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IN THE IOWA SUPREME COURT

S.C. No. 19-0821

MICHAEL MERRILL and KAREN JO FRESCOLN,

Plaintiff/Appellants,

vs.

VALLEY VIEW SWINE, LLC and JBS LIVE PORK, LLC, f/k/a CARGILL PORK, LLC,

Defendants/Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
WAPELLO CO. NO. LALA105144—DIVISION A
HONORABLE JUDGE ANNETTE SCIESZINSKI

APPELLANTS' BRIEF
REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES **5**

STATEMENT OF ISSUES PRESENTED FOR REVIEW **8**

ROUTING STATEMENT **11**

STATEMENT OF THE CASE **11**

STATEMENT OF FACTS **17**

Karen Jo Frescoln **20**

Michael Merrill **21**

SUMMARY OF THE ARGUMENT **22**

ISSUE I: The district court erred in finding plaintiffs liable for costs and expenses under iowa code section 657.11(5) because they did not bring claims as part of a losing cause of action and their claims were not frivolous. **24**

Preservation of Error **24**

Standard of Review **26**

Argument **26**

Two Voluntary Dismissals with Prejudice Do Not Constitute a "Losing Cause of Action" for Purposes of Assessing Costs and Expenses Under Iowa Code section 657.11(5). **27**

Plaintiffs' Claims Were Not Frivolous. **33**

Voluntary Dismissal by a Plaintiff Divests a Court of Jurisdiction to Determine Whether a Claim is a "Losing Cause of Action" Under 657.11(5). **35**

ISSUE II: The District Court also erred in finding that a second voluntary dismissal under Iowa R. civ. p. 1.943 exposes a plaintiff to all costs available under Iowa Code Chapter 625. .... **37**

Preservation of Error **37**

Standard of Review **38**

Argument **38**

ISSUE III: ..The district court erred in the amount of judgment entry because the costs and expenses awarded are not recoverable. **42**

Preservation of Error **42**

Standard of Review **42**

Argument **43**

ISSUE IV: THIS COURT SHOULD AWARD MERRILL AND FRESCOLN APPELLATE ATTORNEY FEES. **46**

Preservation of Error **46**

Standard of Appellate Review **46**

Argument **47**

CONCLUSION **50**

REQUEST FOR ORAL ARGUMENT 50

CERTIFICATE OF FILING... 51

CERTIFICATE OF SERVICE 51

CERTIFICATE OF COMPLIANCE 53

TABLE OF AUTHORITIES

Page(s)

Cases

City of Sioux City v. Freese, 611 N.W.2d 777, 779 (Iowa 2000)..... 25, 37, 42

Cohen v. Iowa Dist. Court for Des Moines County, 508 N.W.2d 78 (Iowa App. 1993).. 33

Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992) .... passim

Darrah v. Des Moines General Hosp., 436 N.W.2d 53, 55 (Iowa 1989) ... 35, 36

E. Iowa Plastics, Inc. v. PI, Inc., 889 F.3d 454, 458 (8th Cir. 2018) 8, 49

Fennelly v. A-1 Mach. & Tool Co., 728 N.W.2d 163, 181 (Iowa 2006)...... 47

Gacke v. Pork Xtra, LLC, 684 N.W.2d 168 (Iowa 2004)....................... 14, 31

Gardin v. Long Beach Mortg. Co., 661 N.W.2d 193, 197 (Iowa 2003) 28

Grant v. Iowa Dist. Court for Hancock Cty., 492 N.W.2d 683, 685 (Iowa 1992)... 29, 40

Hamilton v. City of Urbandale, 291 N.W.2d 15, 17 (Iowa 1980)................ 28

Hockenberg Equip. Co., 510 N.W.2d at 159 47

*Id*14

In re Marriage of Okland, 699 N.W.2d 260, 270 (Iowa 2005).................... 46

In re Marriage of Wood, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997)........ 46

