

**IN THE SUPREME COURT OF IOWA**  
Case No. 22-0293

---

MARCELINO ALVAREZ VICTORIANO,

Plaintiff-Appellant,

vs.

CITY OF WATERLOO, IOWA, Municipal Corporation; OFFICER C.J. NICHOLS, in his/her Individual and Official Capacity as Officer of WATERLOO POLICE DEPARTMENT,

Defendants-Appellees.

---

Appeal from the Iowa District Court  
for Black Hawk County  
The Honorable Joel A. Dalrymple, Judge

---

**BRIEF FOR APPELLEES**

---

Bruce L. Gettman, Jr., AT0002724  
Bradley M. Strouse, AT0009732

of Redfern, Mason, Larsen & Moore, P.L.C.

415 Clay Street  
Cedar Falls, Iowa 50613  
Phone: (319) 277-6830  
Fax: (319) 277-3531  
Email: bgettman@cflaw.com  
strouse@cflaw.com

Attorneys for Defendants-Appellees

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... 4

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ..... 6

ROUTING STATEMENT..... 8

STATEMENT OF THE CASE..... 9

STATEMENT OF THE FACTS ..... 9

ARGUMENT ..... 11

I. THE “RIGHT” TO A VOLUNTARY DISMISSAL IS NOT ABSOLUTE..... 11

    A. Error Preservation and Standard of Review..... 11

    B. Argument..... 12

II. IOWA CODE SECTION 670.4A MANDATES DISMISSAL WITH PREJUDICE ..... 17

    A. Error Preservation and Standard of Review..... 17

    B. Argument..... 18

        1. Iowa Code section 670.4A generally ..... 18

        2. Rule 1.943 directly conflicts with Iowa Code section 670.4A(3) ..... 19

        3. *Struck* supports dismissal with prejudice..... 22

        4. Iowa Code section 670.4A(3) and Rule 1.943 cannot be harmonized ..... 25

        5. The Federal Rules of Civil Procedure..... 27

        6. Conclusion ..... 30

III. THE DISTRICT COURT RETAINED JURISDICTION TO DETERMINE WHETHER RULE 1.943 APPLIED..... 30

    A. Error Preservation and Standard of Review..... 30

    B. Argument..... 32

CONCLUSION .....	32
REQUEST FOR ORAL SUBMISSION .....	34
CERTIFICATE OF COMPLIANCE .....	35
CERTIFICATE OF FILING AND SERVICE .....	36

## TABLE OF AUTHORITIES

### Cases

<i>Benskin, Inc. v. W. Bank</i> , 952 N.W.2d 292 (Iowa 2020) .....	22
<i>Blair v. Werner Enters.</i> , 675 N.W.2d 533 (Iowa 2004) .....	12, 13, 14
<i>Christiansen v. Iowa Bd. of Educ. Exam’rs</i> , 831 N.W.2d 179 (Iowa 2013).....	19, 20, 21, 24–25
<i>Doe v. Cassel</i> , 403 F.3d 986 (8th Cir. 2005).....	27
<i>Graham v. Mentor Worldwide LLC</i> , 998 F.3d 800 (8th Cir. 2021).....	29
<i>In re Marriage of Engler</i> , 532 N.W.2d 747 (Iowa 1995).....	32
<i>In re Marriage of Thatcher</i> , 864 N.W.2d 533 (Iowa 2015) .....	20
<i>Kelly v. State</i> , 525 N.W.2d 409 (Iowa 1994) .....	25
<i>Krebs v. Town of Manson</i> , 129 N.W.2d 744 (Iowa 1964) .....	25
<i>Meier v. Senecaut</i> , 641 N.W.2d 532 (Iowa 2002) .....	31, 32
<i>Mormann v. Iowa Workforce Dev.</i> , 913 N.W.2d 554 (Iowa 2018) .....	22
<i>Morrow v. United States</i> , No. 21-CV-1003-MAR, 2021 WL 7210611 (N.D. Iowa July 9, 2021).....	29
<i>Morrow v. United States</i> , No. 21-CV-1003-MAR, 2021 WL 4347682 (N.D. Iowa July 28, 2021) .....	29
<i>Schmidt v. Abbott</i> , 156 N.W.2d 649 (Iowa 1968).....	20
<i>Smith v. Lally</i> , 379 N.W.2d 914 (Iowa 1986) .....	13
<i>Struck v. Mercy Health Servs.-Iowa Corp.</i> , 973 N.W.2d 533 (Iowa 2022).....	passim
<i>Valles v. Mueting</i> , 956 N.W.2d 479 (Iowa 2021) .....	12

