IN THE IOWA SUPREME COURT

NO. 19-1008

CORNELIUS DAVIS, M.D.

Plaintiff,

vs.

IOWA DISTRICT COURT FOR SCOTT COUNTY,

Defendant.

RELATING TO: THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY – HONORABLE MARK LAWSON, JUDGE

LACE127285

FINAL BRIEF IN SUPPORT OF WRIT OF CERTIORARI

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(2)(a), this case should be retained by the Supreme Court because a writ of certiorari is a procedure to test whether the district court exceeded its jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 1.1401. The case at bar presents substantial questions as to the validity of local court rules that have not been approved by the Iowa Supreme Court, and that violate Iowa Rules of Civil Procedure. The local district court judge exceeded his authority when he awarded the sanctions under the local rules and under the Iowa Rules of Civil Procedure.

STATEMENT OF THE CASE

The case at bar is about the validity of a vague local rule, that has not been approved by the Iowa Supreme Court, about the physical attendance of a party in addition to counsel during a settlement conference, and whether a district court judge can award sanctions under that local rule when the party has complied with the Iowa Rules of Civil Procedure.

STATEMENT OF FACTS

On May 16, 2019, a settlement conference was scheduled to occur. However, the Court refused to hold the Settlement Conference. Ruling (5/17/19) p.1, App. p. 27.

Attorney Michael M. Sellers appeared for the Plaintiff (Dr. Davis). Ruling (5/17/19) p.1, App. p. 27.

Dr. Davis did not appear in person and was available by phone and waiting to participate in the settlement conference. Dr. Davis would be participating himself by telephone in any actual discussions regarding a settlement. Ruling (5/17/19) p. 2, App. p. 28.

Dr. Hartman did not physically appear in person and is a named individual in the lawsuit. (Nelson Affidavit) p.2, App. p.109.

Dr. Augelli did not physically appear in person and is a named individual in the lawsuit. App. p.109.

Dr. Kovach did not physically appear in person and is a named individual in the lawsuit. App. p.109.

Genesis was represented by the in-house counsel representing the party corporation, as well as their attorney. App. p. 109.

Dr. Lohmuller appeared for himself and Defendant DSG. He was represented by Counsel as well. App. p. 109.

Without prompting from the Defendants, the Court advised Defendants they would be awarded sanctions. The Court ordered monetary sanctions to Davenport Surgical Group's (DSG) representative and attorney. The Court awarded a total of $4,000 in expenses as a "sanction." Ruling (5/17/19) p.3, App. p. 29.

The order setting the May 16th, 2019 settlement conference dated January 25, 2018, stated: "All parties with authority to settle must be present." Order Setting Trial (1/25/2018) p.1, App. p. 19.

On May 8th, 2019, Defendant DSG motioned to be excused from appearing at the settlement Conference. In their motion, DSG stated that they would not be settling with Dr. Davis.

In an order Denying DSG's requested exclusion from the settlement conference, Judge Lawson ruled "Settlement conferences are mandatory for all parties in our district. Although a motion for summary judgment is pending, DSG remains a party and must attend. In addition, the Court expects all parties to negotiate in good faith." Order (5/8/2019) p.1, App. p. 25.

At the settlement conference, Mr. Sellers made it clear that he was prepared, after lengthy and repeated discussions with his client, about what his client would accept by way of settlement and that Plaintiff Dr. Davis was

available and would be participating by telephone. (Nelson Affidavit) p.1, App. p. 108.

On May 16, 2019, Mark R. Lawson, District Court Judge for the Seventh Judicial District issued an oral order for sanctions related to a settlement conference scheduled in this case and held at the Scott County Courthouse. Ruling on Oral Motion for Sanctions for Failure to Appear at Settlement Conference. Ruling (5/17/2019) p.1, App. p. 27.

In that order, he approved Davenport Surgical Group's requested sanction of $4,000, representing its attending doctor's lost time of $1,500, and its attorney's time and mileage of $2,500. Ruling (5/17/2019) p.3, App. p. 29.

Genesis requested $500 in attorney fees as a sanction. The Judge denied this sanction. Ruling (5/17/2019) p. 2-3, App. p. 28-29.

On May 23, 2019, Plaintiff filed a Motion to Rescind Sanction. Motion to Rescind Sanction App. p. 31.

On June 4, 2019, Defendant Davenport Surgical Group filed a Resistance to Plaintiff's Motion to Rescind Sanction. App. p. 39.

On June 5, 2019, the Court, the Honorable Judge Henry W. Latham II issued its ruling on all Defendants' Motions for Summary Judgment dismissing virtually all counts and Defendants in the Petition and Amended Petition in the case. App. p. 48.

Also, on June 5, 2019, Plaintiff filed his Reply to Resistance to Request for Rescission of Sanction. App. p. 44.

