ELECTRONICALLY FILED FEB 12, 2025 CLERK OF SUPREME COURT

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

Plaintiff-Appellant's Application for Further Review
Of Court of Appeal's January 23, 2025 Decision

Roxanne Conlin, AT0001642
Devin Kelly, AT0011691
ROXANNE CONLIN & ASSOCIATES, P.C.
3721 SW 61st Street, Suite C
Des Moines, IA 50321-2418
Phone: (515) 283-1111
Fax: (515) 282-0477

Email: roxanne@roxanneconlinlaw.com
Email: dkelly@roxanneconlinlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

1. **Whether a defendant can procedurally use a motion in limine as an untimely motion to reconsider or an untimely motion for summary judgment.**

2. **Whether a district court abuses its discretion when reversing its good cause determination, made years before trial, on the eve of trial.**

3. **Whether the Court's recent decision in *Cf. S.K. by & through Tarbox v. Obstetric & Gynecologic Assocs. of Iowa City & Coralville, P.C.* and the granting of further review in *Wilson v. Shenandoah Medical Center* alter the law applicable to the issues presented in this appeal, such as "good cause" and "waiver".**

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

The District Court and Court of Appeals affirmed the use of a motion in limine in conflict and/or inconsistent with Iowa law. *Lewis v. Buena Vista Mut. Ins. Ass'n*, 183 N.W.2d 198, 201 (Iowa 1971) ("the motion in limine is not ordinarily employed to choke off an entire claim or defense . . . ."); Iowa R. Civ. P. 1.981(3) (2024) (summary judgment motions typically due not less than 60 days prior to the date the case is set for trial); Iowa R. Civ. P. 1.904(2) (2024) (motion to reconsider considered timely if filed within 15 days after the filing of the order, judgment, or decree to which it is directed.).

The case involves important questions of changing legal principles, such as what constitutes "good cause" for purposes of Iowa Code Section 668.11 and when the issue of waiver applies. These legal principles have recently and are currently undergoing further development by the Iowa Supreme Court as demonstrated in *Cf. S.K. by & through Tarbox v. Obstetric & Gynecologic Assocs. of Iowa City & Coralville, P.C.* and the granting of further review in *Wilson v. Shenandoah Medical Center.*

ARGUMENT

II. Summary of Relevant Proceedings.

Plaintiff filed this medical negligence action on January 7, 2019. D0001, Pet.

at Law and Jury Demand, Jan. 7, 2019. On September 6, 2019, Defendants filed their Motion for Summary Judgment, arguing that Plaintiff failed to timely serve her expert materials. 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.

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 appealed.

On January 23, 2025, the Iowa Court of Appeals affirmed the lower court's decertification and dismissal.

III. The District Court and the Court of Appeals Should be Reversed.

a. A Defendant Cannot Procedurally Use a Motion in Limine as an Untimely Motion to Reconsider a Prior Summary Judgment Ruling or an Untimely Second Motion for Summary Judgment.

On November 12, 2019, the district 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).

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). This deadline was not changed by the parties. D0009, Trial Scheduling and Discovery Plan ¶ 10, Feb. 6, 2019.

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.").

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 or an untimely second motion for summary judgment. *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.

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 motion for reconsideration or a renewed/second 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. 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 district court should not have entertained much less granted Defendants' Motion in Limine Number 17. Trial was set to begin only a week after the motion in limine was filed and no timely motion to reconsider, renewed or second motion for summary judgment, 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.

Defendants' request for the district court to reconsider its November 2019

denial of summary judgment disguised as a motion in limine should not have been entertained by the district court, much less granted. The district 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).

b. Does a District Court Abuse Its Discretion When Reversing Its Good Cause Determination, Made Years Before Trial, on the Eve of Trial?

In dismissing Plaintiff's claim on the eve of trial, the district 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. "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 district 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.

The district 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.

The district 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." 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. 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 district court. 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 *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 district court did not abuse its discretion in denying summary judgment and allowing an extension of the expert deadlines back in November of 2019.

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 district 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 district 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 district court failed to undertake when reversing itself.

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.

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 district court's decision to reverse itself on the eve of trial undermines

both of the primary objectives of Section 668.11.