Iowa R. Civ. P. 1.943 (2019) .... passim

Jahnke v. Deere & Co., 912 N.W.2d 136, 141 (Iowa 2018) .... passim

Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014) 6, 28

Kinseth v. Weil-McLain, 913 N.W.2d 55, 75 (Iowa 2018) 34

McGill v. Fish, 790 N.W.2d 113, 119 (Iowa 2010) 28

Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002) 6, 24

Morgan Honomichl, et al. v. Valley View Swine, LLC, and JBS Live Pork, LLC f/k/a Cargill Pork, LLC, formerly captioned *Jerry Dovico, et al.*, Wapello County Case No. LALA 105144-Div. A 10

Noll v. Iowa District Court for Muscatine County, 919 N.W.2d 232, 234 (Iowa 2018) .... passim

Peppmeier v. Murphy, 708 N.W.2d 57, 65 (Iowa 2005) 7, 39

Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016) 7, 27

Schark v. Gorski, 421 N.W.2d 527, 529 (Iowa 1988) .... passim

Smith v. Lally, 379 N.W.2d 914, 916 (Iowa 1986) 6, 26, 29

United Electrical, Radio & Machine Workers of America v. Iowa Public Empl. Relations Bd., 928 N.W.2d 101, 114 (Iowa 2019) 41

Williams v. Van Sickel, 659 N.W.2d at 581 49

Winburn v. Hocksburgen, ... 43

Woody v. Machin, 380 N.W.2d 727, 730 (Iowa 1986) 7, 8, 41, 45

Zimmerman v. Iowa Dist. Ct. for Benton County, 480 N.W.2d 70, 74 (Iowa 1992) 34

Statutes

Iowa Code § 657.11(5)(2019) .... passim

Iowa Code Section 622.72 .... 8, 45

Iowa R. Civ. P. 1.716 (2019) 44

Iowa Rule of Civil Procedure 1.413 .... 35, 36

Iowa. R. App. P. 6.1101(2)(c), (f) 10

Other Authorities

18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* section 4435, at 132-35 & 134 n.7 (2d ed. 2002) 8, 39

Black's Law Dictionary, 3rd Pocket Ed. 33

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE I: THE DISTRICT COURT ERRED IN FINDING PLAINTIFFS LIABLE FOR COSTS AND EXPENSES UNDER IOWA CODE SECTION 657.11(5) BECAUSE THEY DID NOT BRING CLAIMS AS PART OF A LOSING CAUSE OF ACTION AND THEIR CLAIMS WERE NOT FRIVOLOUS.

City of Sioux City v. Freese, 611 N.W.2d 777, 779 (Iowa 2000)

Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992)

Darrah v. Des Moines General Hosp., 436 N.W.2d 53, 55 (Iowa 1989)

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 178 (Iowa 2004)

Gardin v. Long Beach Mortg. Co., 661 N.W.2d 193, 197 (Iowa 2003)

Hamilton v. City of Urbandale, 291 N.W.2d 15, 17 (Iowa 1980)

Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223, 228 (Iowa 2018)

Jahnke v. Deere & Co., 912 N.W.2d 136, 141 (Iowa 2018)

Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014)

Kinseth v. Weil-McLain, 913 N.W.2d 55, 75 (Iowa 2018)*Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002)

Noll v. Iowa District Court for Muscatine County, 919 N.W.2d 232, 234 (Iowa 2018)

Schark v. Gorski, 421 N.W.2d 527, 529 (Iowa 1988)

Smith v. Lally, 379 N.W.2d 914, 916 (Iowa 1986)

Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016)

Zimmerman v. Iowa Dist. Ct. for Benton County, 480 N.W.2d 70, 74 (Iowa 1992)

Iowa R. Civ. P. 1.943 (2019)

Iowa Code Chapter 625

Iowa Code § 657.11(5)(2019)

ISSUE II: THE DISTRICT COURT ALSO ERRED IN FINDING THAT A SECOND VOLUNTARY DISMISSAL UNDER IOWA R. CIV. P. 1.943 EXPOSES A PLAINTIFF TO ALL COSTS AVAILABLE UNDER IOWA CODE CHAPTER 625.