The Court then removed the label of "sanction." Ruling (6/7/2019) p. 3-4, App. p. 93-94.

On June 7, 2019, the Court in its "Ruling on Plaintiff's Motion to Rescind Sanction," denied Plaintiff's Motion to Rescind Sanction. App. p. 91.

In that order, Judge Lawson stated that the Court did not intend the order to be punitive and that the order was intended to reimburse a particular defendant its expenses. Ruling (6/7/2019) p. 3-4, App. p. 93-94.

On June 14th, 2019, Mr. Sellers filed a Writ of Certiorari to the Supreme Court.

On July 15th, 2019, the Supreme Court granted the Writ of Certiorari.

STANDARD OF REVIEW

The Supreme Court will review a district court's decision on whether to impose sanctions for an abuse of discretion by a properly filed writ of certiorari. *Mathias v. Glandon*, 448 N.W.2d 443, 445 (Iowa 1989). A writ of certiorari is a procedure to test whether the district court exceeded its jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 1.1401. *State v. West*, 320 N.W.2d 570, 573 (Iowa 1982). "[W]hen the district court exercises its discretion on grounds or for reasons untenable or to an extent unreasonable,"

the Supreme court will find that as an abuse of discretion or that the Court acted without proper authority. *Schettler v. Iowa Dist. Ct.,* 509 N.W.2d 459, 464 (Iowa 1993), *French v. Iowa Dist. Ct.,* 546 N.W.2d 911, 913 (Iowa 1996). See *State ex rel. Fletcher v. Iowa Dist. Ct.,* 213 Iowa 822, 831–32, 238 N.W. 290, 294–95 (1931).

Although the Supreme Court will review for an abuse of discretion, the Court will correct erroneous applications of law as well. *Weigel v. Weigel,* 467 N.W.2d 277, 280 (Iowa 1991). However, the Supreme Court is to either sustain the proceedings below or annul the proceedings wholly or in part. *State v. Iowa Dist. Court*, 236 N.W.2d 54, 55-56 (Iowa 1975). See *Hearity v. Iowa Dist. Ct. for Fayette County*, 440 N.W.2d 860, 862–63 (Iowa 1989).

Under a writ of certiorari, when determining whether an event is sanctionable conduct, the Court will consider the facts at the time. *Weigel*, 467 N.W.2d at 280–81. The standard the Court will apply is that of a reasonably competent attorney admitted to practice before the district court. *Id*. The reasonableness of the attorney's judgment must be viewed as of the time of the event, not with hindsight gained through the hearing process, and measured by all the circumstances. *Weigel v. Weigel*, 467 N.W.2d 277, 280–81 (Iowa 1991) and *Mathias*, 448 N.W.2d at 447; *see also* 281 *Century Prods., Inc.*, 837 F.2d at 251; *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801

F.2d 1531, 1536–37 (9th Cir.1986). (Additional cites omitted.) However, if the decision was debatable, then there would be no "bad faith." *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 485 (Iowa 2005)

ARGUMENT

The District Court erred in ordering the imposition of "reasonable expenses" of a Defendant and Defendant's Counsel in this matter. The order is inappropriate because it is (1) inconsistent with and not authorized by the Iowa Rules of Civil Procedure (2) inconsistent with the guidelines used to impose sanctions (3) inconsistent in application, as three other Defendants also failed to appear for the settlement conference "in person" but were not the subject of sanctions and (4) arbitrary, as no party complied with all of the requirements of Rule 7.1. Furthermore, violations of Rule 7.1 are not sanctionable.

ISSUE I: Local Rule 7.1 is Inconsistent with the Iowa Rules of Civil Procedure

Rule 7.1 of the Seventh Judicial District's "Guidelines of Practice and Administration" is the rule at the heart of this writ. Rule 7.1 is not a local rule as authorized by the Iowa Rules of Civil Procedure.

The "easily accessible rules," as quoted by Judge Lawson, are not easy to find on the judicial website because they are under the subpage

"announcements" and are titled "Guidelines of Practice and Administration." (Website page) App. p. 96.

Iowa R. Civ. P. 1.1806 states: "Each district court, by action of a majority of its district judges, may from time to time make and amend rules governing its practice and administration ***not inconsistent with these rules***. All such rules or changes shall be subject to prior approval of the supreme court." (emphasis added)**.** Iowa R. Civ. P. 1.1806 (rules by trial courts).

On August 23, 2019, the Seventh Judicial District Court Administrator Kathy Gaylord confirmed that the "local rules" (including "Rule 7.1 and Rule 7.1(c) as referred to by Judge Lawson, at page 2 of the Order Imposing Sanctions) are *guidelines* and not "local rules." Said guidelines were not and are not subject to submission to or approval by the Iowa Supreme Court pursuant to Iowa R. Civ. P. 1.1806.