*Venard v. Winter*, 524 N.W.2d 163 (Iowa 1994).....26, 27

### **Statutes**

Iowa Code § 4.1(30) ..... 20

Iowa Code § 4.7..... 21

Iowa Code § 4.8 ..... 21

Iowa Code § 147.140 ..... passim

Iowa Code § 668.11 ..... 26

Iowa Code § 670.4A..... passim

42 U.S.C. § 1983.....27

### **Court Rules**

Iowa R. App. P. 6.1101(2)..... 8

Iowa R. of Civ. P. 1.101..... 19, 33

Iowa R. of Civ. P. 1.943..... passim

Fed. R. Civ. P. 41..... 28, 29

### **Secondary Sources**

27 C.J.S. Dismissal Nonsuit § 24 (1999)..... 13

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **I. THE “RIGHT” TO A VOLUNTARY DISMISSAL IS NOT ABSOLUTE**

*Blair v. Werner Enters.*, 675 N.W.2d 533 (Iowa 2004)

*Smith v. Lally*, 379 N.W.2d 914 (Iowa 1986)

*Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533 (Iowa 2022)

*Valles v. Mueting*, 956 N.W.2d 479 (Iowa 2021)

Iowa Code § 147.140

Iowa Code § 670.4A

27 C.J.S. Dismissal Nonsuit § 24 (1999)

### **II. IOWA CODE SECTION 670.4A(3) MANDATES DISMISSAL WITH PREJUDICE OF PLAINTIFF’S CLAIMS**

*Benskin, Inc. v. W. Bank*, 952 N.W.2d 292 (Iowa 2020)

*Christiansen v. Iowa Bd. of Educ. Exam’rs*, 831 N.W.2d 179 (Iowa 2013)

*Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005)

*Graham v. Mentor Worldwide LLC*, 998 F.3d 800 (8th Cir. 2021)

*In re Marriage of Thatcher*, 864 N.W.2d 533 (Iowa 2015)

*Kelly v. State*, 525 N.W.2d 409 (Iowa 1994)

*Krebs v. Town of Manson*, 129 N.W.2d 744 (Iowa 1964)

*Mormann v. Iowa Workforce Dev.*, 913 N.W.2d 554 (Iowa 2018)

*Morrow v. United States*, No. 21-CV-1003-MAR, 2021 WL 7210611 (N.D. Iowa July 9, 2021)

*Morrow v. United States*, No. 21-CV-1003-MAR, 2021 WL 4347682 (N.D. Iowa July 28, 2021)

*Schmidt v. Abbott*, 156 N.W.2d 649 (Iowa 1968)

*Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533 (Iowa 2022)

*Venard v. Winter*, 524 N.W.2d 163 (Iowa 1994)

Iowa Code § 4.1(30)

Iowa Code § 4.7

Iowa Code § 4.8

Iowa Code § 147.140

Iowa Code § 668.11

Iowa Code § 670.4A

42 U.S.C. § 1983

Iowa R. of Civ. P. 1.101

Iowa R. Civ. P. 1.943

Fed. R. Civ. P. 41

### **III. THE DISTRICT COURT RETAINED JURISDICTION TO DETERMINE WHETHER RULE 1.943 APPLIED**

*In re Marriage of Engler*, 532 N.W.2d 747 (Iowa 1995)

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court because it presents an issue of first impression and presents fundamental and urgent issues of broad public importance requiring ultimate determination by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2).

Specifically, this case involves the interpretation of recently-enacted Iowa Code section 670.4A and a direct conflict between that statute and Iowa Rule of Civil Procedure 1.943 regarding voluntary dismissals without prejudice. The Iowa Supreme Court should address the proper scope and interpretation of the statute.



## **STATEMENT OF THE CASE**

This case arises from the District Court's dismissal with prejudice of Plaintiff's Amended Petition. App. 94–95. The District Court determined that Plaintiff failed to comply with recently-enacted Iowa Code section 670.4A(3), part of the Iowa Municipal Tort Claims Act. That code section provides in part that failure to comply with the specific pleading requirements of that section “shall result in dismissal with prejudice.” Iowa Code § 670.4A(3).

The District Court further found that Plaintiff could not avoid the mandate of that section by voluntarily dismissing his action without prejudice. App. 94. The District Court set aside Plaintiff's Dismissal Without Prejudice and dismissed the action with prejudice pursuant to Iowa Code section 670.4A(3). App. 95.

Resolution of this case requires this Court to determine whether Iowa Rule of Civil Procedure 1.943 provides an absolute right to voluntary dismissal and, if so, whether Iowa Code section 670.4A(3) conflicts with and displaces that otherwise absolute right.

## **STATEMENT OF THE FACTS**

The District Court granted Defendants' Pre-Answer Motion to Dismiss. Accordingly, the only available facts are those set forth in Plaintiff's Amended Petition.