City of Sioux City v. Freese, 611 N.W.2d 777, 779 (Iowa 2000)

Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992)

Grant v. Iowa Dist. Court for Hancock Cty., 492 N.W.2d 683, 685 (Iowa 1992)

Jahnke v. Deere & Co., 912 N.W.2d 136, 141 (Iowa 2018)

Noll v. Iowa District Court for Muscatine County, 919 N.W.2d 232, 234 (Iowa 2018)

Peppmeier v. Murphy, 708 N.W.2d 57, 65 (Iowa 2005)

Schark v. Gorski, 421 N.W.2d 527, 529 (Iowa 1988)

United Electrical, Radio & Machine Workers of America v. Iowa Public Empl. Relations Bd., 928 N.W.2d 101, 114 (Iowa 2019)

Woody v. Machin, 380 N.W.2d 727, 730 (Iowa 1986)

18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* section 4435, at 132-35 & 134 n.7 (2d ed. 2002)

Iowa Code Chapter 625

ISSUE III: THE DISTRICT COURT ERRED IN THE AMOUNT OF JUDGEMNT ENTRY BECAUSE THE COSTS AND EXPENSES AWARDED ARE NOT RECOVERABLE.

City of Sioux City v. Freese, 611 N.W.2d 777, 779 (Iowa 2000)

Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992)

Noll v. Iowa District Court for Muscatine County, 919 N.W.2d 232, 234 (Iowa 2018)

Winburn v. Hocksburgen, Poweshiek County Case No. LALA002187

Woody v. Machin, 380 N.W.2d 727, 730 (Iowa 1986)

Iowa R. Civ. Pr. 1.716

Iowa Code Section 622.72

ISSUE IV: THIS COURT SHOULD AWARD MERRILL AND FRESCOLN APPELLATE ATTORNEY FEES.

E. Iowa Plastics, Inc. v. PI, Inc., 889 F.3d 454, 458 (8th Cir. 2018)

Fennelly v. A-1 Mach. & Tool Co., 728 N.W.2d 163, 181 (Iowa 2006)

*Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co.,*510 N.W.2d 153, 159-60 (Iowa 1993)

In re Marriage of Okland, 699 N.W.2d 260, 270 (Iowa 2005)

In re Marriage of Wood, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997)

Williams v. Van Sickel, 659 N.W.2d 572, 579 (Iowa 2003)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case as it involves a substantial issue of first impression regarding the award of costs and expenses to confinement operators under Iowa Code section 657.11(5). Retention is further warranted as this case involves substantial questions of enunciating or changing legal principles concerning the historically liberal application of the so-called "two dismissal rule" arising out of Iowa Rule of Civil Procedure 1.943. *See* Iowa. R. App. P. 6.1101(2)(c), (f) (criteria for retention).

STATEMENT OF THE CASE

This appeal arises from and is a companion to the ongoing litigation in the Iowa District Court for Wapello County captioned *Honomichl, et al. v. Valley View Swine et al*.[1] This Court previously ruled on the interlocutory appeal arising from the summary judgment order in the same litigation entered by the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.[2]

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[1] *Morgan Honomichl, et al. v. Valley View Swine, LLC, and JBS Live Pork, LLC f/k/a Cargill Pork, LLC*, formerly captioned *Jerry Dovico, et al.*, Wapello County Case No. LALA 105144-Div. A

[2] *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 226 (Iowa 2018).

Plaintiffs-Appellants Michael Merrill and Karen Frescoln are former plaintiffs who brought an action in nuisance for the smell emanating from confined animal feeding operations ("CAFOs") operated or populated by Defendants-Appellees Valley View Swine, LLC ("Valley View") and JBS Live Pork, LLC ("JBS"), successor in interest to Cargill Pork, LLC ("Cargill Pork") (collectively "CAFO Defendants"). App. 36.

Both Merrill and Frescoln have each voluntarily dismissed their claims, once in this action and previously in a related prior action, pursuant to Iowa Rule of Civil Procedure 1.943.[3] App. 34, 275, 389.

On November 21, 2013, a group of plaintiffs (including Merrill and Frescoln) filed a petition in Wapello County against various defendants including Valley View and Cargill Pork.[4] At that time, different counsel represented the Wapello County CAFO plaintiff group. Said prior counsel did

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[3] "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 . . . . 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." Iowa R. Civ. P. 1.943 (2019).