First, the district 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 district court's reversal. This case had been ongoing for nearly five years before the district 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 district 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.

c. Recent Case Law Developments.

i. *Cf. S.K. by & through Tarbox v. Obstetric & Gynecologic Assocs. of Iowa City & Coralville, P.C.* and the Issue of Waiver.

In a recent decision by the Iowa Supreme Court, Justice Waterman, joined by three other members of the Court, including Chief Justice Christensen, opined that a defendant *could and did* waive their right to challenge the sufficiency of a Section 147.140 certificate of merit affidavit. *S.K. by and through Tarbox v. Obstetric & Gynecologic Assoc. of Iowa City and Coralville, P.C.*, 13 N.W.3d 546, 569-583 (Iowa 2024) (Waterman, J., concurring opinion). ("On this record, the clinic through its prolonged litigation conduct waived its right to dismissal under Iowa Code section 147.140(6) as a matter of law."). Justice Waterman reiterated that the purpose of Section 147.140 was to "enable healthcare providers to *quickly dismiss* professional negligence claims that are not supported by the requisite expert testimony." *Id*. at 569 (emphasis original) (internal quotations and citations omitted).

Waiver is "the voluntary or intentional relinquishment of a known right." *Scheetz v. IMT Mut. Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982). Waiver can either be express by affirmative acts or implied from conduct supporting the conclusion that a waiver of the right was intended. *Continental Cas. Co. v. G.R. Kinney Co.*, 140 N.W.2d 129, 130, (Iowa 1966). When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver. *Scheetz*, 324 N.W.2d at 304. While the issue of waiver is usually one of fact for a jury to determine, when the evidence is undisputed, the issue is one of law for the court. *Id*. citing *Continental Cas. Co.*, 140 N.W.2d at 130; *Williams v. Stroh Plumbing & Electric, Inc.*, 94 N.W.2d 750, 753 (Iowa 1959).

Similar to Section 147.140, Section 668.11's underlying objectives of are clear and have been repeatedly emphasized in case law: "[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).

Here, Plaintiff had an expert 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. This case had been ongoing for nearly five years before the district 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.

This case allows the Court to consider the waiver doctrine as it applies to Section 668.11 in light of *Cf. S.K. by & through Tarbox v. Obstetric & Gynecologic Assocs. of Iowa City & Coralville, P.C.*

ii. *Wilson v. Shenandoah Medical Center* and the Issue of Good Cause.

On September 26, 2024, the Iowa Supreme Court granted further review in *Wilson v. Shenandoah Medical Center*, No. 23-0509, a case directly relevant to the issue of "good cause" in this appeal. *Wilson* also provides the Iowa Supreme Court a key opportunity to consider the accuracy of the *Stanton*, *Jackson*, and *Reyes* decisions, which formed the basis for the district court's ruling in this case. In *Wilson*, the Iowa Court of Appeals affirmed the district court's denial of the defendant's motion for summary judgment for the plaintiffs' failure to timely

designate an expert witness under section 668.11. 2024 WL 3519800 (Iowa Ct. App. July 24, 2024) (slip opinion) at *2, 5. The Court of Appeals found that the district court had correctly weighed the factors used to determine whether good cause for a delayed designation exists. *Id*. at *5. It confirmed the district court's finding of good cause, as well as its determination that the defendant suffered no harm as a result of the delay. *See Id*.

The *Wilson* Court stressed that in determining whether good cause exists for plaintiff's noncompliance with the section 668.11 deadline, "the court considers three factors: (1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant's counsel's actions. *Id*. at *2 (quotation omitted). The Court of Appeals noted that the district court acknowledged in its ruling that a three-month deviation from an expert witness disclosure deadline has been considered a serious deviation. *Id*. However, the district court also found that since the defendant had requested a continuance of the trial date and thereafter acquiesced to the plaintiffs' late designation by engaging in scheduling negotiations to conduct depositions both before and after the plaintiffs' deadline - even without the plaintiff's having designated an expert – that the defendant had not suffered prejudice due to the late designation. *Id*. at *4-5.

