IN THE SUPREME COURT OF IOWA

No 22-0405

Pottawattamie County No. LACV 121621

JAHN PATRIC KIRLIN and SARA LOUISE KIRLIN,
Plaintiffs-Appellants,

vs.

DR. BARCLAY A. MONASTER, M.D., and DR CHRISTIAN WILLIAM JONES, M.D., and PHYSICIANS CLINIC, INC., d.b.a. METHODIST PHYSICIANS CLINIC – COUNCIL BLUFFS,
Defendants-Appellees.

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ROUTING STATEMENT

This appeal should be retained. This appeal involves a substantial issue of first impression, requiring enunciation of legal issues. This appeal presents an issue of first impression. This appeal also involves issues of broad public importance that will require ultimate determination by the Iowa Supreme Court, *See,* Iowa Rs. App. P. 6.1101(2)(a), (c-d).

STATEMENT OF THE CASE

This case is an appeal from the Iowa District Court for Pottawattamie County in the matter of case number LACV121621, *John Patrick Kirlin, et al. vs. Dr. Barclay Monaster,* et al. The case involves claims for permanent injuries by Plaintiffs Johan Patrick Kirlin and Sara Louise Kirlin arising out of the negligent care and treatment (or failure to treat) provided by Dr. Jones and Dr. Monaster between April 1 – April 16, 2019.

On September 11, 2020, as amended September 14, 2020 Kirlin's filed suit against Defendants Dr. Barclay Monaster, Dr. Christian Jones, Physicians Clinic d.b.a Methodist Physicians Clinic, Dr. Dan C. Kjeldgaard and Advanced Chiropractic Care, Inc. for claims arising out the subject incident in the Iowa District Court for Pottawattamie County, case number LACV120936, which was assigned to Judge Kathleen Kilnowski.

All Defendants filed answers. On October 2, 2020 Plaintiffs timely filed and served on all Defendants a Certificate of Merit from Dr. David Segal. All Defendants moved to dismiss Plaintiffs' petition. On December 22, 2020, Kirlins filed a Dismissal Without Prejudice of their initial claim (LACV120936).

On April 14, 2021, Plaintiffs filed a second petition in the Iowa District Court for Pottawattamie County, case number LACV121621 against Defendants Dr. Barclay Monaster, Dr. Christian Jones, and Physicians Clinic *d.b.a* Methodist Physicians Clinic, making similar claims to those in the prior suit. This suit was timely filed as to all Defendants. This case was assigned to Judge Michael Hooper.

On May 7, 2021, Defendant Barclay Monaster filed a pre-Answer Motion to Dismiss and/or Motion for Summary Judgment of Plaintiffs' Claims on the grounds that Plaintiff failed to file a Certificate of Merit

affidavit in the previous lawsuit (LACV120936) that complies with Iowa Code § 147.140.

On May 7, 2021, Defendant Dr. Christian Jones and Methodist Physicians Clinic – Council Bluffs filed a pre-Answer Motion to Dismiss pursuant to Iowa Code Ann. §1.421(1)(f) on the grounds that expiration of the statute of limitations as to Dr. Christian Jones and any vicarious claim against Physicians Clinic arising from the alleged acts or omissions of Dr. Jones and Plaintiffs' failure to file a compliant certificate of merit affidavit in a prior case alleging the same claim and same acts of negligence results in a substantive right of dismissal with prejudice in favor of these defendants.

On May 13, 2021, Plaintiffs filed and served Certificate of Merit affidavits by Dr. Brian Smith as to all Defendants.

On May 14, 2021, Plaintiffs timely Resisted the Motions to Dismiss of all Defendants.

On August 5, 2021, a hearing was held on Defendants' various Motions to Dismiss. This hearing was not transcribed. On August 6, 2021, the District Court issued an Order denying all Defendants' Motions to Dismiss.

