IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0195

DANIELLE PUTMAN,

Appellant,

vs.

SHAWN J. WALTHER and AMY M. WALTHER

Appellee.

COURT OF APPEALS DECISION FILED DECEMBER 16, 2020

APPELLANT'S APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals Err in upholding the District Court Opinion finding that Putman was required to designate an expert witness for her claim under Chapter 558A, Iowa's Real Estate Disclosure Act?

2. Did the Court of Appeals Err in upholding the District Court Opinion granting summary judgment for failure to designate an expert without an opportunity to be heard in compliance with Iowa R. Civ. P. 1.517(3)?

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STATEMENT SUPPORTING FURTHER REVIEW

Under Iowa Rule of Appellate Procedure 6.1103(1)(b)(4), this case should have been retained by the Supreme Court as the interpretation of a statute is a matter of law for the Supreme Court to decide. *Clay County v. Public Employment Relations Bd*., 784 N.W.2d 1, 4 (Iowa 2010). The Court of Appeals erred in finding Putman was required to disclose an expert pursuant to Iowa Code § 668.11 against a seller of real estate for her claim under Iowa Code § 558A, Iowa's Real Estate Disclosure Act.

STATEMENT OF THE CASE

On October 25, 2018, Plaintiff/Appellant Danielle Putman (hereinafter "Putman") sued Shawn J. Walther and Amy M. Walther (hereinafter "the Walthers"), Sandy Stuber, individually and as real estate agent for REMAX Home Group, (hereinafter "Stuber") Michael Meany, individually as real estate agent for Sulentic Fischels (hereinafter "Meany") and Mike Bartlett Home Inspections (hereinafter "Bartlett") for violations of Iowa Code 558A, Iowa's Real Estate Disclosure Act, intentional and negligent misrepresentation. See Petition (App. 1-3). On November 30, 2018, Putman filed an Amended Petition in order to correctly name REMAX Home Group and Sulentic Fischels. See Amended Petition (App. 41-43). On March 15, 2019, a Trial Scheduling Order and Discovery Plan was filed. (App. 46-52).

On March 22, 2019, an Order Setting Trial was filed that incorporated the Trial Scheduling Order and Discovery Plan setting Trial for January 7, 2020. (App. 53-57). The case proceeded through the discovery phase. Putman responded to the Walthers' interrogatory requests and specifically named "representative from Magee Construction" as a potential expert witness.[1]

On November 1, 2019 and November 4, 2019, Meany and Stuber each moved for summary judgment arguing that Putman's failure to disclose a professional liability expert required summary judgment as to each of them. See Meany and Stuber Motions for Summary Judgment. On November 8, 2019, the Walthers moved for summary judgment arguing that Putman's failure to designate an expert witness concerning causation and damages entitled them to dismissal of all of Putman's claims as well. See the Walthers Motion for Summary Judgment. (App. 106-108). The Walthers adopted Meany and Stuber's Statement of Undisputed Material Facts as their own. (See the Walthers Statement of Undisputed Material Facts (App. 109-110). On November 22, 2019, Ms. Putman resisted each motion. See Resistance to

[1] Although the interrogatory answer naming Magee Construction as a potential expert is not in the summary judgment record, Putman specifically named Magee Construction as a potential expert witness in her interrogatory answer to the Walthers and Meany acknowledged Magee was disclosed in discovery in the hearing on January 3, 2020, ***before the summary judgment ruling***. (App. 132-133). In addition, Putman referenced the Magee Construction estimate in her Resistance to Summary Judgment.

Motion for Summary Judgment. (App. 111-120). On December 9, 2019, a hearing was held telephonically, but not reported.