[4] Wapello County Case No. LALA105087, App. 8.

not schedule mediation with those defendants, including CAFO Defendants here, prior to filing the nuisance petition as mandated by Iowa Code section 654B.3.[5] Prior counsel then filed the November 21, 2013 petition without attaching the mediation release therefrom as mandated by Iowa Code sections 654B.8[6] and 657.10[7]. App. 8.

Consequently, the Wapello County CAFO plaintiff group was compelled to dismiss their claims without prejudice on January 2, 2014, pursuant to Iowa Rule of Civil Procedure 1.943, in order to comply with the mandatory mediation requirements upon refiling. App. 34. This Court noted this sequence of events in its decision on the interlocutory appeal arising out

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[5] "1. a. A person who is a farm resident, or other party, desiring to initiate a civil proceeding to resolve a dispute, shall file a request for mediation with the farm mediation service. The person shall not begin the proceeding until the person receives a mediation release . . . ." Iowa Code Ann. § 654B.3 (2019).

[6] "4. If the parties waive mediation, or if a mediation agreement is not reached, the parties may sign a statement prepared by the mediator that mediation was waived or that the parties did not reach an agreement. If any party does not sign the statement, the mediator shall sign the statement. The statement constitutes a mediation release." Iowa Code Ann. § 654B.8 (2019).

[7] "Notwithstanding this chapter, a person, required under chapter 654B to participate in mediation, shall not begin a proceeding subject to this chapter until the person receives a mediation release under section 654B.8 . . . ." Iowa Code Ann. § 657.10 (2019).

of this litigation. *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 228 (Iowa 2018).

On April 2, 2014, Frescoln and Merrill, along with sixty-seven other plaintiffs residing in Wapello and Jefferson County, refiled their petition alleging nuisance claims against the CAFO Defendants arising out of their CAFOs in Wapello County. App. 36.

The CAFO Defendants filed for summary judgment on October 6, 2015, alleging they were entitled to immunity pursuant to Iowa Code Chapter 657. See CAFO Defendants Motion for Summary Judgment, Statement of Facts, Brief and Exhibit list filed October 6, 2015.

Plaintiffs moved for partial summary judgment the same day, alleging that Iowa Code section 657.11(2) was unconstitutional as applied to their claims. See Plaintiffs Motion for Summary Judgment, Statement of Facts, Brief and Exhibit list filed October 6, 2015. Merrill voluntarily dismissed his claims for the second time on June 7, 2016. App. 275. On June 8, 2016, the district court granted Plaintiffs' motion for partial summary judgment, finding Iowa Code section 657.11(2) unconstitutional as applied to their claims, and simultaneously denying the CAFO Defendants' motion for summary judgment on that issue. June 8, 2016 Ruling on pretrial motions. On June 10,

2016, the CAFO Defendants filed a motion seeking costs and expenses against Merrill pursuant to Iowa Code section 657.11(5). App. 278. Merrill resisted the motion on June 24, 2016. App. 375.

On June 13, 2016, after Merrill was no longer a plaintiff, the CAFO Defendants filed for interlocutory appeal challenging the district court's denial of their summary judgment motion. The supreme court retained the appeal. The case was captioned *Honomichl v. Valley View Swine, LLC*, No. 16-1006. Following oral argument in February 2018, the supreme court issued its opinion in June 2018. *See Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223 (Iowa 2018). The court held that an unconstitutional as-applied challenge to section 657.11 cannot be disposed of summarily through a dispositive motion finding. *Id.* at 238. Rather, "a pretrial hearing, or an appropriate motion after the submission of all the evidence at trial, allows the district court to properly balance the *Gacke* factors with the legislative purpose of the statute to protect and promote animal agriculture in the state." *Id*. Therefore, what has become known as the "*Gacke* test"[8] requires an

[8] The *Gacke* test gets its name from the case of *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168 (Iowa 2004), from which a three-pronged test has arisen with respect to constitutional challenges to statutes attempting to limit the rights of a citizen of Iowa from pursuing nuisance claims against CAFO operators.

evidentiary hearing in order to permit the district court to adequately determine if Iowa Code Chapter 657 is unconstitutional as applied to the facts of a particular plaintiff's claim. *See id.*

The *Honomichl* decision was filed July 19, 2018 and procedendo issued the same day.