On September 22, 2021, Plaintiff sued the City of Waterloo and an unknown officer advancing various claims arising out of an officer-involved shooting which occurred on April 7, 2021. Petition, ¶6–8; App. 6. Prior to any responsive pleading, on November 8, 2021, Plaintiff amended his Petition to name the officer who allegedly shot Plaintiff. App. 9.

In response to Plaintiff's Amended Petition, Defendants filed a motion to dismiss, alleging among other things that Plaintiff failed to comply with the procedural requirements of Iowa Code section 670.4A(3). App. 13–18. Plaintiff resisted. App. 21–29. In response to the resistance, Defendants filed a brief in support of their Motion. App. 30–72. On the same day Defendants filed their Brief in Support, Plaintiff filed a dismissal without prejudice. App. 73–74. The dismissal without prejudice was filed one day before the hearing on the motion to dismiss, so no hearing was held.

Two days later, Defendants filed a Motion to Set Aside and Resistance to Plaintiff's Voluntary Dismissal. App. 75–80. Plaintiff resisted Defendants' motion. App. 83–93.

The District Court set a hearing on (1) Defendants' Motion to Dismiss, (2) Plaintiff's Dismissal Without Prejudice, and (3)

Defendants’ Motion to Set Aside and Resistance to Plaintiff’s Voluntary Dismissal. App. 81–82.

A reported hearing was held as scheduled. App. 94. The District Court determined that Iowa Code section 670.4A applied to Plaintiff’s claims. App. 94. The District Court further determined that while “in nearly all circumstances” a plaintiff is allowed to dismiss his own petition at any time up to ten days before trial, there are exceptions. App. 94. The District Court held that Iowa Code section 670.4A conflicts with Iowa Rule of Civil Procedure 1.943 and that as a result the matter “shall be dismissed with prejudice.” App. 94–95.

Plaintiff timely filed an appeal from the District Court’s Order.

## **ARGUMENT**

### **I. THE “RIGHT” TO A VOLUNTARY DISMISSAL IS NOT ABSOLUTE**

#### **A. Error Preservation and Standard of Review**

Plaintiff made no statement regarding error preservation or standard of review. Plaintiff preserved error regarding his claim of an absolute right to voluntary dismissal in his Resistance to Defendants’ Motion to Set Aside Plaintiff’s Voluntary Dismissal, the Brief filed in support thereof, and at hearing on February 2, 2022.

Iowa’s appellate courts “review a district court’s ruling on a motion to dismiss for the correction of errors at law.” *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022). Rulings on statutory interpretation are also reviewed for correction of errors at law. *Id.*

## **B. Argument**

Plaintiff initially argues that Rule 1.943 at all times and in all cases grants an absolute right of dismissal at any time until ten days before trial. However, as with any rule, there are always exceptions.

Furthermore, even if the rule is absolute where applicable, it cannot be absolute if it does not apply at all. In this case, the rule does not apply because the legislature specifically mandated a different and exclusive result.

While Rule 1.943 has been described as “absolute,” the Iowa Supreme Court has recognized at least one possible exception. *Blair v. Werner Enterprises*, 675 N.W.2d 533, 536–37 (Iowa 2004); *but see Valles v. Mueting*, 956 N.W.2d 479, 484 (Iowa 2021) (referring to the right to dismiss settling defendants as “absolute” under Rule 1.943). While the exception identified may or may not itself apply in this

case, it at least indicates that Iowa courts have contemplated exceptions to the rule.

The Iowa Supreme Court favorably quoted a treatise which recognizes situations where a plaintiff may not be permitted to dismiss the action. *Blair*, 675 N.W.2d at 536–37. The case itself is not particularly instructive here, factually or procedurally. But the Court recognized prior cases holding Rule 1.943 “gives a plaintiff a right to dismiss an action at any time before the beginning of trial. When any defense pleadings are solely defensive, the dismissal terminates the court’s jurisdiction of the action.” *Id.* at 536 (quoting *Smith v. Lally*, 379 N.W.2d 914, 916 (Iowa 1986)). Crucially, the Court continued:

Where a plaintiff moves to discontinue an action, the vital question is whether the defendant will suffer prejudice by the discontinuance. A plaintiff ordinarily cannot take a voluntary discontinuance where the defendant has acquired some substantial right or advantage in the course of the proceeding which would be lost or rendered less efficient by such a termination, or where the defendant thereby would be deprived of a just defense.

*Id.* (quoting 27 C.J.S. Dismissal Nonsuit § 24, at 254 (1999)). *Blair* thus recognizes that the absolute right to dismiss may not be so absolute.

Under the facts of this case, *Blair* also suggests that voluntary dismissal should not be permitted under Rule 1.943 because the

Defendants here have acquired a substantial right or advantage which would be lost by voluntary dismissal, and the Defendants would be deprived of the defense of immediate dismissal with prejudice.

