

IN THE IOWA SUPREME COURT

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NO. 22-0293

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MARCELINO ALVAREZ VICTORIANO,

Plaintiffs/Appellants,

VS.

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

Defendants/Appellees

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR BLACK HAWK COUNTY, IOWA  
Case No. CVCV143685  
THE HONORABLE JOEL A. DALRYMPLE

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**FINAL REPLY BRIEF OF APPELLANT  
MARCELINO ALVAREZ VICTORIANO**

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**I. THE RIGHT TO A VOLUNTARY DISMISSAL PURSUANT TO I.R.C.P.  
1.943 REMAINS ABSOLUTE UNDER IOWA LAW**

**Cases:**

Blair v. Werner Enterprises, 675 N.W.2d 533 (Iowa 2004)  
Vernard v. Winter, 524 N.W.2d 163 (Iowa 1994)  
Darrah v. Des Moines Gen. Hosp., 436 N.W.2d 53 (Iowa 1989)  
Valles v. Muetting, 956 N.W.2d 479 (Iowa 2021)  
Estate of Kahn and Estate of Hodges et al., v. State of  
Iowa & City of Clermont, No. 22-0742 (Iowa 2022)  
Struck v. Mercy Health Services-Iowa Corp.,  
973 N.W.2d 533 (Iowa 2022)  
Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018)

**Statutes:**

Iowa R. Civ. P. 1.943  
Iowa Code § 670.4A  
Iowa Code § 147.140

**II. PLAINTIFF PROPERLY PRESERVED ERROR ON JURISDICTIONAL ISSUE**

**Cases:**

Struck v. Mercy Health Services-Iowa Corp.,  
973 N.W.2d 533 (Iowa 2022)  
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)

**Statutes:**

Iowa R. Civ. P. 1.943  
Iowa R. Civ. P. 1.904(2)

### **ROUTING STATEMENT**

The Plaintiff believes this matter should be routed to the Iowa Court of Appeals because it presents no new issues for which the Supreme Court is the appropriate Court under Iowa R. Civ. P. 6.1101(3)(b).

### **PRESERVATION OF ERROR**

The Trial Court committed error when it deprived the Plaintiff of his absolute right to a voluntary dismissal without prejudice at this stage of litigation. Further, the Trial Court committed error when it improperly shifted the burden to the Plaintiff at hearing. Last, the Trial Court committed error when it heard, considered, and decided evidence and legal arguments on legal issues other than the Defendants' Motion to Set Aside the Plaintiff's voluntary dismissal pursuant to Iowa Rule of Civil Procedure 1.943. All of which were plain error.

### **ARGUMENT**

#### **I. THE RIGHT TO A VOLUNTARY DISMISSAL PURSUANT TO I.R.C.P. 1.943 REMAINS ABSOLUTE UNDER IOWA LAW**

The Supreme Court has entertained multiple cases in which the "absolute right" to a voluntary dismissal of a petition, counterclaim, cross-claim, cross-petition or petition of intervention at any time up until ten days before trial has been examined. See generally Blair v. Werner Enterprises, 675 N.W.2d 533, 537 (Iowa 2004), Vernard v. Winter, 524 N.W.2d 163 (Iowa 1994), Darrah vs. Des Moines Gen. Hosp., 436 N.W.2d 53, 54 (Iowa

1989), and Valles v. Mueting, 956 N.W.2d 479 (Iowa 2021). Despite the Court identifying certain circumstances that may give rise to an exception to this absolute right of dismissal, the Defendants have failed to cite a single case in which the Court imposed this exception and denied a party their right under I.R.C.P. 1.943.

In fact, the Supreme Court re-affirmed Valles and the absolute right of a party to dismiss their action at any time at least ten days before trial and such dismissal is without prejudice. Estate of Kahn and Estate of Hodges et al., v. State of Iowa & City of Clermont, No. 22-0742 (Iowa 2022).

The Defendants have attempted to liken Iowa Code § 670.4A to Iowa Code § 147.140, a certificate of merit for professional negligence claims applicable to health care professionals and facilities. In Struck v. Mercy Health Services-Iowa Corp., 973 N.W.2d 533 (Iowa 2022), the Court *presumed* the legislative intent was similar to that of other states that have enacted similar merit requirements; to deter frivolous litigation and reduce cost of medical malpractice litigation and medical malpractice insurance premiums. Id at 542. It is unimportant to reaching a conclusion in this matter to determine the legislative intent of section 670.4A, however, the appellees argue that it is to fix the Supreme Court's decision in Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018). Hearing Tr. P. 20, ln. 20-25; p. 21; ln. 1-8; App. P. 118-119. Importantly, Iowa Code section 147.140 states, [F]ailure to

substantially comply with the [certificate of merit requirement] shall result, upon motion, in dismissal with prejudice [..]" Id at 539. A dismissal with prejudice can only be ordered if a motion is instituted. The Court cannot enter a dismissal with prejudice sua sponte.

## II. PLAINTIFF PROPERLY PRESERVED ERROR ON JURISDICTIONAL ISSUE

The Appellant does not come to this Court singing a different song. Struck v. Mercy Health Services-Iowa Corp., 973 N.W.2d 533 (Iowa 2022) quoting State v. Rutledge, 600 N.W.2d 324 (Iowa 1999). The appellant first raised the jurisdiction issue in his written Resistance to Defendants' Motion to Set Aside Plaintiff's Voluntary Dismissal, App. 83, stating "[U]pon such voluntary dismissal without dismissal without prejudice, the court no longer has jurisdiction over the matter. I.R.C.P. 1.943."

Appellees seem to make an argument that Plaintiff-appellant somehow waived this objection or appealable issue by agreeing to an order of arguments and/or issues presented by the court at hearing. Hearing Tr. P. 2. ln.14-25; p. 5; ln. 1-8; App. 100, 103. However, in reading the transcript, it is clear that the court saw the matters as one issue. Further, the jurisdiction argument was raised during the hearing by plaintiff-appellant once the defendant-appellees raised their arguments contained in the Defendants' Pre-Answer Motion to Dismiss. Hearing Tr. P. 23, ln.

3-13; App. 121. Last, the trial court did properly rule on the jurisdiction issue leaving no reason for plaintiff-appellant to file a rule 1.904(2) motion to reconsider, enlarge, or amend. Order, para. 2; App. 94.

### CONCLUSION

Recent case law continues to uphold the right of a party to a voluntary dismissal without prejudice file ten days or more days prior to trial in a matter. Therefore, the plaintiff-appellant is entitled to a voluntary dismissal without prejudice in the current matter. There are no preservation of error defects on the part of the plaintiff-appellant because lack of jurisdiction was raised in written filings and during the oral arguments at hearing.

Respectfully submitted,

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**REQUEST FOR ORAL ARGUMENT**

Appellant, MARCELINO ALVAREZ VICTORIANO, request oral argument in this matter.

Respectfully submitted,

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**CERTIFICATE OF FILING**

I, Molly M. Hamilton, hereby certify that I have filed the foregoing "Final Reply Brief" with the Clerk of the Supreme Court of Iowa through the ECF/EDMS System on the 9th day of June, 2022.

    /s/    Molly M. Hamilton      
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**CERTIFICATE OF SERVICE**

I, Molly M. Hamilton, hereby certify that on this same date, I served the attached "Final Reply Brief" through the ECF/EDMS System on the following:

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**CERTIFICATE OF COMPLIANCE**

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:

This brief has been prepared in a monospaced typeface using Courier New in 12 characters per inch and contains 89 number of lines of text, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(2).

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