The Supreme Court has stated explicitly that the Rules of Civil Procedure have a definite purpose. In *Thews v. Miller*, this Court stated that:

> We take this occasion to stress the importance of the rules of civil procedure. They have been adopted for a definite purpose. […] Local trial courts and the courts of each district cannot adopt and proceed according to rules which are contrary to the rules adopted by this court. *Thews v. Miller*, 121 N.W.2d 518, 522 (Iowa 1963).

Moreover, in *Halvorson v. City of Decorah*, the Supreme Court echoed the stance in *Thews*:

> Section 4 of Article V of the Iowa Constitution, I.C.A. states: 'The Supreme Court shall have appellate jurisdiction and exercise a supervisory control over all inferior judicial tribunals throughout the State.' We have given the matter of rules for the simplification and prompt attention to civil procedure our diligent attention, especially in the last twenty years. We have had a very busy and able committee which has assisted the court by making suggestions as to rules which will assist in the matter of justice. […] After the rules have been promulgated and announced they should receive attention and use by the Bench and the Bar. *Halvorson v. City of Decorah*, 133 N.W.2d 232, 233–34 (Iowa 1965)

The intent of the Iowa Supreme Court is clear. The Supreme Court wanted a uniform set of rules by which every court should be governed by and under which any reasonable attorney should be able to go into any Court in Iowa and be able to practice. *See also*, Iowa R. Civ. P. 1.101, "The rules of this chapter [Rules of Civil Procedure] shall govern the practice and procedure in all courts of the state …." and *Anderson v. Goodyear Tire & Rubber Co.*, 259 N.W.2d 814, 818 (Iowa 1977) stating, "Rules of Civil Procedure have the force and effect of statutes."

In drafting the Iowa Rules of Civil Procedure, the Iowa Supreme Court approved the following rules for pretrial conferences:

- "In any action, the court may in its discretion direct the **attorneys for the parties** and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (e) Facilitating the settlement of the case." The Iowa R. Civ. P. 1.602(1) (emphasis added).
- **"At least one of the attorneys** for each party participating in any conference before trials shall have authority to enter into stipulations…" Iowa R. Civ. P. 1.602(3) (emphasis added).

- "The [pretrial] conference **shall be attended by at least one of the attorneys** who will conduct the trial for each of the parties and by any unrepresented parties." Iowa R. Civ. P. 1.602(4) (emphasis added).

In 2016, the Seventh District Court published the "*Guidelines* of Practice and Administration," which contains Rule 7.1:

> *RULE* 7.1: SETTLEMENT CONFERENCE PROCEDURES:
>
> > Settlement conferences shall be held in all cases except for the following case types: debt collections and mortgage foreclosures. The settlement conference judge shall not be assigned as trial judge. Attorneys in cases set for settlement conference shall comply with the following: […]
> >
> > (c) All parties to the action shall attend the settlement conference unless specifically excused by the settlement conference judge.
> >
> > 1. If a party is an entity other than an individual, a representative shall be present who has authority to make decisions respecting that party's claim and settlement.
> >
> > 2. Attorneys shall be prepared to disclose the settlement offer and demand and the extent of their authority.

> 3. Where that authority is limited, the person having the authority to authorize payment in the amount necessary to effect settlement shall be present.
>
> Guidelines of Practice and Administration (2016), App. p. 96.

Judge Lawson interprets Rule 7.1 to mean that, not only must counsel be present, but so too must the individual parties. May 17th Ruling pg. 2 and June 7th Ruling pg. 2. App. p. 28 and 92. These rules directly contradict the Iowa Rules of Civil Procedure. This Court has repeatedly found the danger and inequity of courts deviating from the uniform rules. See, i.e., *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010), and *Iowa Civ. Liberties Union v. Critelli*, 244 N.W.2d 564, 570 (Iowa 1976), which warns of the "proliferation of idiosyncratic local rules," which deny equal protection and violate the integrity of judicial processes. The Supreme Court must interpret the plain language and goals of the statute when the wording is precise. *Schiavone v. Fortune,* 477 U.S. at 30, 106 S.Ct. at 2384–85, 91 L.Ed.2d at 28., *Butler v. Woodbury County*, 547 N.W.2d 17, 20 (Iowa App. 1996).

The Seventh District had an opportunity to seek approval of the Iowa Supreme Court to have a rule (Rev. 2016) that would be different from all the other districts in the state, but they did not. Local Rule 7.1 is an illegitimate local rule (a/k/a – guideline).