Dismissal with prejudice under Iowa Code section 670.4A(3) provides an earlier or more complete remedy and allows municipal tort defendants to terminate a meritless action early in the process. *See Struck*, 973 N.W.2d at 541. Even if Rule 1.943 generally applies to municipal tort claims, a recognized exception prohibits voluntary dismissal in this case.

In light of the fact that the voluntary dismissal rule otherwise conflicts with Iowa Code section 670.4A(3), the Court should recognize that every rule has exceptions and refuse to allow Plaintiff to use Rule 1.943 to avoid the dismissal with prejudice mandate of Iowa Code section 670.4A(3).

That reasoning and outcome was implicitly endorsed by the Iowa Supreme Court in *Struck*. In 2017, the Iowa legislature adopted a certificate of merit requirement for personal injury and wrongful death actions. Iowa Code § 147.140. That statute imposes upon a plaintiff a duty to serve a certificate of merit affidavit. *Id.* A failure to substantially comply with the statute “shall result, upon motion, in

dismissal with prejudice.” Iowa Code § 147.140(6). *Struck* involved the interpretation of the statute and the Iowa Supreme Court’s first opportunity to address the certificate of merit requirement. *Struck*, 973 N.W.2d at 536.

*Struck* holds that the legislative goal to enable providers to quickly dismiss professional negligence claims not supported by the requisite expert testimony is supported by the dismissal with prejudice of claims which fail to comply with the statute. *Id.* at 541. The Court recognized that Iowa Code section 147.140 “provides an earlier and more complete remedy” of dismissal with prejudice when a plaintiff fails to comply with the statutory requirements than would otherwise exist. *Id.* Here, as in *Struck*, allowing a Plaintiff to circumvent mandatory dismissal with prejudice “violates the command” of the statute. *Id.* at 542.

Indeed, Plaintiff appears to acknowledge that exceptions to the so-called “absolute” right to voluntary dismissal under Rule 1.943 have been recognized. Plaintiff Brief p. 8 (“Iowa case law has examined the potential for limitation on this absolute right ... when a defendant is prejudiced. ... [T]he Iowa Supreme Court delineated the type of prejudice a defendant must be at risk of suffering in order to deprive

the plaintiff of a right to a voluntary dismissal.”). Plaintiff concedes that at least one exception to the “absolute” right to voluntary dismissal under Rule 1.943 exists, disputing only the applicability of the exemption here.

Finally, Plaintiff hastily asserts that the District Court’s ruling was inconsistent because it referred to dismissal without prejudice. No reasonable reading of the District Court’s decision could conclude the District Court intended to allow dismissal without prejudice. The Court once erroneously referred to “without prejudice” rather than “with prejudice.” The actual sentence which Plaintiff claims creates inconsistencies reads “[a]gain, upon considering the arguments of counsel and a review of the pleadings, the Court does find in favor of the defendants and this matter should be dismissed without prejudice pursuant to Iowa Code § 670.4A.” App. 95. The next sentence reads “**IT IS THEREFORE ORDERED** the above-captioned matter shall be dismissed with prejudice.” App. 95. (Emphasis in original). While those two sentences clearly contain a typographical or transcription error, there should be no doubt that the District Court found in favor of the Defendants and dismissed the action with prejudice. If Plaintiff believed the District Court had erroneously dismissed the action with



prejudice when it intended to allow Plaintiff's voluntary dismissal, Plaintiff should have raised the issue with the District Court before filing his notice of appeal.

Ultimately, the so-called "right" to a voluntary dismissal under Rule 1.943 is not absolute. The Iowa Supreme Court has recognized as much. Moreover, whether the right to dismissal under the rule is absolute is irrelevant if the rule itself does not apply.

## **II. IOWA CODE SECTION 670.4A MANDATES DISMISSAL WITH PREJUDICE**

### **A. Error Preservation and Standard of Review**

Plaintiff made no statement regarding error preservation or standard of review. Plaintiff preserved error regarding whether Iowa Code section 670.4A(3) conflicts with Iowa Rule of Civil Procedure 1.943 in his Resistance to Defendants' Motion to Set Aside Plaintiff's Voluntary Dismissal, the Brief filed in support thereof, and at hearing on February 2, 2022.

Iowa's appellate courts "review a district court's ruling on a motion to dismiss for the correction of errors at law." *Struck*, 973 N.W.2d at 538. Rulings on statutory interpretation are also reviewed for correction of errors at law. *Id.*

## **B. Argument**

### **1. Iowa Code section 670.4A generally**

Iowa Code section 670.4A modified the Iowa Municipal Tort Claims Act. Under the revised statute, a “plaintiff who brings a claim under this chapter alleging a violation of the law must state with particularity the circumstances constituting the violation and that the law was clearly established at the time of the alleged violation.” Iowa Code § 670.4A(3).