In the present case, Defendants similarly acquiesced to a continuance when on July 20, 2020, the Parties filed a Joint Motion to Continue the then scheduled

trial date, then set for October 5, 2020. D0045, Joint Mot. to Continue Tr. (July 20, 2020), and also by failing to file a motion to reconsider or an interlocutory appeal, in essence, "remaining silent" as to the missed deadline. Plaintiff's late designation was similarly harmless because Defendants did not lose any tactical advantage, nor were they surprised or prejudiced by the late designation, which they ignored for 1,441 days until the eve of trial.

In the present case, the District Court held that the reasons Plaintiff cited for missing the Section 668.11 deadline constituted "good cause". *See* D0030, Ruling on Defs.' Mot. for Summ. J. & Pl.'s Mot. for Ext. of Time to Designate an Expert, p. 7 (11/12/2019). Plaintiff's counsel has outlined a multitude of legitimate reasons as to why the deadline was not met. These reasons were all considered when the District Court initially found good cause for the missed deadline but were apparently not considered when the District Court then reversed itself on the eve of trial. *Compare* D0030 at p. 6, with D0133, Court Reporter's Transcript of Hearing (10/26/2023). Rather, the district court appears to have reversed itself based solely – and erroneously – upon the discussion in *Stanton* regarding the amount of time by which a disclosure deadline is missed. D0133 at p. 9 ("But I think that **I'm required**. I think *Stanton* says that it is error not to grant the motion at this time based on the reasoning for the delay in certification.") (emphasis added); *Cf. State v. Sandifer*, 570 N.W.2d 256, 257 (Iowa Ct. App. 1997) ("A remand for

resentencing is required where a court fails to exercise discretion because it believes it has no discretion."). *Wilson* now provides guidance which makes it clear that the District Court in the present case was incorrect, that it was *not* required, in reversing itself and that it was not a reversible error when summary judgment was denied nearly five years ago. *See Wilson* at *4-5.[1]

In addition, the *Wilson* Court emphasized that the district court's use of its broad discretion in deciding whether good cause exists under section 668.11 should be exercised within the bounds of the legislative intent of the statute. *Id*. at * 5 ("[T]he legislative intent behind the Iowa Code section 668.11 requirement 'was to provide certainty about the identity of experts and prevent last minute dismissals when an expert cannot be found.") quoting *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). Here, the legislative intent of 668.11 is plainly undermined by the district court's decision to reverse itself, which caused a last-minute dismissal for want of an expert, when there was, in fact, an expert ready to testify. *See* Appellant's Brief at p. 24.

CONCLUSION

For the reasons set forth above, Plaintiff requests that the Court

[1] In this case the Appellate Court noted that "Sondag does not argue in her brief that the district court mistakenly believed it lacked discretion, and we express no opinion on such a claim." P. 8, fn. 1. Plaintiff indeed attempted to make this argument to the court once the *Wilson* opinion was issued, but Plaintiff's attempt to provide this additional argument based on the new law was denied and Plaintiff was simply only able to provide notice to the Court of the additional authority. Order, Sept. 9, 2024; Pl.-Appellant's App. to File Supp. Briefing (Unresisted), Sept. 6, 2024; Appellant's Supp. Brief, p.7, Sept 6, 2024

grant further review of the Court of Appeal's January 23, 2025 Decision, the district court and Court of Appeals Decision be reversed, and the case be remanded for further proceedings.

/s/ Devin C. Kelly

Roxanne Conlin, AT0001642
Devin Kelly, AT0011691
ROXANNE CONLIN & ASSOCIATES, P.C.
3721 SW 61st Street, Suite C
Des Moines, IA 50321-2418
Phone: (515) 283-1111
Fax: (515) 282-0477
Email: roxanne@roxanneconlinlaw.com, dkelly@roxanneconlinlaw.com
ATTORNEYS FOR PLAINTIFF

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 5,591 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Devin C. Kelly *02/12/2025*
Devin C. Kelly Date

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 12, 2025, 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:

Alexander C. Barnett
abarnett@l-wlaw.com
Ian J. Russell
irussell@l-wlaw.com
LANE & WATERMAN LLP
Attorneys for Defendants

Devin C. Kelly *02/12/2025*
Devin C. Kelly Date