In *Sterner v. Fischer*, 505 N.W.2d 490, (Iowa 1993), a case which involved the violation of the same rule in the same jurisdiction, but was dismissed on jurisdictional issues, the appellant's brief noted:

> The Supreme Court Advisory Committee in making its recommendation to the Iowa Supreme Court for the 1979 Amendment to Rule 136 provided therein." The pretrial judge may direct the parties to the action to be present or immediately available at the time of the conference." The Iowa Supreme Court when it adopted the amendment to Rule 136 in 1979 deleted this provision therefrom.[1]

Not only does the plain language of the Seventh District's Rule 7.1 contradict the Iowa Rules of Civil Procedure, but the Advisory Committee considered requiring parties to be present in addition to counsel and rejected it. Instead, "… the court may in its discretion direct the attorneys for the parties …," to appear at pretrial conferences. Iowa R. Civ. P. 1.602. Rule 7.1 violates the Iowa Rules of Civil Procedure.

[1] Counsel for Dr. Davis did an extensive search for the Supreme Court Advisory Committee document but could not locate it. This included researching the archives at the Drake Law Library, State Law Library, research with the Iowa Supreme Court clerk's office, and contacting the attorney that represented Sterner on the case.

ISSUE II: Local Rule 7.1 does not require the presence of a party in addition to counsel and/or is otherwise vague.

In *In re Marriage of Malone,* a Scott County divorce case, the Court ordered a settlement conference requiring, "parties and their counsel ... MUST attend both conferences." *In re Marriage of Malone*, 860 N.W.2d 342 (Iowa App. 2014). That Scott County judge's order specifically ordered all parties to be in attendance, in person. The Court order in *Marriage of Malone* explicitly stated that the parties and their counsel "MUST" be in attendance at the settlement conference.

Rule 7.1 is not even remotely so clear.

The "rule" is vaguely worded and does not put counsel on notice that it is a mandatory requirement that every person named in the lawsuit must be physically present for the settlement conference. Furthermore, the introductory paragraph to Local Rule 7.1 is directed only to "attorneys" and not to the individually named parties.

The term "party" or "parties" is used universally in the courts and in all legal procedures to refer to either the actual person or to the attorney for the actual person unless clearly and explicitly defined and identified differently. Iowa Supreme Court opinions usually refer to positions advanced by a "party," as, by the side of the lawsuit by name, but positions cited in such

opinions are rarely, except in *pro se* cases, advanced by the actual named person or entity.

Even the Rules of Civil Procedure use "parties" to mean both counsel and those they represent. For instance, the rules regarding discovery conferences require, "parties," to "… consider the nature and basis of their claims and defense for promptly settling their case," but demands that "The attorneys of record and all unrepresented parties …," are responsible for arranging a conference." Iowa R. Civ. P. 1.507(2). This confirms that the use of the word "parties" means attorneys of record or unrepresented parties. Throughout the Iowa Rules of Civil Procedure, the "parties" and attorneys of record are used interchangeably.

In the Seventh District Guidelines, Local Rule 7.1 subsection (c)(1) states: that non-individual parties must be represented by someone with authority to settle ("If a party is an entity other than an individual, a representative shall be present who has authority to make decisions respecting that party's claim and settlement."). Subsection 2 states: "*Attorneys* shall be prepared to disclose the settlement offer and demand and the extent of their authority." (emphasis added). App. p.98.

If subsection 2 of Rule 7.1 required all actual parties to be personally and physically present for the settlement conference, it would not be necessary

to mandate that the attorneys be prepared to disclose the demands and the extent of their authority. It would be surplusage if all the actual parties are always required to be personally present in addition to the attorneys of record.

Subsection 3 of Rule 7.1(c) provides: “Where that authority is limited, the person having the authority to authorize payment in the amount necessary to effect a settlement shall be present.” (emphasis added)

The reference is back to the authority of the attorneys mentioned in subsection 2. If all the actual parties are required to be personally physically present, it is reasonable for a reader to believe that the term “parties” includes attorneys representing parties. Otherwise, requiring the presence of another person where the authority is limited would, again, be pointless and would be surplusage. It would not matter if a participant had “limited” authority under the local rule if every party was required to be physically and personally present for the settlement conference.

The invalid Local Rule 7.1 makes no requirement that individuals be physically present, but only requires a person of authority be present for entities.

If the Seventh District intends that both parties and their counsel be present for a settlement conference, then its rules should make that fact crystal

clear, as the Court did in *Malone*. Counsel must have notice. Rule 7.1 does not provide any.

In his ruling, Judge Lawson referred to the order setting the settlement conference dated January 25, 2018, which stated: "In addition, the order setting the settlement conference and jury trial, in this case, stated: "All parties with authority to settle must be present." Judge Lawson believes this provided the necessary clarity to advise the parties that they personally must be present in addition to their counsel.

It does not.

The Supreme Court in *Weigel* laid out the proper conduct of compliance with the Rules of Civil Procedure. *Weigel*, 467 N.W.2d at 280. An attorney's conduct is measured by an objective standard of reasonableness under the circumstances, and the standard of a reasonably competent attorney admitted to practice in Iowa. *Id.* (citations omitted) (quoting *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir.1986)), See *Barnhill v. Iowa Dist. Ct. for Polk County*, 765 N.W.2d 267, 272–73 (Iowa 2009), *as corrected* (May 14, 2009). The actions of Mr. Sellers in this case, were reasonable due to the clarity of the Iowa Rules of Civil Procedure and the lack of authority for the "Guidelines of Practice and Administration" and vagueness of Local Rule 7.1.