On January 3, 2020 a reported pretrial conference occurred. (App. 121). On the same day, the district court granted the motion for summary judgment as to all Defendants, finding that an expert opinion was required on the issues of causation and damages and because Putman did not timely designate or disclose any expert as to those issues, all claims made by her, including negligent misrepresentation, fraudulent misrepresentation, and violations of Chapter 558A were dismissed. See January 3, 2020 Order (App. 149-153). Putman timely filed her Notice of Appeal. On May 18, 2020, Putman moved to voluntarily dismiss Meany and Stuber from this appeal and proceed against the Walthers on her Iowa Code §558A claim only. On December 16, 2020, the Court of Appeals entered an Order affirming the District Court Decision finding, *inter alia*, that Putman was required to designate an expert witness under chapter 558A to establish her claim that the Walthers fell short of complying with standards for real estate disclosure and failed to do so. [December 16, 2020 Decision of the Court of Appeals, p. 9].

STATEMENT OF FACTS

On or about April 27, 2018, Putman purchased a house at 2502 West 8th Street, Waterloo, Iowa, from the Walthers. (App. 1). The real estate

transaction involved two real estate agents, namely Stuber on behalf of the Walthers, and Meany on behalf of Putman. (App. 1). On February 8, 2018, as part of the real estate transaction, the Walthers provided Putman a Sellers Disclosure of Property Condition (hereinafter "Seller Disclosure Statement"). (App. 8-12).

The disclosure statement asked:

1. Basement/ Crawl Space/ Slab: Any known water, seepage or other problems? [The Walthers checked the box "**Yes**"].
   Describe: [The Walthers wrote, "**2010 sewer back up [&] SW wall seepage a few times**"]. (Emphasis Added)

22. Other items: Are you aware of any of the following:

    (5) Any known physical problems? (Example: settling, flooding, drainage or grading problems, ect.) [The Walthers checked the box "**No**"]. (Emphasis Added)

On or about June 29, 2018, Putman experienced water infiltration in the basement for the first time. (App. 13, 113). On July 16, 2018, a contractor from Magee Construction Company inspected Putman's home and authored an estimate dated July 19, 2018 (hereinafter "Magee estimate"). (App. 13-37). The Magee estimate included pictures of water damage and noted the following: (1) previous water infiltration in the SW corner which indicates a previous water infiltration ; (2) the floor of the SW corner bedroom raised off the concrete floor 2 ½ inches; (3) an existing basement window visible from the exterior in the SW corner behind mulch/dirt which showed a wall was built

to channel water flow on the south side of the home; (4) an old drain line capped off and a clean out which were under the carpet and pad of the family room in the basement. (App. 13-37). The estimate further stated, "Water came in through the wall at the SW corner of the basement," and "I do not know what the south wall looks like behind the drywall, but it is obvious the infiltration of water/rain on June 29, 2018 which was over 2" according to the US Weather Service came through this wall." *Id.* Finally, Magee provided a detailed estimated repair cost of $11,571.48 dollars does dollars need to be here. *Id.*

Putman again experienced water infiltration in the basement on August 6, 2018, September 4, 2018, September 19, 2018, and October 1, 2018. (App. 113). After the flooring and sheetrock were removed from the basement walls, Putman reported there were watermarks on the wall indicating water infiltration throughout the basement. (App. 114). Putman also was advised by neighbors that the Walthers had a sump pit and pump in the backyard which was removed prior to her purchase. (App. 113). On August 18, 2018, Putman obtained a "list of known complaints from the 2500 blk of W. 8th Street and the intersection of 8th St. W and Locke Street from the City of Waterloo (hereinafter "City of Waterloo report"). (App. 40). The City of Waterloo report showed the Walthers complained to city officials in 2010, 2012 and

2014 about street flooding and/or storm sewer back up. *Id.* In 2008, before the Walthers purchased the home, a complaint was made about "Basement backup. Main was surcharged, street flooded." *Id.*

On October 25, 2018, Putman sued the Walthers, Stuber, Meany and Bartlett for negligent misrepresentation, fraudulent misrepresentation and violations of Iowa Code § 558A. (App. 1-40). Putman alleged the Walthers failed to disclose the true condition of water infiltration in the SW corner wall of the basement in good faith. In addition, Putman alleged the Walthers had a sump pit and pump in the backyard which they removed prior to the sale of the home to her and failed to disclose it. (App. 1-40). Attached to the original petition filed by Putman was the Magee estimate, a demand letter, the Seller Disclosure of Property Condition form, and the City of Waterloo report. (App. 4-40). On November 30, 2018, by amended petition, Putman corrected the names of Defendant Stuber and Meany, but did not change any substantive allegations against the Defendants. (App. 41-43). All Defendants answered and denied the allegations in the amended petition. (App. 44-45).