Frescoln voluntarily dismissed her claims on September 24, 2018. App. 389. The CAFO Defendants moved for costs and expenses against Frescoln pursuant to Iowa Code section 657.11(5) on October 11, 2018. App. 391. Frescoln filed a resistance on October 22, 2018, which Merrill joined the same day. App. 545, 547.

On November 20, 2018, the district court heard the CAFO Defendants' motions for costs and expenses against Merrill and Frescoln. App. 1483. On December 11, 2018, the district court granted the CAFO Defendants' motions and invited them to submit requested costs. App. 1634. On February 5, 2019, JBS submitted a motion to amend or enlarge with its requested costs. App. 581 This was forty-one days after the fifteen-day deadline for a motion to amend or enlarge. *See* Iowa R. Civ. P. 1.904(2) and 1.1007. On February 8, 2019, Valley View followed suit, forty-four days late. App. 784. Merrill and Frescoln resisted the CAFO Defendants' motions as untimely.

In its Order for Hearing and Directing Proceedings entered February 18, 2019, the district court preserved the CAFO Defendants' untimely claims and recast, *sua sponte*, the motions specifically pled to amend and enlarge under Iowa Rule of Civil Procedure 1.904. February 18, 2019 Order for Hearing. The district court outlined its reasoning as follows:

> "On February 5 and 8, 2019 the defendants filed respective Motions to Enlarge and Amend. Counsel for former defendants [sic] Karen Jo Frescoln and Michael Merrill subsequently filed a Resistance citing timeliness objections. The court deems the defendants' Motions to constitute applications for quantification of the costs and expenses which were awarded to the defendants in the court's December 11, 2018 Ruling on Motions for [Costs, Expenses, and Fees]. As such, the Motions/applications now before the court are not time-barred."

After hearing on March, 22, 2019, the district court awarded costs to both JBS and Valley View on April 19, 2019. App. 1646. The Judgment Entry on Costs and Expenses assessed total costs of $9,317.27 against Merrill and $9,184.25 against Frescoln. App.1656.

Merrill and Frescoln filed timely notice of appeal on May 16, 2019. App. 1659.

STATEMENT OF FACTS

Karen Frescoln and Mike Merrill, with sixty-eight other plaintiffs residing in Wapello and Jefferson County, alleged nuisance claims against the

defendants for the CAFO buildings in Wapello County. Defendant JBS is an integrator, a supplier and owner of hogs that it places in CAFOs operated by finishers who grow the hogs to market weight. Defendant Valley View is a finisher that owns the CAFOs at issue in Wapello County, Iowa. The two CAFOs are known as Valley View Site 1 and Valley View Site 2; they became operational in August 2013 and September 2013, respectively. (Jeff Adam Dep. Tr. 25:3-10, attached as Ex. E to 10/6/15 Pls. Statement of Facts ("Pls. MSJ Facts")[9]).

Due to the large number of plaintiffs, the district court divided the claims into three divisions, A, B, and C. Both Frescoln and Merrill were placed in division A. Eventually plaintiffs filed for partial summary judgment as to defendants' affirmative defenses relating to immunity under Chapter 657. In support of their motion, the plaintiffs submitted a statement of undisputed facts. *See generally* Pls. MSJ Facts filed Oct. 6, 2015. All deposition transcripts for the plaintiffs were attached thereto as Exhibit I. Plaintiffs' statement of undisputed facts individually detailed with supporting transcript citations that: (1) each of them resided on their property before the

[9] Unless otherwise noted, the exhibits referenced herein are attached to Pls. MSJ Facts. *See generally* Pls. MSJ Facts.

CAFOs were built; (2) the CAFO Defendants' hog operations have substantially impaired the plaintiffs' use and enjoyment of the same; and (3) none have materially benefitted from Defendants' operations. Pls. MSJ Facts at 2-6.

Plaintiffs detailed these same facts in responding to the CAFO Defendants' statement of facts supporting its own summary judgment motion. October 30, 2015 Pls. Response to Def. Cargill Pork's Statement of Facts at 11-16. In arguing section 657.11 (2) was unconstitutional, Plaintiffs further illustrated how the CAFOs significantly interfere with their use and enjoyment of their property using specific examples from the deposition transcripts. Pls. MSJ at 8-10.