It is and was reasonable for lawyers to interpret the order setting the settlement conference as requiring every party to be represented by someone (or to participate themselves if *pro se*) with full authority to settle all claims. This is particularly true considering the unified Rules of Civil Procedure adopted by the Iowa Supreme Court.

Judge Lawson also cited a call from the court attendant regarding the question of whether the conference should proceed considering the outstanding summary judgment ruling was still pending as a basis for the sanction. Judge Lawson states that Mr. Sellers requested the meeting proceed, "…without advising the court that his client would not be present…." The court attendant did not advise that the court would require and expect every individual actual physical party to be personally present in court and did not inquire if the Plaintiff would be *personally, physically* participating in the settlement conference.

The Court also cited the fact that it refused to excuse DSG (or its attorneys) from participating in the settlement conference as another basis used by the District Court to determine Dr. Davis' counsel was put on notice that the parties must be present in addition to their attorneys. Again, however, there is no language in that ruling that would indicate that parties, in addition

to counsel, were to be physically present at the conference. Ruling (5/17/19) p.3, App. p. 29.

The plain and clear language used in Rule 7.1 does not alert attorneys or parties that they must all physically, and personally appear at a settlement conference. Nor do the ancillary arguments that Judge Lawson put forth in his rulings as to why Dr. Davis' counsel should have known his client was expected to physically participate personally do so.

Mr. Sellers zealously represented Dr. Davis. See *Weigel*, 467 N.W.2d at 281. It was made clear that he was prepared, after lengthy and repeated discussions with his client about what his client would accept by way of settlement to earnestly try to resolve this matter before the pending trial. It was repeatedly stated that Dr. Davis was available by phone and waiting to participate in the settlement conference. (Nelson Affidavit) App. p. 108.

In Judge Lawson's final ruling, he stated: "While the Court is sympathetic that local customs can sometimes ambush out-of-district lawyers, the Court simply does not see this as the case here." Ruling on Plaintiff's Motion to Rescind Sanction. App. p. 92. Counsel for Dr. Davis does not believe that local customs in any Court in Iowa should *ever* ambush "out of district lawyers." This is especially true when the language of the rule itself does not clearly demarcate – or in this case, distinguish at all - from the

generally understood method of practice and demands of the official Iowa Rules of Civil Procedure.

ISSUE III: Rule 7.1 was applied unequally and resulted in disparate effects to violating parties.

"A district court abuses its discretion when it "exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. [citation omitted] An erroneous application of the law is clearly untenable." *First Am. Bank v. Fobian Farms, Inc.,* 906 N.W.2d 736, 744 (Iowa 2018).

In the case at bar, the purported requirement in Rule 7.1, that a named party must be physically present in person was not imposed on the other individually named parties.

Of the seven parties to this lawsuit, the only named party to personally appear for the settlement conference was Dr. Lohmuller for himself and Defendant DSG. (Nelson Affidavit) App. p. 109. If all these other parties were able to be represented without personally appearing for the settlement conference, then it is unreasonable and untenable that sanctions be imposed only upon Dr. Davis. This is arbitrary enforcement of a vague "rule" that has not been approved by the Iowa Supreme Court. It is patently unfair to impose a Court-Ordered sanction solely on Dr. Davis for not being personally present.

Furthermore, Local Rule 7.1 has a litany of requirements in sections (a) and (b) with which none of the parties complied, nor have they been approved by the Iowa Supreme Court. For instance, Rule 7.1(B)(4) requires pre-trial briefs be submitted prior to a settlement conference. App. p. 97. None of the parties filed pre-trial briefs. Rule 7.1(B)(5) requires proposed jury instructions be submitted prior to a settlement conference. App. p. 98. None of the parties filed jury instructions.

The decision of the District Court to cherry-pick the one provision of this lengthy "Rule" and apply it to *one* party for purposes of sanctions when every party involved violated Rule 7.1's requirements is arbitrary, unreasonable and untenable.

Judge Lawson conceded that there was a genuine reason for proceeding with the settlement conference. May 17th Ruling. App. p. 28. However, the Court ordered Dr. Davis to pay the expenses for Dr. Lohmuller ($ 1500) and costs of Davenport Surgical Group's attorney ($2,500). App. p. 27-28. The Court concluded that alleged noncompliance of Dr. Davis was not substantially justified. Judge Lawson did not inquire into the actual amounts of billable time and worth awarded. Again, only one out of the seven named parties personally appeared for the settlement conference being Dr. Lohmuller, for himself and Defendant DSG. App. p. 109.

