.*, written expert opinions, were due by August 26, 2019.

At the time the District Court denied Defendants' Motion for Summary Judgment on November 12, 2019, Ms. Sondag had yet to certify a single expert or opinion. Accordingly, when the District Court denied Defendants' Motion for Summary Judgment, it had been nearly four months since Ms. Sondag's deadline to certify an expert had expired and nearly three months since Ms. Sondag's Rule 1.500(2) disclosures were due. The fact Ms. Sondag was yet to comply with the rules governing expert certification and discovery when the District Court denied Defendants' Motion for Summary Judgment negates her contention that she could not certify her expert(s) and opinions until her counsel spoke with Dr. Otero, the surgeon who performed her alleged remedial hip surgery, because Ms. Sondag's counsel spoke with Dr. Otero on September 11, 2019 – more than two months before

the District Court denied the Defendants' Motion for Summary Judgment. (*See* Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, pp. 3-4 (establishing date of Ms. Sondag's initial telephone call with Dr. Otero); Appellant Brief, p. 12 (*accord*)).

Further, the timeline set forth in Ms. Sondag's Appellate Brief establishes her failure to timely designate her experts and opinions is the result of neglect and inattention. Ms. Sondag's counsel was aware, no later than March 26, 2019, "that it would be prudent…to speak with Dr. Otero." (Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, p. 2 (establishing timeline); Appellant Brief, p. 10 (*accord*)). Yet, Ms. Sondag's counsel did not schedule an initial call with Dr. Otero until almost five months later on August 20, 2019. (Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, pp. 3-4 (establishing timeline); Appellant Brief, p. 12 (*accord*)).

Ms. Sondag's counsel's putative inability to contact Dr. Otero until September 2019 was the result of Ms. Sondag's counsel's lack of effort to contact Dr. Otero in the first place. The University of Iowa Health Care's legal department informed Ms. Sondag's counsel on March 27, 2019 that certain information and/or documentation was required before speaking with Dr. Otero. (Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, p. 2 (establishing timeline); Appellant Brief, p. 10 (*accord*)). Ms. Sondag's counsel then waited until April 22, 2019, almost one full

month, to provide the "necessary" information and/or documentation to the University of Iowa Health Care's legal department to speak with Dr. Otero. (Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, p. 2 (establishing timeline); Appellant Brief, p. 11 (*accord*)). Three days later UI Health Care's legal department informed Ms. Sondag's counsel that additional information and/or documentation was required before scheduling a call with Dr. Otero. ((Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, p. 2 (establishing timeline); Appellant Brief, p. 11 (*accord*)). Thereafter, Ms. Sondag's counsel waited over three months to contact the University of Iowa again to schedule a call with Dr. Otero. (Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, p. 3 (establishing timeline); Appellant Brief, p. 12 (*accord*)).

The fact that Ms. Sondag's counsel had a lengthy trial throughout June does not constitute good cause. Ms. Sondag's counsel was certainly aware the *Godfrey* case was scheduled for a six-week jury trial beginning in June of 2019. (*See* Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, p. 3; Appellant Brief, p. 11). Ms. Sondag's counsel simply failed to plan accordingly. *See, e.g., Nedved v. Welch*, 585 N.W.2d 238, 241 (Iowa 1998) (affirming trial court's denial of motion for extension to designate that was filed prior to expiration of deadline, even though plaintiff's counsel indicated she would be withdrawing from the case and additional time was needed to explore substitute counsel). If an overburdened

schedule constituted good cause, Iowa Code section 668.11 would be deprived of any meaning.

Likewise, Ms. Sondag's counsel's failure to properly calendar their expert designation deadline is the hallmark of neglect and inattention that "falls outside the definition of good cause given by the Supreme Court." *Tamayo v. Debrah*, No. 17-0971, 2018 WL 4922993, at *2 (Iowa Ct. App. Oct. 10, 2018) (affirming the district court's decision to decertify the plaintiff's untimely disclosed expert under Iowa Code section 668.11, and observing the plaintiff's counsel's failure to accurately calendar the expert designation deadline "was nothing more than an excuse, plea or apology."). Indeed, Ms. Sondag's counsel's concession that they were unaware of the applicable deadlines only bolsters Defendants' argument because Ms. Sondag had no intent to designate an expert witness in accordance with Iowa Code section 668.11 and the applicable Discovery Plan and Trial Setting Order.