Plaintiff’s Petition and Amended Petition indisputably fail to satisfy these statutory requirements. The relevant issue on appeal is the consequences which flow from that failure. The statute provides the answer. “Failure to plead a plausible violation or failure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice.” *Id.* Indeed, Plaintiff conceded as much before the District Court.<sup>1</sup>

Plaintiff seeks to avoid the dismissal with prejudice expressly mandated by the statute by voluntarily dismissing the action pursuant to Iowa Rule of Civil Procedure 1.943. But that rule of civil

---

<sup>1</sup> “I.C.A. § 670.4A(2) - (4) requires plaintiffs to plead at a higher specificity than the I.R.C.P. and established case law and the consequences of such is dismissal with prejudice ... .” App. 27, ln. 8–10.

procedure has no effect if it conflicts with and must yield to the specifically applicable statute at issue in this case.

**2. Rule 1.943 directly conflicts with Iowa Code section 670.4A(3)**

The Rules of Civil Procedure provide that those rules will yield to statutes which provide different procedure in particular cases. Iowa R. Civ. P. 1.101. The Iowa Municipal Tort Claims Act provides for a different procedure—a procedure other than permissive voluntary dismissal—by expressly mandating dismissal with prejudice for failure to comply with its specific pleading requirements. Therefore, the general rule of voluntary dismissal without prejudice must yield to the specific procedural requirements of Iowa Code section 670.4A(3), including the mandate that a failure to properly plead a plausible violation or that the law was clearly established “shall result in dismissal with prejudice.”

General principles of statutory construction also require dismissal with prejudice. “The goal of statutory construction is to determine legislative intent.” *Christiansen v. Iowa Bd. of Educ. Exam’rs*, 831 N.W.2d 179, 188 (Iowa 2013). “We determine legislative intent from

the words chosen by the legislature, not what it should or might have said.” *Id.*

The language of Iowa Code section 670.4A(3) makes the legislature’s intent clear and unambiguous. There is no need for interpretation or wondering what the legislature meant when it specifically stated that a failure to properly plead the claim shall result in dismissal with prejudice.

The legislature left no room for anything other than mandatory dismissal. Absent a specifically tailored alternate definition, the word “must” states a requirement and the word “shall” imposes a duty. Iowa Code § 4.1(30). The use of the word “must” means Plaintiff was required to follow the statute’s pleading mandates. When Plaintiff failed to do so in either his original Petition or his Amended Petition, the use of the word “shall” in Iowa Code section 670.4A(3) imposes a mandatory duty upon the court to dismiss the action with prejudice. *See In re Marriage of Thatcher*, 864 N.W.2d 533, 539 (Iowa 2015) (“In a statute, the word ‘shall’ generally connotes a mandatory duty.”); *Schmidt v. Abbott*, 156 N.W.2d 649, 651 (Iowa 1968) (“When addressed to a public official the word ‘shall’ is ordinarily mandatory, excluding the idea of permissiveness or discretion.”).

Notably absent from Iowa Code section 670.4A(3) are phrases like “upon motion” or an escape hatch “for good cause shown.”

Additionally, the statute speaks not to the available remedy, but the mandatory “result”. Iowa Code § 670.4A(3). No other potential result is identified in the statute. Upon a failure to properly plead, the only possible *result* is dismissal with prejudice. Allowing a plaintiff to voluntarily dismiss the action without prejudice avoids the mandatory result dictated by statute.

In the event of a conflict between two statutes, the more specific statute must prevail. Iowa Code § 4.7; *Christiansen*, 831 N.W.2d at 189. Similarly, if two statutes are irreconcilable, the most recently enacted statute prevails. Iowa Code § 4.8. Iowa Code section 670.4A is both more specific and more recently enacted; it must prevail.

Plaintiff asserts that Iowa Code section 670.4A “does not conflict in any way” with Rule 1.943. Plaintiff’s Brief, p. 11. Plaintiff offers no support for this assertion and no explanation as to how a mandatory result of dismissal with prejudice can be squared with voluntary dismissal as a matter of right.

The amicus brief filed by the State of Iowa does construct such an argument. It argues that “shall result” means something less than that

by creating an “intermediate ability” to either amend or voluntarily dismiss and refile a petition so long as the court has not ruled on the motion to dismiss. This approach would allow a plaintiff to file a petition, amend the petition, dismiss the petition, refile, and amend the second petition before any failure to meet the requirements of Iowa Code section 670.4A(3) triggers dismissal with prejudice. An interpretation which allows four attempts to meet the statutory requirements seems akin to the evasion of the statutory requirement rejected in *Struck*. *Struck*, 973 N.W.2d at 536. More importantly, it seems inconsistent with a legitimate legislative goal of prompt resolution of cases which fail to meet explicit statutory requirements.