On August 19, 2021, Defendant Dr. Christian Jones and Methodist Physicians Clinic filed an Answer; on August 20, 2021 Defendant Dr,

Barclay Monaster filed an Answer. All parties timely served their initial disclosures

On October 15, 2021 Dr. Christian Jones and Methodist Physicians Clinic filed a Motion for Summary Judgment on the grounds that a) Dr. Jones and Physicians Clinic are entitled to summary judgment because Plaintiffs failed to timely file and serve a sufficient Certificate of Merit Affidavit in the first case, as required by Iowa Code § 147.140 and § 147.139, and b) Dr. Jones and Physicians Clinic are entitled to summary judgment because the Statute of Limitations expired on Plaintiffs' claims.

On October 15, 2021, Dr. Barclay Monaster filed a Motion for Summary Judgment on the grounds that a) Plaintiffs did not substantially comply with the Certificate of Merit requirement (in the first case), and (b) doctrine of res judicata bars bringing a subsequent lawsuit.

On October 25, 2021, Plaintiff's moved for an unresisted enlargement of time to respond as to both pending motions for summary judgment. Plaintiffs motion was granted October 26, 2021. On November 12, 2021Plaintiff's moved for an unresisted enlargement of time to respond as to both pending motions for summary judgment. Plaintiffs motion was granted November 15, 2021.

On November 21, 2021, Plaintiffs resisted both Motions for Summary

Judgment on the grounds that (a) there was no challenge to the Certificate of Merit Affidavits filed in the present case; (b) cases should be tried on the merits ; (c) the cases cited by the defendants are distinguishable from the merits of this case; (d) no claim preclusion in this case; (e) judicial notice not proper in this case; (f) there was no adjudication of substantial compliance in the prior case; (g) plaintiffs had an absolute right to dismiss the prior action pursuant to Iowa Rule 1.943; (h) the district court cannot find in defendants' favor without weighing evidence or resolving factual issues, which is improper on a motion for summary judgment; (i) the Court cannot find in Defendants' favor without delving into credibility determination, which is improper in a motion for summary judgment; and (j) statute of limitations did not expire as to Dr. Jones.

On December 20, 2021, a hearing was held on Defendants' various Motions for Summary Judgment. This hearing was not transcribed. On January 18, 2022, the District Court issued an Order sustaining all Defendants' Motions for Summary Judgment stating, (a) this particular issue is still as of yet unresolved at the appellate level; other cases have involved complete noncompliance with the filing of a certificate of merit, not the question of substantial compliance as we have here. the issue presented is not whether the Plaintiffs failed to file a certificate of merit within the time

allotted, but whether the certificate that was filed substantially complied with §147.140: if it did, then the defendants do not have a claim; if it does not, then the defendants have a substantive right to have the case dismissed with prejudice; (b) a voluntary dismissal under rule 1.943 is final and terminates the court's jurisdiction of the action. Despite where Rule 215 gives Plaintiffs an "absolute right" to dismiss, that right is not without consequence. And without any procedure for defendants to appeal or resist the motion in the first action, this Court is the only method with which the defendants may ask the Court for relief. The Court presently takes the same stance with respect to enforcing sanctions after a voluntary dismissal because without the authority to impose sanction, the rule effectively loses the teeth originally intended by the "harsh consequence" of the statute, the legislative intent as outlined; (c) Substantial compliance means "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." The court would be without discretion to dismiss the Plaintiffs claims with prejudice in the previous case had there been the procedure to address the enforcement of the sanction. Unfortunately, there is no procedure yet written that affords the courts the ability to address an unsettled motion in order to determine the defendants' rights without resorting to a successive case.

On February 1, 2022, Plaintiffs filed a Motion for the Court to reconsider, enlarge or amend its findings in the Court's January 18, 2022 order granting all Defendants' motions for summary judgment alleging (a) The Court's new and novel exception misapplies Darrah, (b) the Court also ignores both Darrah and Franzen warnings about timeliness, (c) in 32 years, *Darrah* has never been stretched beyond sanctionable actions for wrongful conduct in the voluntarily dismissed case, and (d) Plaintiff retains the right to a self-executing voluntary dismissal at any time up until 10 days before trial is scheduled to begin, without court approval and without opportunity for the court to impose rules, sanctions or conditions on the dismissal.