ARGUMENT

QUESTION ONE: Did the Court of Appeals Err in upholding the District Court Opinion finding that Putman was required to designate an expert witness for her claim under Chapter 558A, Iowa's Real Estate Disclosure Act and failed to do so?

The December 16, 2020 Court of Appeals Decision cited *Karnes v. Keffer Overton Assocs. Inc*., No. 00-0191, 2001 WL 1443512, at *2 (Iowa Ct. App. Nov. 16, 2001) and *City of Riverside v. Metro Pavers, Inc.*, 2017 WL 2875687 *2-3 (Iowa Ct. App. July 6, 2017) for its support that Putman's 558A claim failed because she failed to designate an expert witness. Both cases are distinguishable from the present case as both are professional negligence cases. Contrary to a claim under 558A involving a *seller* of real estate, Putman was not subject to the requirements of Iowa Code § 668.11 for licensed professionals. Instead, Putman as a seller of real estate was merely required to comply with Iowa R. Civ. P. 1.500(2)(a), (b), or (c) and did so.

A. The Magee Construction estimate was disclosed and did not require formal designation under Iowa R. Civ. P. 1.500(2)(b) or Iowa R. Civ. P. 1.508.

The district court's decision to disallow the Magee estimate and grant the Walthers' motion for summary judgment was an abuse of discretion, when the facts viewed in the light most favorable to Putman, shows the estimate was from an expert who was not retained and whose opinion was not acquired or developed in anticipation of litigation.

On October 25, 2018, over a year before trial, it is undisputed that Putman attached the Magee estimate to her original petition. (App. 13-37). There was no evidence in the record that Magee was specifically retained as

an expert nor did the facts, when viewed in the light most favorable to Putman, show that Magee's opinion was acquired or developed in anticipation of litigation.

Instead, the record reflects that on July 16, 2018, three months before Putman sued the Walthers, she contacted Magee Construction after experiencing water infiltration in her basement on June 29, 2018, *for the first time*. (App. 13, 113). A reasonable inference from this fact is that Putman contacted Magee in order to diagnose and treat her first water infiltration problem, not to obtain a causation or damages opinion to use in anticipation of litigation. (App. at 13-37). In addition, there was no evidence that Magee was ever retained to provide such an opinion. Under this record, a formal designation with a written report under Iowa R. Civ. P. 1.500(2)(b)(1)-(6) was clearly not required.

In *Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476 (Iowa 2004), the Iowa Supreme Court reversed a district court decision to exclude evidence from a treating physician on the issue of causation because the plaintiff did not designate him as expert in accordance with Iowa Code § 668.11 or Iowa R. Civ. P. 1.508 in a professional liability case. The Iowa Supreme Court found that the district court erred in concluding that plaintiff's failure to

disclose her treating physician in interrogatory answers required exclusion of all opinion evidence that could not be the subject of lay testimony. *Id.* at 482.