The only unforeseen circumstance during the 180-day statutory period was Ms. Sondag's lead counsel's health problems in June of 2019. This circumstance, while certainly unfortunate, is tantamount to a plea for forgiveness. For instance, Ms. Sondag's lead counsel was able to return to the *Godfrey* trial, which concluded on July 15, 2019. (Appellant Brief, p. 12). Thereafter, Ms. Sondag's counsel could have filed a motion requesting an extension to certify their expert(s) and opinions, but they failed to do so.

Ms. Sondag's "good cause" arguments, individually and collectively, do not excuse her failure to timely certify her expert(s) and opinions. Ms. Sondag's putative justifications amount to inadvertence and oversight. The unifying theme of Ms. Sondag's putative justifications is that her counsel overlooked this case in the shuffle of their overburdened schedules. While this might explain why Ms. Sondag failed to timely designate an expert witness, it does not constitute good cause. Any other conclusion would defeat the objective of Iowa Code section 668.11, which requires plaintiffs to have their proof prepared at an early stage in the litigation in order to protect professionals from having to defend against frivolous suits. *Nedved*, 585 N.W.2d at 241 (noting "the requirements of section 668.11 would be rendered meaningless" if a plaintiff's ability to identify an expert after the statutory deadline constituted good cause).

Ms. Sondag's counsel's lack of action during the 180-day statutory period and continued lack of action—well after the applicable deadlines had passed—was a material breach of Iowa Code section 668.11. *Compare Donovan*, 445 N.W.2d at 766 (finding no abuse of discretion in denial of extension request where "the time to designate witnesses had run several months" and counsel had failed to answer interrogatories seeking the statutorily required information about the expert) *and Nedved*, 585 N.W.2d at 241 (holding a three-month delay in designation of expert witnesses is fatal even when prejudice to the defendant is limited to that "which

might be presumed to occur when experts are not designated by the statutory deadline") *with Hantsbarger*, 501 N.W.2d at 505 (finding abuse of discretion in denial of extension request where the plaintiffs named their experts before the statutory deadline and "a complete designation was only delinquent for about one week"). Ms. Sondag's deviation from the time limits imposed by Iowa Code section 668.11 and the applicable Discovery Plan and Trial Setting Order was significant. *Tamayo*, 2018 WL 4922993, at *2 (describing plaintiff's two-month delay "to designate her experts" and having "waited even longer to provide a complete summary of their opinions" as a "significant" deviation from Iowa Code section 668.11. Noting further that plaintiff's "retention of experts months before the original statutory deadline" was irrelevant because the plaintiff "failed to transmit their names to the defense before the deadline.").

2. Prejudice Is Presumed When A Plaintiff Fails To Comply With Iowa Code Section 668.11.

Next, Ms. Sondag argues her untimely designation of expert witnesses resulted in no prejudice to Defendants. Prejudice, however, is always presumed by virtue of an untimely designation under section 668.11. Defendants suffered "the prejudice which might be presumed to occur when experts are not designated by the statutory deadline." *Nedved*, 585 N.W.2d at 241. Iowa courts "cannot ignore the legislature's intent to provide professionals relief from nuisance suits and to avoid

the costs of extended litigation in frivolous cases." *Hantsbarger*, 501 N.W.2d at 504-05. In this regard, Iowa courts recognize that a party is prejudiced by a designation after the statutory deadline, even when the trial is months away:

> We agree the prejudice from allowing Dr. Sinkhorn to serve as an expert would not have been overwhelming, because the case was not scheduled to be tried until June 2008 and, due to the historic floods that occurred, the trial date was actually postponed to October 2009. But there would have been some prejudice—at a minimum, additional work required of defense counsel and defense experts.

Morales, 2011 WL 222527 at *6.

Simply put, allowing Ms. Sondag to ignore the specific requirements of Iowa law governing expert disclosures would invariably result in prejudice. *Nedved*, 585 N.W.2d at 241 (holding prejudice is "presumed to occur when experts are not designated by the statutory deadline."); *Sadler v. Primus*, No. 18-1198, 2019 WL 4302125, at *3 (Iowa Ct. App. Sept. 11, 2019) (*accord*). Moreover, even if no prejudice resulted from Ms. Sondag's late designation, the alleged lack of prejudice, by itself, does not excuse Ms. Sondag's untimely designation. *Stanton*, 2020 WL 4498884 at *3 n.2 (citing *Nedved*, 585 N.W.2d at 241 ("Lack of prejudice, by itself, does not excuse the [plaintiffs'] late designation." (internal citation omitted)).