On February 23, 2022, the court denied Plaintiffs' motion for the court to reconsider, enlarge and/or amend.

STATEMENT OF THE FACTS

As this Appeal was made from a District Court Order Sustaining Motions for Summary Judgment, there has been a limited record generated in this matter and the Statement of Facts which follow largely originate from Plaintiff's Petition.

Beginning on April 1, 2019, Plaintiff, Jahn Kirlin, experienced a sudden and continuous significant right-side neck pain and intense

headaches and pressure behind his right eye. (Petition) (App. 7)

Dr. Jones began treating Jahn for the new symptoms on April 4, 2019, recommending some pain management medications, a pain management referral and eventually suggesting an MRI would be necessary if symptoms did not improve. (Petition) (App. 7)

On April 12, 2019, Dr. Jones was notified the head and neck pain was continuing with no relief, the office stated it was too late in the day on a Friday to order the MRI, and it would be ordered on Monday April 15, 2019. (Petition) (App. 7)

On Monday April 15, 2019, Dr. Monaster intercepted Jahn's care as he has returned from a leave of absence and refused to order an MRI before seeing Mr. Kirlin in person. Jahn scheduled an appointment for 1:30 pm; when Jahn arrived, he was not on the schedule, they added him, and he was seen by Dr. Monaster. Dr. Monaster refused to order the MRI, emphasized a $3000 test was not necessary, ordered a prescription for steroids, suggested Jahn could continue his chiropractic care and to follow up at the end of the week. (Petition) (App. 7)

On April 16, 2019, Jahn experienced stroke symptoms after chiropractic treatment of his neck. Jahn was transported by ambulance to Jennie Edmundson Hospital and eventually to University of Nebraska

Medical Center. It was confirmed that Jahn suffered bilateral distal cervical vertebral artery dissections with high-grade stenoses, and small thrombus in the proximal basilar artery, with permanent and irreversible damage. Dr. Monaster was contacted by Plaintiff, Sara Kirlin, to advise that his patient, Jahn, suffered a stroke and was being taken to the emergency room. Dr. Monaster never met his patient at the emergency room on April 16, 2019. (Petition) (App. 7)

Methodist Physicians Clinic, Dr. Jones and/ or Dr. Monaster have changed or altered Jahn's medical records or omitted the visit; the medical records are void of an appointment with Jahn on April 15, 2019; Dr. Monaster was intoxicated at the time of the appointment with Jahn on April 15, 2019; Dr. Monaster was arrested and plead guilty to Operating a motor vehicle While Under the Influence, 2nd offence, on April 16, 2019. (Petition) (App. 7)

On a regular basis leading up to April 16, 2019, Dr. Jones and Dr. Monaster provided healthcare services to Jahn relating to his ongoing medical needs and services, including his head and neck pain and follow up care, thereby establishing a physician-patient relationship between Dr. Jones and Dr. Monaster and Jahn Kirlin. At all times material hereto, Dr. Jones and Dr. Monaster were employed by Methodist Physicians Clinic and were acting

within the course of their employment. (Petition) (App. 7)

As a result of the physician-patient relationship between Dr. Jones and Jahn Kirlin, Dr. Monaster and Jahn, Dr. Jones and Dr. Monaster owed a duty to Jahn Kirlin to possess and use the care, skill, knowledge, and best tools ordinarily possessed and was negligent in the care and treatment of Jahn. Methodist Physicians Clinic is responsible for the negligence of Dr. Jones and Dr. Monaster under theories or vicarious liability, respondeat superior, employer – employee liability and/ or principal – agent. (Petition) (App. 7)

As a result of the actions of Defendants Dr. Jones. Dr. Monaster, and Methodist Physicians Clinic, Plaintiff Jahn Kirlin has suffered and incurred damages in the past and will continue to suffer and incur damages in the future and Plaintiff Sara Kirlin has been denied the normal relationship, companionship and consortium with Jahn Kirlin and therefore has been damaged. (Petition) (App. 7)

ANALYSIS

1. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS DR. BARCLAY MONASTER AND DR. CHRISTIAN JONES AND METHODIST PHYSICIANS CLINIC'S MOTIONS FOR SUMMARY JUDGMENT ON GROUNDS OF FAILING TO SUBSTANTIALLY COMPLY WITH IOWA CODE § 147.140 IN THE PREVIOUSLY FILED SUIT.