In so holding, the Court found the "paramount criterion" in determining whether an expert opinion requires designation is whether the causation evidence, irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation." *Id.*

The Court then more fully explored this "paramount criterion" in the context of Rule 125 in *Morris -Rosdail v. Schechinger*, 576 N.W.2d 609 (Iowa Ct. App. 1998) and found:

> "In *Morris-Rosdail*, a personal injury action, the district court granted a defense motion to exclude the testimony from two treating doctors regarding the plaintiff's need for future surgery and permanent impairment. The district court granted the motion because the plaintiff had failed to disclose the doctors' opinions in response to the defendant's interrogatory. The court of appeals first noted that rule 125 distinguishes between facts and opinions of doctors of experts derived prior to being retained as experts and those acquired or developed in anticipation of litigation or for trial. The court also noted that the rule does not preclude on expert from testifying to facts and opinions derived prior to being retained as an expert and for this reason treating physicians are generally not subject to rule 125. The court then recognized, that "the threshold question [is] whether the facts and opinions were formulated by a physician in treating a patient or whether they were formulated by a physician for purposes of the issues in pending or anticipated litigation." (internal citations omitted).

Hansen at 482-483.

In finding the treating physician testimony in *Hansen* was not subject to an Iowa Code §668.11 or Iowa R. Civ. P. 1.508 designation and disclosure, the Court found the application of the rule "does not necessarily depend on the label or role of the physician and hinges on the reason and time frame in which the underlying facts and opinions were acquired by the physician. *Id.* at 483 (quoting *Morris -Rosdail v. Schechinger*, 576 N.W.2d at 610. The Court further found that "a treating physician ordinarily focuses, while treating a patient, on purely medical questions rather than on the sorts of partially legal questions (such as causation or percentage of disability), which may become paramount in the context of a lawsuit." *Id.* at 481.

Similar to *Hansen*, the evidence viewed in the light most favorable to Putman, shows that the Magee estimate was not formulated for purposes of issues in pending or anticipated litigation. Rather, the purpose of the estimate was to treat and diagnose Putman's first water infiltration problem, much like that of a treating physician who diagnoses and treats an injury for the first time prior to litigation being filed and who forms a causation opinion in the course of that treatment. Under these facts, the Magee estimate did not require formal designation under Iowa R. Civ. P. 1.500(2)(b) or 1.508. The *Hansen* decision makes clear that under these facts the district court abused its discretion in disallowing this evidence.

B. Putman complied with the substance of Iowa R. Civ. 1.500(2)(c) in disclosing the Magee Construction estimate one year before trial.

The Magee estimate that was attached to Putman's original petition contained all of the information required in Iowa R. Civ. P. 1.500(2)(c). (App. 13-37). Specifically, the estimate attached to Putman's original petition contained the contractor's full name, address, telephone number, fax number, e-mail address, a detailed summary of his observations, photographs, and a reasonable repair cost. *Id.* Iowa R. Civ. P. 1.500(2)(d) states that a party must make a 1.500(2) disclosure in the sequence set in the trial scheduling order, which in this case was 210 days before trial. Putman more than complied with this mandate in providing the disclosure more than one year before trial and naming Magee Construction as a potential expert in responding to discovery requests propounded by the Walthers. The Court of Appeals found the district court did not rule on the issue of substantial compliance or harmless error and the issues were therefore waived.

Putman agrees that the district court did not rule on the issues of substantial compliance or harmless error, but contends it should have, before summarily dismissing the case for what amounts to a discovery dispute. *See Rockette Trucking & Constr., Ltd v. Runde Auto Grp. of Iowa, Inc.*, 947 N.W.2d 685 (Iowa Ct. App. 2020). In *Rockette*, the defendant argued the

district court erred in not excluding evidence as a sanction for discovery violations after the plaintiff failed to designate the identity of expert witness testimony and details of any expert's expected testimony. The Court of Appeals held that the defendant had a duty to compel expert discovery once the alleged mandatory expert disclosure was not provided and failed to do so. *Id.* The Court of Appeals, *after reviewing the district court's analysis of the factors used to consider sanctions for noncompliance with discovery*, held that the failure to exclude the proffered expert testimony as a sanction for a discovery violation was not an abuse of discretion. *Id.* (Emphasis Added).

Unlike *Rockette*, in this case the district court never conducted any kind of analysis of the factors used to consider sanctions for noncompliance with discovery because no hearing was ever held and no record made on the issue. Under these circumstances, it was an abuse of discretion for the district court to enter an order without regard to what was just. *See* Iowa R. Civ. P. 1.517(2)(b).