3. Defense Counsel Took Affirmative Action That Should Have Prompted Ms. Sondag To Comply With Her Expert Deadlines.

Similarly, the final factor does not support a finding of good cause. With respect to expert disclosure deadlines, Iowa courts have long-recognized:

> the defense ha[s] no obligation to remind [plaintiffs] of the deadline before moving to strike her experts. While Iowa Rule of Civil Procedure 1.501(3) requires conferral among counsel to resolve discovery disputes, this case does not involve a discovery dispute but a missed statutory deadline.

Tamayo, 2018 WL 4922993, at *3. Further, despite Ms. Sondag's insistence, defense counsel did not "sit silently" until the applicable deadlines passed. (*See* Appellants' Brief, pp. 22-23). In fact, Iowa courts have held that Defendants' actions here, serving both Interrogatories and Request for Production of Documents seeking information regarding Ms. Sondag's expert witnesses, establish Defendants took affirmative actions that should have prompted Ms. Sondag's counsel to timely certify their expert(s) and opinions:

> Finally, in this case defense counsel did not "silently wait for the time period to pass and then use plaintiffs' deficient designation to seek a prohibition of plaintiffs' experts and a dismissal of their claims." *See* [*Hantsbarger*, 501 N.W.2d at 505]. *Defendant made discovery requests regarding plaintiff's* designation of an expert.

Bolt v. ABCM Corp., No 04-0378, 2004 WL 2952609 at *2 (Iowa Ct. App. Dec. 22, 2004) (emphasis added).

Altogether, Ms. Sondag cannot establish good cause for her failure to timely designate Dr. Bal and his opinions, which the District Court correctly determined is fatal to Ms. Sondag's medical negligence claims against Defendants. Because Ms. Sondag cannot establish good cause for her failure to comply with Iowa Code section 668.11, the District Court correctly determined Ms. Sondag was prohibited from

offering any expert testimony in this lawsuit. *See* IOWA CODE § 668.11(2). Ms. Sondag does not dispute expert testimony is necessary to establish her claims against Defendants. In the absence of expert testimony, there can be no genuine issue of fact and the District Court correctly dismissed Ms. Sondag's claims as a matter of law.

4. Recently Decided Iowa Court Of Appeals Opinions Confirm Ms. Sondag Cannot Establish Good Cause For Her Failure To Timely Designate An Expert Witness.

Ms. Sondag's inability to establish good cause under the three factors analyzed above is reinforced by more recent Iowa Court of Appeals decisions, which the District Court relied upon when it granted Defendants' Motion in Limine No. 17. As made clear in *Stanton v. Knoxville Cnty. Hosp., Inc.*, Iowa courts do not have unfettered discretion when analyzing whether a plaintiff has good cause to justify his or her failure to comply with deadlines under Iowa Code section 668.11. *See Stanton*, 2020 WL 4498884 at **5-6.

In *Stanton*, the trial scheduling and discovery plan required the plaintiff to designate his expert witnesses by January 12, 2019 and to produce expert reports by February 12, 2019. The plaintiff did not comply with those deadlines because he "truthfully" believed his expert designation deadline was June 18, 2019, which was 210 days before trial. *Id.* at *4. Prior to defendants moving for summary judgment in *Stanton*, plaintiff took affirmative steps to begin searching for an expert, which

corroborated plaintiff's belief that his expert disclosure date was in June 2019. *Id.* at *1. Prior to the hearing on the defendants' motion for summary judgment, the plaintiff designated an expert witness and produced an expert report. *Id.* The plaintiff had also partially responded to the defendants' written discovery requests directed at expert witnesses, stating he expected to call "any and all medical providers contained in the medical records" as expert witnesses at trial. *Id.* at *1.

In addition to these facts, the plaintiff argued the *Hantsbarger* factors weighed in favor of finding good cause because trial was still six months away and an email between defense counsel showed they had "agreed to wait and 'see if the plaintiff's lawyer blows his expert deadline' before moving for summary judgment." *Id.* at *3 n.2, *4 n.3. The trial court in *Stanton* was sympathetic to the plaintiff and denied the defendants' motion for summary judgment finding plaintiff had established good cause for his failure to comply with his expert designation deadlines. *Id.* at *2.