The severity of refusing to conduct or allow the settlement conference to proceed that day precluded any possibility of a settlement. It prevented discussion that could have led to a settlement by which Dr. Davis could have been made partially whole on his multi-million-dollar claim. The practical result was that the Defendants were insulated or protected from "accidentally" paying a settlement as a result of Judge Lawson applying an unjust and unenforceable "local rule" that has not been approved by the Iowa Supreme Court and is contrary to the plain meaning of the Iowa Rules of Civil Procedure.

The enforcement of the unenforceable "local rule" and the refusal to conduct the settlement conference was tantamount to a dismissal of the case. While allowed under the Iowa Rules of Civil Procedure, dismissals of a case should be rarely used. See *Fenton v. Webb*, 705 N.W.2d 323, 326 (Iowa Ct.App.2005), and *Kendall/Hunt Publ'g Co. v. Rowe,* 424 N.W.2d 235, 241 (Iowa 1988). However, Judge Lawson did not use the Iowa Rules of Civil Procedure. He used the Guidelines of Practice and Administration and the sub listed rules to summarily end the settlement conference, where no discussion took place.

ISSUE IV: Sanctions are prohibited under Rule 7.1

If *arguendo*, this Supreme Court finds that the Guidelines of Practice and Administration and the sub listed Rule 7.1 is proper and does not violate the Iowa Rules of Civil Procedure, Judge Lawson still improperly awarded sanctions.

The Iowa Rules of Civil Procedure state 1.602(5) *Sanctions*:

> If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the court, upon motion or the court's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in rule 1.517(2)(b)(2)-(4). In lieu of or in addition to any other sanction, the court shall require the party or the attorney representing that party or both to pay the reasonable expenses incurred because of any noncompliance *with **this** rule*, including attorney's fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. Iowa R. Civ. P. 1.602(5) (Emphasis Added).

Local Rule 7.1 does not contain a specific provision for sanctions. Contrary to what Judge Lawson stated in his ruling on Plaintiff's Motion to Rescind Sanctions, the language of local Rule 7.1 is not "sufficiently clear to

constitute an order that the plaintiff be personally present unless excused by the Court." Ruling (June 7, 2019) App. p. 93.

Judge Lawson cited Local Rule 7.1 and Iowa R. Civ. P. 1.602 as the reason for the imposition of the sanctions, "[…] the Court did order monetary sanctions to Davenport Surgical Group's representative and attorney. The Court awarded a total of $4,000 in expenses as a sanction." Ruling (June 7, 2019) App. p.91. Davenport Surgical Group requested a sanction of $4,000, representing the doctor's lost time of $1,500, and its attorney's time and mileage of $2,500).

The sanction mentioned in Iowa R. Civ. P. 1.602 is for non-compliance with that rule. Plaintiff was in full compliance with every requirement of Iowa R. Civ. P. 1.602 and therefore, no sanction could be imposed.

Sanctions are meant to avoid the general cost to the judicial system in terms of wasted time and money. *Breitbach v. Christenson*, 541 N.W.2d 840, 846 (Iowa 1995). See generally *Curbing Litigation Abuse and Misuse: A Judicial Approach,* 36 Drake L.Rev. 483, 499, (1987). The Supreme Court has many times ruled that there is an inherent power of the district court to enforce pretrial orders by imposing sanctions. *Fry v. Blauvelt,* 818 N.W.2d 123, 129 (Iowa 2012) (citing *Rowen v. Le Mars Mut. Ins. Co. of Iowa,* 282 N.W.2d 639, 646 (Iowa 1979)).

In determining the proper sanction, the district court should make specific findings as to " '(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the ... violation.' " *Barnhill v. Iowa Dist. Ct.,* 765 N.W.2d 267, 277 (Iowa 2009) (quoting *In re Kunstler,* 914 F.2d 505, 523 (4th Cir.1990)). In weighing the severity of the violation, the District Court should consider the American Bar Association factors that were outlined in the *Barnhill* decision, including but not limited to: (a) good or bad faith; (b) degree of willfulness of violations; (d) prior history of violations (f) prejudice suffered by the offended; (g) culpability and (h) possible chilling effects. *Id.* at 276–77, *Everly v. Knoxville Community Sch. Dist.,* 774 N.W.2d 488, 495 (Iowa 2009).[2] At the time of awarding the sanctions, Judge Lawson did not consider *any* of these provisions.