A. Preservation of Error

Error is preserved in that Plaintiffs timely resisted Defendants' Motion for Summary Judgment, and timely moved under *Iowa R. Civ. P. 1.904(3)* for the Court to reconsider, enlarge, or amend its January 18, 2022, ruling sustaining Defendants' motions.

B. Scope and Standard of Review

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 649-50 (Iowa 2000).

C. Argument

In *Venard v. Winter*, 524 N.W.2d 163, 164 (Iowa 1994), the Iowa Supreme Court was presented with the question of:

> can a plaintiff avoid the consequences of not designating experts within the time requirements of Iowa Code section 668.11 (1989) by voluntarily dismissing the action and refiling an identical one?

The answer reached by the Iowa Supreme Court was an unqualified "Yes."

Id.

> In *Venard*, the plaintiff filed a legal malpractice action in June 1992. The Defendant answered in September, but the Plaintiff did not timely designate an expert pursuant to Iowa Code § 668.11. The Defendant ultimately filed for summary judgment alleging that the Plaintiff could not prove its claim because plaintiff had not timely designated an expert. Id. Before the district court ruled on the summary judgment motion, plaintiff voluntarily dismissed the action, and five days later filed a nearly identical petition. Id. at 164-65.

On appeal, plaintiff argued that he had had an absolute right to dismiss the first action, and that the dismissal should have no preclusive effect under section 668.11 on a subsequently file action. Id. at 166. The Iowa Supreme Court agreed. Id. (noting that "a party has an absolute right to dismiss an action at any time 'up until ten days before the trial is scheduled to begin'" and that a dismissal under Iowa R. Civ. P. 215 (now 1.943) is without prejudice). The Supreme Court noted that "A dismissal without prejudice leaves the parties as if no action had been instituted. It ends the particular case but it is not such an adjudication itself as to bar a new action between the parties." Id.

The Court also noted that section 668.11 allows a designation beyond the deadlines for good cause and that Section 668.11 "does not suggest that a dismissal of a subsequent suit is the required outcome when

(1) a plaintiff does not designate expert witnesses within 180 days of the defendant's answer in an original action, and then (2) voluntarily dismisses the original action. Id. at 167.

The Court noted in fact that:

> Even if we were to accept [defendant's] contention that [plaintiff] dismissed his first action to escape the consequences of a failure to designate experts in time, it would not matter. The motive of the dismissing party plays no part in a voluntary dismissal under [Rule 1.943]. Under the rule, [plaintiff] was entitled to dismiss the first action without prejudice for any reason. The district court erred in concluding otherwise.

Id. at 168.

In conclusion the Court stated

> We also hold that [plaintiff] had an absolute right under [rule 1.943] to dismiss without prejudice his first legal malpractice action against [defendant] despite [plaintiff's] failure to designate expert witnesses within the time allowed under section 668.11.

Plaintiffs here had an absolute right to dismiss their claim without prejudice, for any reason, and doing so left it as if an action had never been filed. In this case, the Plaintiff's had the additional reason to voluntarily dismiss upon discovery that Plaintiff's certifying expert is a former client of Defense counsel to Dr. Barclay Monaster. The District Court erred in granting Defendants' Dr. Barclay Monaster and Dr. Christian Jones and

Methodist Physicians Clinic's Motions for Summary Judgment based on failure to substantially comply with Iowa Code § 147.140 in the first lawsuit – where no facts were adjudicated.

2. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' DR. BARCLAY MONASTER AND DR. CHRISTIAN JONES AND METHODIST PHYSICIANS CLINIC'S MOTIONS FOR SUMMARY JUDGMENT BY CARVING OUT A NEW EXCEPTION TO PLAINTIFF'S ABSOLUTE RIGHT TO DISMISS AND NO JURISDICTION RULE

A. Preservation of Error

Error is preserved in that Plaintiffs timely resisted Defendants' Motion for Summary Judgment, and timely moved under Iowa R. Civ. P. 1.904(3) for the Court to reconsider, enlarge, or amend its January 18, 2022, ruling sustaining Defendants' motions.

B. Scope and Standard of Review

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 649-50 (Iowa 2000).

C. Argument

Iowa R. Civ. P. 1.943 gives a plaintiff an "absolute right" right to dismiss an action, and the dismissal terminates the court's jurisdiction of the action. See *Venard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994).

Generally, a voluntary dismissal under rule 1.943 is final and terminates the court's jurisdiction of the action. *Smith v. Lally*, 379 N.W.2d 914, 916 (Iowa 1986).

The Iowa Supreme Court has even referred to a voluntarily dismissed case as "nonexistent" and the matter usually deemed "unreviewable" in determining the district court's jurisdiction. See footnote 2 in *Lawson v. Kurtzhals*, 792 N.W.2d 251, 255 (Iowa 2010) (internal citations omitted).

The District Court carved out an exception similar to the one the Iowa Supreme Court adopted in *Darrah v. Des Moines Gen. Hosp*., 436 N.W.2d 53 (Iowa 1989). In 32 years, *Darrah* has never been used to enlarge the no jurisdiction rule beyond a timely claim for sanctionable conduct.

The *Darrah* court found:

> Although plaintiff accurately states the general rule that voluntary dismissal divests the court of jurisdiction, we recognize an exception that retains the court's authority to adjudicate the collateral problem created by prior wrongful conduct of the dismissing party warranting rule 80(a) sanctions. In light of the sanction nature of rule 80(a), we believe the trial court must necessarily retain jurisdiction to rule on motions made shortly after voluntarily dismissal which are based on filings made while the case was still pending. We do not overrule I, but merely limit it to its facts. We would also reiterate *Franzen*'s warning that counsel, or the trial court on its own motion, should request sanctions at the earliest time rule 80(a) violations occur to facilitate judicial economy and effective determination of the issues.

Id.

The *Darrah* defendants (all of them) moved for sanctions despite the no jurisdiction rule, asking the same court to make an exception and to retain jurisdiction to rule on their motions for sanctions. *Id.*

This District Court mistakenly states defendants had no other procedural remedy at the time of the dismissal with prejudice, this is where *Darrah* is misapplied by this court. Specifically, this Court states in its January 18, 2022, order:

> And without any procedure for defendants to appeal or resist the motion in the first action, this Court is the only method with which the defendants may ask the Court for relief. (Court's Order of January 18, 2022).
>
> Unfortunately, there is no procedure yet written that affords the courts the ability to address an unsettled motion in order to determine the defendants' rights without resorting to a successive case. (Court's Order of January 18, 2022).

Generally, parties "should request sanctions at the earliest time rule [1.413, the successor rule to] 80(a) violations occur to facilitate judicial economy and effective determination of the issues." *Darrah v. Des Moines Gen. Hosp.*, 436 N.W.2d 53, 55 (Iowa 1989) (citing *Franzen v. Deere & Co.*, 409 N.W.2d 672, 675 (Iowa 1987)). *Darrah* went on to reiterate Franzen's warning that counsel, or the trial court on its own motion, should request sanctions at the earliest time rule 80(a) violations occur to facilitate judicial

economy and effective determination of the issues. *Id.*

In *Darrah*, the subsequent motions for sanctions all occurred in contiguity (within days) to the voluntary dismissal of plaintiff. It was the same Court; the same case and it was a true retaining of jurisdiction that was granted by Darrah for the purpose of hearing sanctions motions stemming from the dismissing party's conduct in the recently dismissed case. (Plaintiff's Motion to Reconsider P. 5 ¶2)