On an application for interlocutory appeal, the Iowa Court of Appeals disagreed, and held the trial court abused its discretion when it denied the defendants' motion for summary judgment. Specifically, the *Stanton* Court held the plaintiff's deadline to designate an expert witness was unambiguous and that he had ample time to comply with the deadline from the date of filing suit. *Id.* at *4. Accordingly, the plaintiff designating his expert witness four months past his deadline was a "serious deviation" from his obligations under Iowa Code section

668.11. *Id.* at *3. Moreover, even though the *Stanton* Court agreed the plaintiff "truthfully" believed his expert designation was in June 2019, the *Stanton* Court observed the plaintiff had to prove more than just being truthfully mistaken regarding his expert designation deadline. Pursuant to the standards the Iowa Supreme Court enunciated in *Donovan v. State*, 445 N.W.2d 763 (Iowa 1989), the plaintiff had to also establish a "sound" and "effective" reason for his failure to timely designate an expert witness. *See Stanton*, 2020 WL 4498884 at *4 (quoting *Donovan*, 445 N.W.2d at 766 ("'*The movant must show* his [or her] failure to defend *was not due to* his [or her] negligence or want of ordinary care or attention, or to his [or her] carelessness or inattention.'" (emphasis added by the Iowa Court of Appeals (brackets in original)))). The *Stanton* Court determined the plaintiff could not establish a "sound" or "effective" reason for his failure to timely designate an expert witness because, again, his expert designation deadline was clear and he had ample time to comply with that deadline.

The *Stanton* Court continued its analysis and held the district court also abused its discretion when it found the actions of defense counsel contributed to plaintiff's failure to timely certify an expert and that there was otherwise ample time to depose the plaintiff's expert prior to trial. The *Stanton* Court summarized its conclusion on these points as follows:

> In light of these principles, we believe defense lawyers are fully justified in moving forward with motions for summary judgment

> where, as here, **(1) the plaintiff's case cannot proceed without a retained expert; (2) the plaintiff's deadline to designate an expert is clear; (3) more than three months have already passed since plaintiff's deadline; (4) even so, the plaintiff has *still* failed to timely designate an expert; and (5) the plaintiff has not otherwise disclosed an expert by, for example (a) providing information about an expert through discovery responses, as was the case in *Hantsbarger*, or (b) filing at least a partial expert designation, as was the case in *Hantsbarger.*** Given these circumstances, we see no reason for defense counsel to have waited until, say, the dispositive-motion deadline before requesting a "last minute dismissal" of plaintiff's case. *See id.* That sort of delay would have only increased the "time, effort[,] and expense" of litigation—the very burdens section 668.11 was designed to reduce. *See id.*
>
> Defense counsel's actions do not support a finding of "good cause." We disagree with the district court's contrary view.

Id. at * 5-6 (bold font and underlining added) (italics originally added by the Iowa Court of Appeals). The same salient facts were present in this case when the Court denied Defendants' Motion for Summary Judgment in November 2019. It is undisputed Ms. Sondag requires expert testimony to set forth a *prima facie* claim against the Defendants. It is also undisputed that Ms. Sondag was approximately four months delinquent in designating *any* expert and three months delinquent in providing *any* expert report when the District Court denied Defendants' Motion for Summary Judgment. Likewise, even though Ms. Sondag had retained Dr. Bal months prior to her expert designation deadline, she failed to provide any information about him through discovery responses or through a partial expert

designation at the time the District Court heard oral arguments on Defendants' Motion for Summary Judgment.

Stanton makes clear that Ms. Sondag's approximate four-month delay in complying with her obligations under Iowa Code section 668.11 was far from "minimal" when the District Court initially denied Defendants' Motion for Summary Judgment. (*See* District Court Ruling Denying Defendants' Motion for Summary Judgment, D0030, p. 5). The District Court correctly analyzed *Stanton* when it granted Defendants' Motion in Limine No. 17 and decertified Dr. Bal.

In her Appellate Brief, Ms. Sondag draws several distinctions between this case and *Stanton*, but those distinctions are ultimately immaterial as to whether she can establish good cause for her failure to comply with her expert designation deadline. First, Ms. Sondag argues there was an attachment to the trial scheduling plan filed in *Stanton* that specifically set forth the parties' respective expert disclosure deadlines. Ms. Sondag, however, offers no explanation as to how or why the trial scheduling plan filed in this case, which specifically references Iowa Code section 668.11, was ambiguous.