A party is required to adhere to a trial setting conference memorandum. *Lawson v. Kurtzhals,* 792 N.W.2d 251, 259 (Iowa 2010). Although district courts have discretion in deciding whether to enforce the verbiage of pretrial

[2] For a full list of the of the factors that the American Bar Association set forth please see: ABA Section of Litigation, *Standards and Guidelines for Practice under Rule 11 of the Federal Rules of Civil Procedure* (1988), *reprinted in* 121 F.R.D. 101, 125–26 (1988), *Barnhill v. Iowa Dist. Ct. for Polk County*, 765 N.W.2d 267, 277 (Iowa 2009), *as corrected* (May 14, 2009).

motions and orders, 'it is incumbent upon a reviewing court to scrutinize the exercise of that discretion and to confine the exercise to reasonable limits.' "*Fry*, 818 N.W.2d at 130 (citing *Fox v. Stanley J. How & Assocs., Inc.*, 309 N.W.2d 520, 522 (Iowa Ct.App.1981)), See *Schmidt v. Eft*, 889 N.W.2d 244 (Iowa App. 2016).

As Judge Lawson stated:

> [e]ach trial scheduling and discovery plan order entered noted that, if a settlement conference was held: "All parties with authority to settle must be present." In an order filed August 11, 2016 — setting a settlement conference for January 12, 2018 — the order again noted: "All parties with authority to settle must be present.'" On January 25, 2018, the order again provided: "All parties with authority to settle must be present." Ruling (June 7, 2019). App. p. 92.

These orders do not explicitly state that the plaintiff must be there, physically, in person. The Rules of Civil Procedure adopted by the Iowa Supreme Court do not specifically say that a plaintiff must be physically in attendance. It is reasonable for an attorney to interpret these orders setting the settlement conference as requiring every party to be represented by someone (or to participate themselves if *pro se*) with full authority to settle all claims.

It is undisputed that Counsel for Dr. Davis stated that Dr. Davis was available by phone and that he and his counsel had full authority to settle. Dr.

Davis was immediately available to participate himself by telephone in the settlement conference.

Mr. Sellers did not violate the plain meaning of Iowa R. Civ. P. 1.602. Mr. Sellers took his representation of Dr. Davis seriously and made it clear to the District Court that he was prepared for the settlement conference, after lengthy and repeated discussions with his client about what his client would accept by way of settlement to earnestly try to resolve this matter before the pending trial. It was repeatedly stated that Mr. Sellers had full authority to settle for Dr. Davis and that Dr. Davis was ready to participate himself by phone in any actual discussions regarding a settlement. Mr. Sellers participated in the conference in good faith because he believed at that time that every defendant still had potential exposure.

This is not sanctionable conduct or belief, especially when the sanctions are awarded and enforced under unenforceable and unjustifiable Guidelines of Practice and Administration which have not been approved by the Iowa Supreme Court.

The Courts have ruled that the primary purpose of sanctions is compliance, and future deterrence of similarly situated attorneys, not compensation. See *In re Kunstler,* 914 F.2d 505, 522 (4th Cir.1990) *See Rentz*, 556 F.3d at 402. *Barnhill v. Iowa Dist. Ct. for Polk County*, 765 N.W.2d 267,

278 (Iowa 2009), *as corrected* (May 14, 2009), *Everly v. Knoxville Community Sch. Dist.*, 774 N.W.2d 488, 495 (Iowa 2009). *Hearity v. Iowa Dist. Ct.*, 440 N.W.2d 860, 864 (Iowa 1989). This is especially true in cases where there is a potential for a hefty settlement. See *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 400 (6th Cir.2009) and see *Barnhill v. Iowa Dist. Ct. for Polk County*, 765 N.W.2d 267, 278 (Iowa 2009), *as corrected* (May 14, 2009).

In the last paragraph of the June 7th ruling, Judge Lawson states that "the Court did not intend the order to be punitive" but rather, "The order was intended to reimburse a particular defendant its expenses." App. p. 93. The Court then removed the term "sanction." This change divested Judge Lawson of his cited authority in the Second Ruling and is contrary to the precedent set by the Iowa Supreme Court. App. p. 93-94.

This punitive awarding of costs is similar to *Wilson v. Fenton*, 312 N.W.2d 524, 528 (Iowa 1981), and *Hearity v. Iowa Dist. Ct. for Fayette County*, 440 N.W.2d 860, 863 (Iowa 1989). In these cases, the Iowa Supreme Court struck down the awarding of attorney fees, where there is no authority to do so. The striking of the phrase "sanction" directly contradicts the Iowa R. Civ. P. 1.602(5) *Sanctions*, and thus stripped Judge Lawson of the authority of the rule that specifically approved sanctions. The District

Court alone does not have the inherent power to assess attorney fees as a sanction without proper authority. *Hearity v. Iowa Dist. Ct. for Fayette County*, 440 N.W.2d 860, 862–63 (Iowa 1989). Since the award is no longer a sanction as defined under Iowa R. Civ. P. 1.602(5) Judge Lawson deprived the Court of authority under Iowa R. Civ. P. 1.602(5).