QUESTION TWO: Did the Court of Appeals Err in upholding the District Court Opinion granting summary judgment for failure to designate an expert without an opportunity to be heard in compliance with Iowa R. Civ. P. 1.517(3)?

In *City of Riverside v. Metro Pavers, Inc.*, 2017 WL 2875687 *2-3 (Iowa Ct. App. July 6, 2017) the plaintiff argued on appeal that the failure to disclose an expert witness was a discovery dispute and the district court erred

in failing to consider the available range of sanctions in granting summary judgment. The only expert disclosure made by Riverside occurred one day prior to the hearing and well past the discovery deadline. The district court disallowed the expert testimony, refused to continue the case because it would prejudice the defendant and found Riverside could not provide a justifiable excuse for the delay. *Id.* at *4-5. Because Riverside's inability to provide expert testimony was fatal to its cause of action as a matter of law, the district granted summary judgment.

The Iowa Court of Appeals agreed with the court's ruling. *Id.* at *6. In reaching this decision the court found Riverside did not take any meaningful steps to prosecute the cause of action by (1) failing to make initial disclosures, (2) not designating an expert witness within the ample time provided by the discovery plan and did not request an extension of the deadline. The court found based on the summary judgment ruling the district court considered Riverside's request for a continuance and determined that any alternatives would be improper.

In determining the district court did not abuse its discretion in disallowing the late disclosure of an expert witness, the court found the district court in compliance with Rule 1.517(3)(a) because it provided Riverside an opportunity to be heard and determined Riverside had no justifiable excuse

for waiting until one day before the summary judgment hearing to designate an expert and disallowed its expert-witness designation. Under these facts, the court did not find the district court abused its discretion. *Id.* at *8-9.

Unlike *City of Riverside*, which required an Iowa Code § 668.11 disclosure, Putman made an Iowa R. Civ. P. 1.500(2)(c) disclosure more than one year before trial and disclosed Magee as a potential expert in discovery responses. Also, unlike *City of Riverside*, in which Riverside made no argument its expert opinion did not require a formal disclosure, Putman contends hers does not. Moreover, where the defendant in *City of Riverside* was clearly prejudiced by the failure to disclose or designate an expert until one day prior the summary judgment hearing, no similar prejudice occurred here. There is no evidence in the record that the Walthers ever sought a more complete discovery answer than what was disclosed in the interrogatory Putman provided on experts which named Magee, they never requested to take a deposition, nor did they ever file a motion to compel. Instead, the Walthers waited until after the expert disclosure deadline passed and argued in summary judgment that Putman failed to disclose any expert on causation and damages when they were clearly aware of the Magee estimate and that Magee may be called as a potential expert.

Finally, unlike *City of Riverside*, there is no record to suggest the district court allowed Putman the opportunity to be heard on any argument she did not comply with the discovery plan or that the district court considered other alternatives in compliance with Iowa R. Civ. 1.517(3)(a) for a failure to comply. Instead, the district court's short paragraph on sanctions focused on whether Putman's claim ever had a basis in law or in fact when she filed it, not any analysis of whether an alleged failure to formally designate an expert witness by the court-imposed deadline was substantially justified or harmless such that it warranted dismissal. *See Whitely v. Pharm. Serv*., 816 N.W.2d 378, 388 (Iowa 2012) (listing the four factors for the district court to consider when determining appropriate sanctions.)

Under the facts and record in this case, the district court clearly abused its discretion in failing to allow Putman the opportunity to be heard on any alleged failure to properly designate an expert witness as the matter was a discovery dispute and the Court of Appeals erred in failing to consider this argument on appeal.