The *Darrah* relief should have been sought and adjudicated at the earliest time possible following the voluntary dismissal prior lawsuit. ***The defendants (all of them) did not seek any relief following the voluntary dismissal of the prior lawsuit on December 20, 2020***. These defendants were in the exact same procedural posture as the *Darrah* defendants at the instance of the voluntary dismissal of prior lawsuit. The Court effectively "retained jurisdiction" pursuant to *Darrah*, of a prior lawsuit, a case in which this Court never had jurisdiction. This Court makes a subjective ruling in the present case on a motion from the prior lawsuit case; this is not anticipated *Darrah* relief. (Plaintiff's Motion to Reconsider P. 5 ¶3- P.6 ¶1)

The Court's rationale of retaining jurisdiction pursuant to Darrah in the present action to rule on the merits of a subjective motion from a prior action that was voluntarily dismissed more than 12 months ago, with no

relief sought by the defendants is not only untimely, is an extension and application not anticipated or envisioned by the Darrah court.

3. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' DR. BARCLAY MONASTER AND DR. CHRISTIAN JONES AND METHODIST PHYSICIANS CLINICS MOTIONS FOR SUMMARY JUDGMENT BY APPLYING DARRAH RELIEF BEYOND SANCTIONS IN THE SAME CASE THAT WAS VOLUNTARILY DISMISSED

A. Preservation of Error

Error is preserved in that Plaintiffs timely resisted Defendants' Motion for Summary Judgment, and timely moved under *Iowa R. Civ. P. 1.904(3)* for the Court to reconsider, enlarge, or amend its January 18, 2022, ruling sustaining Defendants' motions.

B. Scope and Standard of Review

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 649-50 (Iowa 2000).

C. Argument

Generally, parties "should request sanctions at the earliest time rule [1.413, the successor rule to] 80(a) violations occur to facilitate judicial economy and effective determination of the issues." *Darrah v. Des Moines Gen. Hosp.*, 436 N.W.2d 53, 55 (Iowa 1989) (citing *Franzen v. Deere & Co.*, 409 N.W.2d 672, 675 (Iowa 1987)).

The final paragraph of *Darrah* states,

> "the trial courts in these actions erroneously determined that they were without jurisdiction to hear rule 80(a) motions. The cases should be remanded for further proceedings not inconsistent with this opinion."

Darrah was remanded for further proceedings of a hearing on the merits of the motions for sanctions filed by the defendants. *Id.*

The Darrah court recognized the plaintiff's absolute right to dismiss and did not order the remand to involve any actions that were pending at the time of dismissal. Darrah has been cited 15 times since the 1989 opinion. It has never been applied beyond the holding that the voluntary dismissal of an action does not deprive the court of jurisdiction to hear motions for sanctions after the dismissal. (Plaintiff's Motion to Reconsider P. 7 ¶1).

In *Darrah,* the subsequent motions for sanctions all occurred in contiguity (within days) to the voluntary dismissal of plaintiff. It was the same Court; the same case and it was a true retaining of jurisdiction that was granted by *Darrah* for the purpose of hearing sanctions motions stemming from the dismissing party's conduct in the recently dismissed case. The *Kirlin* Defendants did not seek relief following the voluntary dismissal of the prior lawsuit. (Plaintiff's Motion to Reconsider P. 5 ¶3).

4. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' DR. BARCLAY MONASTER AND DR. CHRISTIAN JONES AND METHODIST PHYSICIANS CLINICS MOTIONS FOR SUMMARY JUDGMENT NOTWITHSTANDING PLAINTIFFS'S RIGHT TO VOLUNTARY DISMISS AT ANY TIME UP UNTIL 10 DAYS BEFORE TRIAL IS SCHEDULED TO BEGIN WITHOUT COURT CONDITIONS OR APPROVAL

A. Preservation of Error

Error is preserved in that Plaintiffs timely resisted Defendants' Motion for Summary Judgment, and timely moved under *Iowa R. Civ. P. 1.904(3)* for the Court to reconsider, enlarge, or amend its January 18, 2022, ruling sustaining Defendants' motions.