Next, Ms. Sondag notes the plaintiff in *Stanton* did not start looking for an expert witness until approximately a year and half after filing his lawsuit whereas she contacted Dr. Bal within two of months of filing the above-captioned lawsuit. (*See* Plaintiff's Brief in Support of Her Motion to Reconsider, D0124, p. 9; Appellant

Brief, p. 20). This fact, however, actually cuts against a finding of good cause in this case. The plaintiff in *Stanton* was able to designate an expert witness approximately one month after he started looking for an expert, and he provided the accompanying expert report shortly thereafter. *See Stanton*, 2020 WL 4498884 at **1, 3. Here, Ms. Sondag retained Dr. Bal well in advance of her deadline to designate an expert witness. Armed with this information, Ms. Sondag could have disclosed Dr. Bal by responding to Defendants' written discovery requests directed at expert witnesses and/or made a timely partial expert designation like the plaintiff in *Hantsbarger v. Coffin* had done. *See Hantsbarger*, 501 N.W.2d 501, 505-06 (Iowa 1993) (finding good cause for the plaintiff's failure to comply with Iowa Code section 668.11 where the plaintiff identified her expert witness through written discovery responses and made a partial designation of expert witnesses within the applicable deadline); *Cf. Stanton*, 2020 WL 4498884 at *5 (distinguishing *Hantsbarger* based on the plaintiff's failure to provide any information relating to his retained expert witness in a timely manner); *see also Tamayo*, 2018 WL 4922993 at *2 (holding a plaintiff's "retention of experts months before the original statutory deadline" is irrelevant if the plaintiff "fail[s] to transmit their names to the defense before the deadline."). Further, even though the plaintiff in *Stanton* waited a year and half after filing suit to begin searching for an expert, he was able to designate an expert witness and produce an expert report prior to the hearing on the defendants' motion for summary

judgment. Here, it is undisputed Ms. Sondag failed to provide any information regarding her retained expert witness, much less an expert report, by the time the District Court heard oral arguments on Defendants' Motion for Summary Judgment.

Lastly, Ms. Sondag implicitly distinguishes *Stanton* on the basis that the defendants in that case ultimately disclosed their experts prior to the plaintiff. (*See* Appellant Brief, p. 21). Ms. Sondag, however, places too much reliance on this fact. The *Stanton* Court specifically recognized the prejudice to the defendants in was "not as great as in some cases" because "trial was still six months away when the court denied summary judgment." *Stanton*, 2020 WL 4498884 at *3 n.2. More importantly, the *Stanton* Court specifically stated that "[e]ven if no prejudice had occurred…that would not 'excuse' Stanton's 'late designation.'" *Id.* (quoting *Nedved*, 585 N.W.2d at 241 (Iowa 1998) (recognizing there is always some inherent prejudice by virtue of an untimely designation under section 668.11)).

Defendants are not required to designate their own expert witnesses prior to seeking summary judgment based on a plaintiff's failure to timely designate his or her own expert under Iowa Code section 668.11. Indeed, such a requirement would undercut one of the primary purposes of Iowa Code section 668.11, which is to require medical malpractice plaintiffs to have their proof prepared at an early stage in the litigation and to curtail unnecessary defense costs. This conclusion is confirmed by *Jackson v. Cath. Health Initiatives, Inc.*, No. 22-1911, 2023 WL

5602863 (Iowa Ct. App. Aug. 30, 2023) wherein the Iowa Court of Appeals affirmed a district court's decision to decertify an expert based upon the plaintiff's failure to comply with Iowa Code section 668.11. *Id.* at **2-3. The defendants in *Jackson* did not designate their own expert witnesses prior to moving for summary judgment, and the Iowa Court of Appeals had no difficulty affirming the district court's decision to decertify the expert based on the plaintiff's failure to comply with Iowa Code section 668.11. *Id.* In affirming the trial court, the *Jackson* Court found *Reyes v. Smith*, No. 21-0303, 2022 WL 1656238, (Iowa Ct. App. May 25, 2022), another on-point decision, to be indistinguishable. *Id.*