CONCLUSION

For the reasons set forth above, the December 16, 2020 Decision of the Court of Appeals affirming the January 3, 2020, Order of the Honorable Kelly Ann Lekar should be reversed, with the Court finding that in an Iowa Code

Chapter 558A, the requirements of Iowa Code § 668.11 for licensed real estate professionals do not apply to a seller of real estate; that Putman's disclosure of Magee over one year before trial complied with the substance of Iowa R. Civ. P. 1.500(2)(c); and the failure of the district court to allow Putman an opportunity to be heard under Iowa R. Civ. P. 1.517(3) for the alleged failure to designate an expert in granting summary judgment was an abuse of discretion.

The December 16, 2020 Decision of the Court of Appeals affirming the granting of summary judgment as to the Walthers should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this 5th day of January, 2021, Danielle Putman served Appellant's Application for Further Review on all other parties to this appeal by e-mailing one copy thereof to the respective counsel for said parties:

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitations of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 3,643 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: January 5, 2021

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IN THE COURT OF APPEALS OF IOWA

No. 20-0195
Filed December 16, 2020

DANIELLE PUTMAN,
Plaintiff-Appellant,

vs.

SHAWN J. WALTHER and AMY M. WALTHER,
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Kellyann Lekar, Judge.

A home buyer appeals the district court's grant of summary judgment to the sellers on her claims of fraudulent and negligent misrepresentation. **AFFIRMED.**

Patrick C. Galles of Correll, Sheerer, Benson, Engels, Galles & Demro P.L.C., Cedar Falls, for appellant.

Matthew M. Craft of Dutton, Daniels, Hines, Kalkhoff, Cook & Swanson, P.L.C., Waterloo, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Schumacher, JJ.

TABOR, Judge.

Danielle Putman bought a home from Shawn and Amy Walther. After water seeped into her basement, Putman sued the Walthers for fraudulent misrepresentation and negligent misrepresentation of the conditions of the house. Putman now appeals the district court's grant of the Walthers' motion for summary judgment. Because the court properly determined Putman's failure to designate an expert witness on causation and damages was fatal to her case, we affirm the summary judgment ruling.

I. Facts and Prior Proceedings

In March 2018, the Walthers sold their house to Putman. In the Seller Disclosure of Property Condition, the Walthers revealed that the basement only had a "2010 sewer back up and SW wall seepage a few times." But after Putman took possession of the home in April, she experienced significant water infiltration in the basement.

To address that problem, Putman arranged for Magee Construction Company to inspect her basement. After the inspection, Magee Construction sent her a letter detailing the harm caused by seepage:

> Inspected the water damage to your lower level on Monday the 16th of July. Observed water damage to the family rooms and bedroom. Tested the walls of all the rooms with a moisture meter and had water in the drywall a foot up from the floor.

The letter also described the damage shown in four photographs:

> The pictures #2 show the meter pegged with moisture a foot up from the floor. Pictures #1 shows the floor of the bedroom SW corner, raised off the concrete floor approximately 2 1/2″ which indicates a previous water infiltration from the exterior. Not known at this time of any damage to the framing under existing sub floor. Pictures #3 show the damage to the flooring of the family rooms. Pictures #4

> show the exterior SW side exterior, which show an existing basement window behind the mulch/dirt and at some point in time a wall was built to channel the water flow on the south side of the structure. Pictures #5 show an old drain line capped off and a clean-out which were under the carpet and pad of the family room.

Magee Construction estimated it would cost $11,571.48 to repair the water damage to the basement.

In October 2018, Putman sued the Walthers for both fraudulent misrepresentation and negligent misrepresentation.[1] Putman alleged their failure to disclose the defects of the basement caused her "mental, emotional, and financial damage and loss." She attached the letter, estimate, and photographs from the inspection.

After the parties' initial disclosures, the Walthers moved for summary judgment in November 2019, noting Putman "failed to designate an expert witness and can offer no testimony concerning causation as to the water intrusion into [her] home."