The better approach is to acknowledge numerous recent cases which hold that plaintiffs may effectively plead themselves out of court and to hold that Plaintiff has done so here. *See id.* at 537 (citing *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 299, 306 (Iowa 2020) and *Mormann v. Iowa Workforce Dev.*, 913 N.W.2d 554, 575 (Iowa 2018)).

### **3. *Struck* supports dismissal with prejudice**

The recent *Struck* decision also supports mandatory dismissal with prejudice. In enacting the certificate of merit requirement of Iowa

Code section 147.140 at issue in *Struck*, the legislature apparently elected to prescribe the consequence of a failure to provide a certificate of merit in less absolute terms than those subsequently used in Iowa Code section 670.4A(3). First, Iowa Code section 147.140 allows the parties to agree to extend the deadline for the certificate and allows the court to extend the deadline for good cause shown. Iowa Code § 147.140(4). The statute also provides that failure to “substantially comply” with the certificate of merit requirement “shall result, *upon motion*, in dismissal with prejudice.” Iowa Code § 147.140(6).

The Iowa Supreme Court recently addressed the certificate of merit statute. *Struck*, 973 N.W.2d 533. The Court held “the legislature enacted section 147.140 to provide a mechanism for early dismissal with prejudice of professional liability claims against healthcare providers when supporting expert testimony is lacking.” *Id.* at 539.

In “clarify[ing] the scope of the new statute,” the Court concluded that the district court correctly ruled that Iowa Code section 147.140 required dismissal of professional negligence claims. *Id.* at 540. “A contrary holding would undermine the legislative goal to enable healthcare providers to quickly dismiss professional negligence

claims that are not supported by the requisite expert testimony.” *Id.* at 541. Similarly, allowing a result under Iowa Code section 670.4A(3) other than dismissal with prejudice would undermine the similar legislative goal of early dismissal with prejudice of municipal tort claims that are not supported by the statutorily required assertions of particularity of the circumstances and a violation of a clearly established law.

The Court concluded that the language of Iowa Code section 147.140 “mandates the dismissal of pleadings filed without the requisite certificate of merit.” *Id.* at 542. The Court “decline[d] to allow plaintiffs to evade the statutory requirement on appeal” because “our liberal pleading rules do not require a different result.” *Id.* By the same reasoning, the Court should not allow plaintiffs alleging claims subject to Iowa Code section 670.4A to evade the statutory dismissal with prejudice mandate by voluntarily dismissing their action and trying again. Nothing in Iowa Code section 670.4A suggests the legislature intended any result other than mandatory dismissal with prejudice, and the Court should not create a judicial remedy which overrides the mandatory language of the statute. *See Christiansen,*



831 N.W.2d at 190 (“Legislative intent is expressed by omission as well as by inclusion of statutory terms.”).

The *Struck* decision resulted in dismissal with prejudice even though the mandatory dismissal language of Iowa Code section 147.140 is softer than the language at issue in this case—it requires substantial compliance and allows for an extension for good cause shown. By contrast, the legislature did not include any “upon motion” requirement, any lesser, “substantial compliance” standard, or any “good cause shown” exception in Iowa Code section 670.4A(3). If dismissal with prejudice was the obvious result under Iowa Code section 147.140, it should be the obvious result under the straightforward “shall result in dismissal with prejudice” language of Iowa Code section 670.4A(3).

#### **4. Iowa Code section 670.4A(3) and Rule 1.943 cannot be harmonized**

Other general principles of statutory construction also indicate that Iowa Code section 670.4A(3) displaces Iowa Rule of Civil Procedure 1.943. The Iowa Rules of Civil Procedure have the force and effect of statute. *Krebs v. Town of Manson*, 129 N.W.2d 744, 746 (1964). If two statutes conflict, the court must first attempt to harmonize them. *Kelly v. State*, 525 N.W.2d 409, 411 (Iowa 1994).

Assuming the right to a voluntary dismissal under Rule 1.943 is truly absolute, Iowa Code section 670.4A(3) mandating dismissal cannot be harmonized with Rule 1.943.

*Struck* also underscores Defendants argument before the District Court that the language of Iowa Code section 670.4A(3) is sufficiently specific to displace Iowa Rule of Civil Procedure 1.943 and that the two provisions cannot be harmonized.