In *Reyes*, the Iowa Court of Appeals expressly held "a delay of sixty-days is substantial" when analyzing a plaintiff's failure to comply with Iowa Code section 668.11. *Reyes*, 2022 WL 1656238 at *2 (citing cases). The *Reyes* Court also rejected the plaintiff's argument that "the extraordinary COVID-19 pandemic led to their calendar error that caused them to miss the expert-designation deadline." *Id.* In doing so, the *Reyes* Court stated in pertinent part:

> Even accepting [plaintiffs'] arguments as factually true, they never explain exactly how the pandemic interfered with counsels' work or their ability to timely file an expert designation beyond attributing the late filing to their error in calendaring the deadline….Reyes [had] sufficient time to properly calendar the expert-designation deadline before the impact of the pandemic. Reyes has shown little more than want of ordinary care or attention in missing the expert-designation deadline, and the district court did not abuse its discretion in denying their motion for additional time to designate an expert witness.

Id. While Defendants are sympathetic to Ms. Sondag's counsel's time-consuming jury trial in the summer of 2019 and counsel's health issues that arose around that same time, just like in *Reyes*, nothing about those facts prevented Ms. Sondag's counsel from properly calendaring the expert disclosure deadline at the outset of this lawsuit. Based on these newly decided authorities, the District Court correctly granted Defendants' Motion in Limine No. 17, decertified Dr. Bal as an expert witness, and dismissed Ms. Sondag's lawsuit. *See Stanton*, 2020 WL 4498884 at **5-6; *Jackson*, 2023 WL 5602863 at **2-3; *Reyes*, 2022 WL 1656238 at *2.

D. The District Court's Ruling Furthered The Purpose Of Iowa Code Section 668.11

Ms. Sondag's final argument is that the District Court's ruling to decertify Dr. Bal as an expert witness defied the underlying purpose of Iowa Code section 668.11. In making this argument, Ms. Sondag emphasizes the prejudice she incurred on account of the District Court's decision to grant Defendants' Motion in Limine No. 17. Iowa Code section 668.11, however, is designed to protect medical professionals and their insurers, not medical malpractice plaintiffs. The Iowa Supreme Court has specifically recognized the legislature enacted Iowa Code section 668.11 to address "problems surrounding medical liability, liability insurance, and the attendant availability and cost of medical services to the public…." *Thomas v. Fellows*, 456 N.W.2d 170, 173 (Iowa 1990). The District Court's Ruling avoided an unnecessary

two-week jury trial for the named Defendant, Dr. Hoffman, and the Defendants' insurers who intended to appeal the Court's denial of Defendants' Motion for Summary Judgment in the event of an adverse judgment at trial. Accordingly, the District Court's Ruling, which removed a two-week jury trial from Dr. Hoffman's calendar and helped minimize defenses costs, advanced some of the fundamental reasons the legislature enacted Iowa Code section 668.11 in the first place.

CONCLUSION

For the foregoing reasons, Defendants/Appellees, Orthopaedic Specialists, PC and John Hoffman, MD, respectfully request that the district court's rulings be affirmed, that Ms. Sondag's appeal be denied in its entirety, and that the judgment in favor of Defendants be affirmed.

REQUEST FOR ORAL ARGUMENT

Defendants/Appellees, Orthopaedic Specialists, PC and John Hoffman, MD, believe this case could be affirmed without oral argument. If argument is granted, Orthopaedic Specialists, PC and John Hoffman, MD request to be heard.

LANE & WATERMAN LLP

By: */s/ Alexander C. Barnett*
Ian J. Russell, AT0006813
Alexander C. Barnett, AT0012641
220 North Main Street, Suite 600
Davenport, IA 52801
Telephone: 563-324-3246

Facsimile: 563-324-1616
Email: irussell@l-wlaw.com
Email: abarnett@l-wlaw.com

ATTORNEYS FOR DEFENDANTS ORTHOPAEDIC SPECIALISTS, P.C. and JOHN HOFFMAN, M.D.

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The undersigned certifies Defendants-Appellees' Brief was electronically filed and served on the 28th day of May, 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:

Roxanne Conlin
Devin Kelly
Roxanne Conlin & Associates, P.C.
3721 SW 61st Street, Suite C
Des Moines, IA 50321-2418
Email: roxanne@roxanneconlinlaw.com
Email: dkelly@roxanneconlinlaw.com

Clerk of the Iowa Supreme Court
Iowa Judicial Branch Building
1111 East Court Avenue, 4th Floor
Des Moines, IA 50319

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