Putman resisted their motion. In her resistance, she listed the following sources: (1) city employees called to her home to observe the water infiltration; (2) Magee Construction, the company that conducted an inspection and provided a repair estimate; (3) realtor Steve Burrell, who provided a sale price estimate; and (4) neighbors who could testify as to the water in her basement. Putman also asserted that she could "testify as to the source of water and her observations

[1] The petition also named as defendants Sandy Stuber, Michael Meaney, and Mike Bartlett Home Inspections. Putman amended the petition on November 30 to add Movers & Shakers, LLC and Sulentic & Fischels Realtors, Inc. as defendants. Putman voluntarily dismissed the appeal as to these defendants, leaving the Walthers as the only appellees.

having lived in the home for more than a year." Expanding on that point, Putman submitted an affidavit, stating "[t]hat water came in to the basement from sanitary sewer overflow, seepage through the floor and walls and other unknown sources."

In January 2020, the district court granted the Walthers' motion for summary judgment. The court held that "expert testimony is required on the issues of causation and damages, because the cause of water damage to the house and the cost of repair are not common knowledge to a lay person." Putman did not meet that requirement, in the court's estimation:

> [A]fter review of the record, the witnesses mentioned in Plaintiff's Resistance were not formally designated as experts nor were these individuals disclosed as experts in the Plaintiff's discovery responses. In reviewing the interrogatory responses submitted in support of the various motions for summary judgment, the Court notes that no expert witness was mentioned in the discovery responses.[2] Further, Plaintiff makes summary allegations that representatives were disclosed in the Resistances to the motions for summary judgment but provides no actual interrogatory responses to support these allegations.

After listing those deficiencies, the court ruled Putman had not properly designated or disclosed an expert on the issues of causation or damages. Given that omission, the court granted summary judgment on Putman's claims of negligent misrepresentation and fraudulent misrepresentation.[3]

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[2] In answers to interrogatories, Putman listed four neighbors as witnesses. She also listed as expert witnesses a city engineer, the waste management director, the sewer maintenance foreperson, and a representative of Magee Construction. Defendants Sandy Stuber and Movers & Shakers, LLC provided Putman's list of expert witnesses as an exhibit in support of their objections to her witness and exhibit list. That exhibit was not part of the record in the motion for summary judgment.

[3] The district court noted Putman did not refer to Iowa Code chapter 558A (2019) in her complaint but "essentially pled a cause of action under that chapter."

Putman appeals the district court's decision granting summary judgment.

II. Scope and Standard of Review

Our review of summary judgment decisions is for correction of errors at law. *Hollingshead v. DC Misfits, LLC*, 937 N.W.2d 616, 618 (Iowa 2020). A party may be granted summary judgment by showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). "We review the facts in the record 'in the light most favorable to the nonmoving party' and 'draw every inference in favor of the nonmoving party.'" *Hollingshead*, 937 N.W.2d at 618 (quoting *Skadburg v. Gately*, 911 N.W.2d 786, 791 (Iowa 2018)).

III. Analysis

Putman does not dispute that she needed to present expert testimony to establish her claims of causation and damages. *See Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 793 (Iowa 2009) ("When the causal connection between the tortfeasor's actions and the plaintiff's injury is not within the knowledge and experience of an ordinary layperson, the plaintiff needs expert testimony to create a jury question on causation.").

Iowa Rule of Civil Procedure 1.500(2)(a) provides that "a party must disclose to the other parties the identity of any witness the party may use at trial to present evidence under Iowa Rules of Evidence 5.702, 5.703, 5.705."[4] Under this disclosure rule, a party must disclose the identity of expert witnesses. *McConkey*

[4] These rules of evidence govern testimony by expert witnesses.

ex rel. B.M. v. Huisman, No. 18-1399, 2019 WL 3317373, at *3 (Iowa Ct. App. July 24, 2019).