CONCLUSION

There has been a proliferation of idiosyncratic local rules, and Rule 7.1 undermines the integrity of the judicial process and the uniformity this Court attempts to achieve. The "easily accessible rules" (actually, guidelines) were not and are not subject to submission to or approval by the Iowa Supreme Court. Local Rule 7.1 is vaguely worded and does not put counsel on notice that it is a mandatory requirement that every person in the lawsuit must be physically present for the settlement conference.

The Supreme Court has explicitly stated that the Rules of Civil Procedure have a definite purpose, and the local court cannot create rules which are contrary to the rules adopted by the Supreme court. The Supreme Court wanted a uniform set of rules by which every court should be governed by and under which any reasonable attorney should be able to go into any Court in Iowa and be able to practice.

The practical effect of the promulgation of such local rules is twofold: (1) it signals to out-of-town counsel that they are not welcome to practice in the 7th District and; (2) allows judges to pander to local, influential firms.

Judge Lawson stated in his first ruling: "Mr. Sellers advanced a legitimate reason for proceeding with the settlement conference." App. p. 28. Judge Lawson was referring to the stated assumption by Mr. Sellers that none of the parties had any idea of what the Court might do in the pending summary judgment which could have been dispositive in many respects for any one or more of the parties.

Judge Lawson stated in the hearing that he had discussed the case with the trial Judge, who was about to render the rulings on the Summary Judgement motions and asked if the parties wanted to continue with the settlement conference. *ANY* discussion among the parties could have and might have led to a settlement that day. The only action that stood in the way of a possible settlement was the Court's adamant prohibition against any discussions or negotiations.

The Court's ruling stated: "[b]ecause the plaintiff was not personally present; the Court was unable to conduct a settlement conference in this case. As a result, both the settlement conference and the trial will need to be

continued." App. p. 27. The Court was not "unable" to conduct a settlement conference.

Local Rule 7.1 provides the discretion to not have a settlement conference at all as presumably all parties can be excused. The Court *chose* not to conduct a settlement conference, offered sanctions to the Defendants without a request from them and capitulated to whatever the Defendants requested in terms of a continuance without explanation, under the guise of authority from the Guidelines of Practice and Administration. Dr. Davis, through counsel, was ready to settle, and Dr. Davis was available to participate by telephone in addition to participation by counsel. Dr. Davis was deprived of the only opportunity he had to achieve a settlement of the case.

The ruling on the Summary Judgment Motions, issued shortly thereafter, dismissed virtually all the Plaintiff's claims. The practical result was that the Defendants were insulated from "accidentally" paying a settlement as a result of the decision not to allow a settlement conference to occur.

The purported requirement that a named party must be physically present in person was only imposed on one party of the lawsuit. The enforcement of the unenforceable "local rule" and the refusal to conduct the settlement conference was tantamount to a dismissal of the case and deprived

Dr. Davis of any meaningful opportunity to settle his case. An idiosyncratic, invalid local rule should not have this type of effect on a case.

The sanction placed on Attorney Sellers and Dr. Davis imposed under Iowa R. Civ. P. 1.602 and Local Rule, is invalid as well. Mr. Sellers was in full compliance with every requirement of Iowa R. Civ. P. 1.602 and therefore, no sanction could be imposed. He did not violate the plain meaning of Iowa R. Civ. P. 1.602. Mr. Sellers took his representation of Dr. Davis seriously and made it clear to the District Court that he and his Plaintiff, Dr. Davis were prepared for the settlement conference,

The District Court divested itself of the authority when Judge Lawson stated that "the Court did not intend the order to be punitive" but rather, "The order was intended to reimburse a particular defendant its expenses." App. p. 93. The Court then removed the term "sanction." App. p. 93-94. This change divested Judge Lawson of his cited authority in the Second Ruling and is contrary to the precedent set by the Iowa Supreme Court.

WHEREFORE, for these reasons, Dr. Davis does request that the Iowa Supreme Court: (1) set aside the "reasonable expenses" order imposed upon Dr. Davis and his counsel; (2) order that the terminology "local rule" or "Rule" be removed from the 7th judicial district's guidelines and nullified as inconsistent with the Iowa Rules of Civil Procedure; (3) instruct the Seventh

Judicial District that it does not have authority to impose the "personal participation mandate" on parties to litigation in the Seventh Judicial District. Dr. Davis also requests that the Iowa Supreme Court find that the Guidelines of Practice and Administration along with the sub-listed Local Rule 7.1, as written, does not require or give proper notice that an individual party to an action must be physically present during pretrial settlement conferences.

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

1. This page Final Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Final Brief contains 6914 words, excluding the parts of the Final Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Final 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 Final Brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.

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REQUEST FOR ORAL ARGUMENT

Plaintiff respectfully request to be heard orally upon submission of this cause to the Iowa Supreme Court.

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ATTORNEY COST CERTIFICATE

I hereby certify that the actual cost paid for printing the foregoing "Final Brief In Support of Writ Of Certiorari" was $0.00.

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CERTIFICATE OF SERVICE

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