Another case supports this argument as well. Previously, the Iowa Supreme Court considered whether a failure to comply with Iowa Code section 668.11 regarding expert witness designation required dismissal with prejudice. *Venard v. Winter*, 524 N.W.2d 163 (Iowa 1994). The defendant argued a conflict existed between what is now Rule 1.943 and Iowa Code section 668.11. *Id.* at 167. The Court disagreed, noting the statute “says *nothing* about dismissal of *any* lawsuit.” *Id.* (emphasis in original). Furthermore, the statute allowed late designation for good cause shown, indicating remedies short of dismissal were appropriate. *Id.*

Most importantly, the Court held “[i]f, as [plaintiff] suggests, the legislature intended a relationship between [Rule 1.943] and section 668.11, it could easily have said so.” *Id.* “[N]othing in section 668.11

requires a dismissal of any action for a party's failure to designate experts." *Id.* at 168.

Perhaps mindful of the *Venard* decision, the legislature directly mandated dismissal with prejudice in Iowa Code section 147.140. The language of Iowa Code section 147.140 establishes a direct relationship between the statute and Rule 1.943 by expressly requiring dismissal of the action as a consequence of a failure to comply with the statute. The legislature did exactly what the Iowa Supreme Court called for in *Venard*. Similarly, Iowa Code section 670.4A(3) also mandates dismissal and satisfies the direct conflict requirement of *Venard* by explicitly mandating dismissal with prejudice.

## **5. The Federal Rules of Civil Procedure**

The State in its amicus brief also argues that the Federal Rules of Civil Procedure are instructive because in its view Iowa Code section 670.4A applies federal pleading standards to the tort claims acts.<sup>2</sup> Assuming that premise survives scrutiny, the Federal Rules of Civil Procedure regarding dismissing actions differ significantly from the

---

<sup>2</sup> This is questionable, given that there are no heightened pleading requirements under 42 U.S.C. § 1983. *Doe v. Cassel*, 403 F.3d 986, 988–89 (8th Cir. 2005).

Iowa Rules of Civil Procedure. Why should the federal rules be impliedly adopted in this narrow area of the law over the existing Iowa rules?

Federal Rule of Civil Procedure 41 governs voluntary dismissals. It provides that a Plaintiff may only unilaterally voluntarily dismiss an action without court order by filing a notice of dismissal before the opposing party serves an answer or a motion for summary judgment. Fed. R. Civ. P. 41(a)(1).<sup>3</sup>

If the Court were to adopt this reasoning and apply the Federal Rules of Civil Procedure rather than the Iowa Rules of Civil Procedure, a defendant could avoid voluntary dismissal by filing a motion for summary judgment rather than a motion to dismiss, or by filing an answer prior to filing a motion to dismiss. This approach

---

<sup>3</sup> The Advisory Committee Notes on subdivision (a) provide a policy justification for including motions for summary judgment which applies equally to motions to dismiss such as the motion at issue here:

A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

Fed. R. Civ. P. 41.

seems no more consistent with Iowa Code section 670.4A than the Iowa Rules.

Under federal law, once leave of court is required, the court should consider whether a dismissal will prejudice the defendant, and the plaintiff is not permitted to dismiss merely to escape an adverse decision. *See, e.g., Morrow v. United States*, No. 21-CV-1003-MAR, 2021 WL 7210611, at \*2 (N.D. Iowa July 9, 2021) (addressing Iowa’s Certificate of Merit statute; *citing Graham v. Mentor Worldwide LLC*, 998 F.3d 800, 804–05 (8th Cir. 2021)). The *Morrow* court refused to allow the plaintiff to voluntarily dismiss the action when the plaintiff had failed to comply with the certificate of merit statute because that statute required dismissal with prejudice.<sup>4</sup> The federal rules, then, arguably support a policy exception to voluntary dismissal as a matter of right when it is used to avoid an adverse decision or when it will prejudice a defendant.

---

<sup>4</sup> More precisely, the district court waited to rule on the motion for voluntary dismissal until Defendant’s Motion for Summary Judgment pursuant to the Certificate of Merit statute could be heard. *Id.* at \*3–4. Ultimately, the motion for voluntary dismissal was denied and summary judgment granted because Iowa Code section 147.140 “compels the court, upon defendant’s motion, to dismiss the plaintiff’s complaint with prejudice.” *Morrow v. United States*, No. 21-CV-1003-MAR, 2021 WL 4347682, at \*6 (N.D. Iowa July 28, 2021). The court reached the same result under Federal Rule of Civil Procedure 41(a)(2). *Id.*

Ultimately, the outcome for Plaintiff does not appear to be any better under the federal rules than it would be under Iowa's rules. In any event, the State offers no compelling justification for displacing the Iowa Rules of Civil Procedure with the Federal Rules of Civil Procedure.

