

**IN THE COURT OF APPEALS OF IOWA**

No. 2-947 / 12-0914  
Filed November 29, 2012

**STATE FARM MUTUAL  
AUTOMOBILE INS. CO.,**  
Plaintiff-Appellee,

**vs.**

**DOVEANNA MORPHEW n/k/a  
DOVEANNA LEKIN,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

Doveanna Lekin appeals from an order dismissing her petition to vacate a judgment. **REVERSED AND REMANDED.**

Steven E. Ort of Bell, Ort & Liechty, New London, for appellant.

Anthony R. Epping, Des Moines, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

**DANILSON, J.**

Doveanna Lakin appeals from an order dismissing her petition to vacate a judgment. We reverse the dismissal and remand for further proceedings.

**I. Background Facts and Proceedings.**

State Farm Mutual Automobile Insurance Co. filed this action against Doveanna Lakin and others to recover money damages it had paid to its insured as the result of an automobile accident, which the insurer claims was the fault of the driver Breinn Lakin, a minor. Doveanna was the purported owner of the vehicle driven by Breinn. State Farm obtained a default judgment in April 2011 because none of the three defendants appeared.

In August 2011, Doveanna filed—in a separate action—“a petition to vacate judgment.” After a hearing on State Farm’s motion to dismiss, this action was dismissed by court order filed on October 17, 2011, because a petition to vacate must be filed in “the original proceeding.” See Iowa R. Civ. P. 1.1013.<sup>1</sup> The dismissal order noted, “In so granting the motion, this does not prevent the Petitioner herein from filing her Petition properly in Case Number LALA003789.”

---

<sup>1</sup> Iowa Rule of Civil Procedure 1.1013(1) provides:

A petition for relief under rule 1.1012 [to vacate or modify judgment] requires payment of the filing fee set forth in Iowa Code section 602.8105(1)(a), or if made in small claims, the filing fee set forth in section 631.6(1)(a), and *must be filed and served in the original action within one year after the entry of the judgment or order involved*. It shall state the grounds for relief, and, if it seeks a new trial, show that they were not and could not have been discovered in time to proceed under rule 1.977 or 1.1004. If the pleadings in the original action did not allege a meritorious action or defense the petition shall do so. It shall be supported by affidavit as provided in rule 1.413(3).

(Emphasis added.)

On November 17, 2011, Doveanna filed a petition to vacate judgment in this, the original action, but failed to include a required affidavit. See Iowa Rs. Civ. P. 1.1013, 1.413(3).<sup>2</sup> State Farm moved to dismiss. Doveanna dismissed the petition without prejudice on January 17, 2012.

On February 24, 2012, Doveanna re-filed the petition to vacate with proper affidavit. State Farm then filed a motion to dismiss pursuant to rule of 1.943, which provides:

A party may, without order of court, dismiss that party's own petition, counterclaim, cross-claim, 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.

State Farm argued that Doveanna's petition had been twice dismissed and consequently, the January 17, 2012 dismissal was with prejudice by operation of law. The district court agreed and dismissed the petition to vacate.

Doveanna now appeals.

---

<sup>2</sup> Iowa Rule of Civil Procedure 1.413(3) states:

Any motion asserting facts as the basis of the order it seeks, and any pleading seeking interlocutory relief, shall contain or be accompanied by an affidavit of the person or persons knowing the facts requisite to such relief. A similar affidavit shall be appended to all petitions which special statutes require to be verified.

## II. Scope and Standard of Review.

This issue turns on an interpretation of the relevant rules of civil procedure, which we review for correction of errors of law. See *Hasselmann v. Hasselman*, 596 N.W.2d 541, 543 (Iowa 1999)

## II. Discussion.

Doveanna contends the district court erred in finding Iowa Rule of Civil Procedure 1.943 applicable. We agree. By its very terms, rule 1.943 states “[a] party may” dismiss a petition once “at any time up until ten days before the trial is scheduled” and that dismissal “shall be without prejudice.” See *Lawson v. Kurtzhals*, 792 N.W.2d 251, 256 (Iowa 2010) (“It is clear from the plain language of rule 1.943 that the court lacks the discretion to deny a party’s motion to voluntarily dismiss ‘at any time up until ten days before the trial is scheduled to begin.’”). The January 17, 2012 dismissal by Doveanna is the only dismissal *by a party*. See Iowa R. Civ. P. 1.943(1). Consequently, the remainder of rule 1.943(1) does not come into play.

State Farm asserted the prior-dismissal aspect of rule 1.943(1) barred Doveanna’s February 24 re-filed petition to vacate. That portion of the rule states: “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, . . . such dismissal shall operate as an adjudication against that party on the merits, unless otherwise ordered by the court, in the interests of justice.” Iowa R. Civ. P. 1.943(1) (emphasis added). The two-dismissal rule is inapplicable here because the Doveanne had not “previously dismissed an

action”, the district court dismissed the separate action. *Cf. Schaefer v. Schaefer*, 66 N.W.2d 428, 432 (1954) (finding two-dismissal rule inapplicable because the second dismissal was by the court—not the plaintiff).

Because the district court erred in concluding rule 1.943(1) is applicable, we reverse and remand for further proceedings on the petition to vacate judgment filed on February 24, 2012.

**REVERSED AND REMANDED.**