B. Scope and Standard of Review

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C. Argument

Iowa R. Civ. P. 1.943 – Voluntary Dismissal

> A party may, without order of court, dismiss that party's own petition, counterclaim, crossclaim, cross-petition or petition of intervention, at any time up until ten days before the trial is scheduled to begin. Thereafter a party may dismiss an action or that party's claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent

> adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against that party on the merits, unless otherwise ordered by the court, in the interests of justice.

The general rule is clear enough. A voluntary dismissal filed more than ten days before trial is self-executing and becomes final on the day it is filed. *Iowa R. Civ. P. 1.943*. A voluntary dismissal filed within "ten days before the trial is scheduled to begin" is not self-executing and requires approval by the court. *Id.*

The language "up until ten days before the trial is scheduled," when coupled with the "thereafter" clause, establishes a finish line, not a goalpost. *Valles v. Mueting, 956 N.W.2d 479, 486 (Iowa 2021).*

The Court's January 18, 2022 order sustaining defendants Motions for Summary Judgment, has the effect of limiting plaintiffs time frame beyond the legislatively ratified "10 days before trial" to voluntarily dismiss its action.

The Court's order does not recognize the finality of a voluntary dismissal under rule 1.943, that it terminated the court's jurisdiction of the action, or that this court never had jurisdiction of the prior lawsuit. It ignores the Iowa Supreme Court referral to a voluntarily dismissed case as nonexistent and unreviewable. (Plaintiff's Motion to Reconsider P. 8 ¶2-3). (App. 295)

The Court granted Defendants relief they failed to seek in the prior lawsuit. The Court should not impose sanctions in the prior lawsuit, it was set before Judge Kilnowski. The Court should not make findings of fact on substantial compliance in the prior lawsuit, it was set before Judge Kilnowski. The Court should not hear evidence in the prior lawsuit, it was set before Judge Kilnowski. (Plaintiff's Reply to Resistance to Motion for Reconsideration) (App. 319).

If Defendants were entitled to sanctions or other *Darrah* relief after Plaintiff's voluntary dismissal of the prior lawsuit, they were obliged to file a post dismissal request for relief in the prior lawsuit, not the new case. (Plaintiff's Reply to Resistance to Motion for Reconsideration) (App. 319).

The Court erroneously imposed "after-the-fact" terms and conditions on the *Kirlin* plaintiff's December 20, 2020 (the prior lawsuit) dismissal, ignoring it was not within ten days before trial. The Court's order leaps backward into a case that was not before this court, and says your dismissal is subject to the following terms and conditions… since you refiled, this court will now revisit the previously pending defense motion and make a ruling regarding substantial compliance from your prior lawsuit. This retroactive condition is not consistent with rule 1.943. The Court is imposing an after-the-fact condition that Plaintiffs' voluntary dismissal without prejudice in the

prior lawsuit was with the consequence of having the merits of a pending motion decided without the benefit of a hearing, evidence, or due process. The Court abused its discretion in making a subjective ruling on a pending motion from previously dismissed case, in which defendants sought no relief after the voluntary dismissal; and did so without a hearing, evidence, briefs, and without due process. (Plaintiff's Motion to Reconsider P. 8 ¶4-5) (App. 295).

CONCLUSION

For the reasons stated above, the District Court erred in granting Defendants' Motions for Summary Judgment. This decision by the District Court should be reversed and remanded to the District Court for trial on the merits.

REQUEST FOR ORAL ARGUMENT

Counsel requests oral argument.

PROOF OF FILING AND SERVICE

The undersigned hereby certifies that she, electronically filed the Appellee's Final Brief on the 17th day of June 2022, and further certifies that she served all other parties to this appeal via EDMS.

By:*/s/ Kelly N. Wyman*

Kelly N. Wyman AT0013001

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of Iowa R. 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 14-point type and contains 4754 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: June 17, 2022.

By:*/s/ Kelly N. Wyman*

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ATTORNEY COST CERTIFICATE

I hereby certify the cost of printing the foregoing Plaintiffs-Appellants' Reply Brief was the sum of $0.00.

/s/ Kelly N. Wyman	June 17, 2022
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