## **6. Conclusion**

Iowa Code section 670.4A(3) requires that a failure to properly plead a claim "shall result in dismissal with prejudice." A general rule of civil procedure cannot save Plaintiff from this mandate. The statute displaces the general procedural rule regarding voluntary dismissal. The district court correctly set aside Plaintiff's voluntary dismissal and dismissed the action with prejudice.

### **III. THE DISTRICT COURT RETAINED JURISDICTION TO DETERMINE WHETHER RULE 1.943 APPLIED**

#### **A. Error Preservation and Standard of Review**

Plaintiff made no statement regarding error preservation or standard of review. Plaintiff failed to preserve error regarding "whether the court had jurisdiction to consider any legal arguments other than the Defendants' motion to set aside the Plaintiff's voluntary dismissal." Plaintiff Brief, p. 11. Issues must be both raised and decided by the district court before they will be decided on

appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). “It is not a sensible exercise of appellate review to analyze facts of an issue without the benefit of a full record or lower court determination.” *Id.* (citation omitted).

Plaintiff alleges on appeal that “[s]ince there was no reason to deprive the Plaintiff of his right to a voluntary dismissal pursuant to Iowa Rule of Civil Procedure 1.943 at the time of such filing, the Court was deprived of all jurisdiction of the case.” Plaintiff Brief, p. 13. Plaintiff did not raise this issue with the district court.

Indeed, at hearing, Plaintiff consented to the District Court first hearing argument on the motion to set aside the voluntary dismissal and then addressing the original motion to dismiss. Hearing Tr. p. 2, ln. 14–p. 3, ln. 8; App. 100. Counsel for Plaintiff did summarily argue at hearing that the mere filing of a voluntary dismissal deprives the Court of jurisdiction of the matter. Hearing Tr. p. 23, ln. 3–13; App. 121. To the extent that this sentence or two at hearing sufficiently raises the issue, the issue was never ruled upon. “When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.” *Id.* Plaintiff here failed to do so.

Jurisdictional questions are reviewed for errors of law. *In re Marriage of Engler*, 532 N.W.2d 747, 748 (Iowa 1995).

### **B. Argument**

Assuming Plaintiff preserved error, his entire argument regarding jurisdiction presumes that he prevails in demonstrating an absolute right to voluntary dismissal under Iowa Rule 1.943 and that Rule 1.943 can be harmonized with Iowa Code section 670.4A. The question is not really one of jurisdiction, but of substantive result. If Plaintiff demonstrates an absolute right to dismissal under Rule 1.943 and that Iowa Code section 670.4A does not displace or take precedence over the rule of civil procedure, then Plaintiff's voluntary dismissal without prejudice stands. However, if the right to voluntary dismissal under Rule 1.943 does not apply—either because it is not absolute or because it is displaced by the statute, then the District Court clearly had jurisdiction to so determine.

The issues raised in Plaintiff's brief point III, then, are in no way outcome determinative.

### **CONCLUSION**

When a Plaintiff fails to meet its specific pleading requirements, Iowa Code section 670.4A(3) prohibits any result other than



dismissal with prejudice. Plaintiff concedes there is no truly absolute right to voluntary dismissal without prejudice under Rule 1.943; at least one exception has been recognized.

Even if the right is absolute where the rule applies, the rule does not apply here. Rule 1.943 is displaced by Iowa Code section 670.4A(3) as it provides for different procedure in a particular case. Iowa R. Civ. P. 1.101. Rule 1.943 is also displaced because it directly conflicts with Iowa Code section 670.4A(3). The two provisions cannot be harmonized without rendering meaningless the express language of the statute. “Shall result in dismissal with prejudice” is meaningless if a plaintiff can amend, dismiss and refile, and amend again before mandatory dismissal is triggered. Such a construction means dismissal with prejudice would virtually never be the “result” as mandated by the statute.

The voluntary dismissal without prejudice was correctly set aside, and the dismissal with prejudice of Plaintiff’s action should be affirmed.

## REQUEST FOR ORAL SUBMISSION

Defendants request to submit the case with oral argument.

Respectfully Submitted,

Redfern, Mason, Larsen & Moore, P.L.C.

By: /s/Bruce L. Gettman, Jr.  
Bruce L. Gettman, Jr. AT0002724  
bgettman@cflaw.com

By: /s/Bradley M. Strouse  
Bradley M. Strouse AT0009732  
strouse@cflaw.com

415 Clay Street  
P.O. Box 627  
Cedar Falls, IA 50613  
Telephone: (319) 277-6830  
Facsimile: (319) 277-3531

*Attorneys for Appellees  
City of Waterloo and  
Officer C.J. Nichols*

## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4,998 words, excluding the parts exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Georgia 14 point font.

/s/ Bradley M. Strouse

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on June 15, 2022, I, or a person acting on my behalf, 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 all counsel of record to this appeal using EDMS.

/s/ Bradley M. Strouse