Putman asserted in her resistance to summary judgment that she had "identified witnesses in response to discovery requests," including Magee Construction. But the district court determined "the witnesses mentioned in Plaintiff's Resistance were not formally designated as experts nor were [they] disclosed as experts in the Plaintiff's discovery responses."[5]

On appeal, Putman raises a different issue, contending she adequately disclosed Magee Construction as an expert witness by attaching the letter and estimate from the company to her original petition. She argues no formal designation was necessary because "the Magee estimate was not formulated for purposes of issues in pending or anticipated litigation." She relies on *Hansen v. Central Iowa Hospital Corp.*, 686 N.W.2d 476, 480 (Iowa 2004), in which the plaintiff failed to designate her treating physician as an expert witness in accordance with Iowa Code section 668.11 (2001). Our supreme court determined the physician could still give his opinion testimony on causation arising from treating the plaintiff because his opinion was not "formulated as a retained expert for purposes of issues in pending or anticipated litigation." *Hansen*, 686 N.W.2d at 485.

[5] The court explained that it made its ruling by "reviewing the interrogatory responses submitted in support of the various motions for summary judgment." As noted, Putman listed Magee Construction as an expert witness in the answer to an interrogatory, but none of the parties submitted the answer in association with the motion for summary judgment.

Putman did not raise this issue in her resistance to the Walthers' motion for summary judgment. She stated only that she had identified Magee Construction "in response to discovery requests." Also, the district court never ruled on whether Putman had retained Magee Construction in anticipation of litigation. *See id.* We conclude Putman did not preserve this issue for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Next, Putman claims she complied with the substance of rule 1.500(2)(c) by attaching Magee Construction's estimate to her petition, which included "the contractor's full name, address, telephone number, fax number, e-mail address, a detailed summary of his observations, photographs, and a reasonable repair cost." Because she provided this information, Putman contends her failure to formally designate Magee Construction as an expert witness was harmless error.

Putman does not provide legal authority to support her claim that she substantially complied with the disclosure rule. Substantial compliance means "compliance in respect to essential matters necessary to assure the reasonable objectives" of the rule or statute. *See Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993) (finding literal compliance with Iowa Code section 668.11 on expert disclosure was not required). Because she offers no cases to bolster her position, we find this issue waived on appeal. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). Even if the issue was not waived, the district court did not rule on the issues of substantial

compliance or harmless error, and therefore these issues have not been preserved for our review. *See Meier*, 641 N.W.2d at 537.

Finally, Putman contends summary judgment was inappropriate because the Magee Construction estimate presented a genuine issue of material fact on the issues of causation and damages for her claim under Iowa Code section 558A.6. That statute creates a civil cause of action for a seller's failure to make required real estate disclosures. *See Arthur v. Brick*, 565 N.W.2d 623, 626 (Iowa Ct. App. 1997) (noting chapter 558A sets "standards for disclosure" in real estate transactions).

On this point, the district court noted: "Although the Petition did not specifically refer to Code of Iowa Chapter 558A, the allegations of the Petition essentially pled a cause of action under that Chapter." After determining that expert testimony on causation was required for Putman's claim, the court concluded: "In sum, all claims made by the Plaintiff, including negligent misrepresentation, fraudulent misrepresentation or violation of Chapter 558A to the extent that cause of action could be considered pled by Plaintiff, are subject to summary disposition for failure to designate or disclose experts on causation and damages."

Summary judgment is appropriate when a plaintiff's claims must be supported by expert testimony and the plaintiff fails to designate an expert witness. *See Karnes v. Keffer Overton Assocs. Inc.*, No. 00-0191, 2001 WL 1443512, at *2 (Iowa Ct. App. Nov. 16, 2001) ("We agree with the district court that an expert was necessary in this case and that failure to designate one was appropriate grounds for summary judgment in favor of the defendants."); *accord City of Riverside v.*

Metro Pavers, Inc., No. 16-0923, 2017 WL 2875687, at *2–3 (Iowa Ct. App. July 6, 2017). Putman needed to designate an expert witness on her claim under chapter 558A to establish her claim that the Walthers fell short in complying with the standards for real estate disclosure. Her failure to do so is grounds for summary judgment.

We affirm the district court's decision granting summary judgment to the Walthers.

AFFIRMED.