In denying the CAFO Defendants' request to dismiss plaintiffs' claims on the basis of immunity in section 657.11(2) (and granting plaintiffs' motion that the defenses in section 657.11(2) were unconstitutional and therefore unavailable), the district court issued summary rulings. June 8, 2016 Ruling on pretrial motions. The court did so "[i]n an exercise of judicial economy" due to the fast-approaching trial; accordingly, the court explicitly incorporated by reference "the parties' excellent, conscientious legal briefing" in their motions for summary judgment. *Id.*

The specific factual details the district court incorporated in declaring section 657.11(2) unconstitutional as applied include each plaintiffs' testimony as to the following:

KAREN JO FRESCOLN

In 2013, Karen Frescoln and her husband Robert owned and resided at the property locally known as 2256 Ash Avenue in Batavia, Iowa. App. 852, Frescoln Dep. Tr., 7:12-25. The Frescolns resided continuously on the farm from 1979 through 2013 and raised their children there. App. 853, Frescoln Dep. Tr., 8:1-3. The property is located no further than one half mile from each of the facilities. App. 924, Frescoln Dep. Tr., 79:10-15. The Frescoln property consisted of a homestead with a farmhouse on a century farm inherited from Robert's family. App. 859, Frescoln Dep. Tr., 14:8-20. Frescoln and her husband still own the farm property; her daughter, son-in-law and grandchildren now reside in her former house, but she is on the property daily as their full-time childcare provider. App. 865, 866, 927, Frescoln Dep. Tr., 20:11-20, 21:12-22, 82:19-21. Robert was never a party to the litigation due to early onset Alzheimer's. App. 999, Frescoln Dep. Tr., 154:6-10.

Frescoln smelled an "[a]lmost daily smell" on her property from the Valley View CAFOs. App. 945, Frescoln Dep. Tr. 100:4-5. Frescoln described the smell as:

> Decaying animal almost. Poop from a child's diaper type odor. Sometimes it can knock it just curls your toes, gags you, and it hangs in the air like a fog. Not every day, but enough, enough that it changes plans that you've made to be outside.

App. 945, Frescoln Dep. Tr. 100:6-12.

MICHAEL MERRILL

Michael "Mike" Merrill grew up in Packwood, Iowa, approximately ten miles north of Fairfield. App. 1147, 1153, Merrill Dep. Tr., 14:12-14; 20:18-20. He and his wife permanently settled in Batavia, Iowa in 1989, and bought their current home in 1991. App. 1151, Merrill Dep. Tr., 18:21-25. Mike has worked in automotive repair since high school, and his wife works for the Excel meat packing plant in Ottumwa formerly owned by Cargill Pork LLC. App. 1142, Merrill Dep. Tr., 9:5-14.

The Merrill home has an attached shop where Mike does automotive work in the evenings, in addition to his factory day job. Mike's home is just over three miles away from the most northerly Valley View site, and he "never noticed any odors prior to Valley View Farm -- Valley View Swine farm being built." App. 1216, Merrill Dep. Tr., 83:10-12. Mike experienced "intrusive

odors" on his property from the Valley View CAFO when the wind is out of the south-southwest and it is humid. App. 1217, Merrill Dep. Tr., 84:7-20. Mike further testified that the "smell gets intrusive" on his property, in his garden and by his koi pond. (App. 1225, 1226, 1227, Merrill Dep. Tr., 92:23-25; 93:22-25; 94:1-5. Estimating the number of days he smelled odor, Mike testified he smelled odor that interfered with his use and enjoyment of his property more than eight times a year in 2014 and six to twelve times in 2015 as of the date of his deposition on July 30, 2015. (App. 1238, 1239, Merrill Dep. Tr., 105:16-25; 106:1-25.

Both Merrill and Frescoln presented sufficient facts to survive summary judgment before the district court. Additionally, this Court noted in the *Honomichl* decision that "each of the parties presented genuine issues of material fact at the summary judgment stage that could lend themselves to a jury verdict for the nonmoving party." *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 237 (Iowa 2018).

Additional facts are identified in the argument as necessary.

SUMMARY OF THE ARGUMENT

This case highlights ongoing issues with the Iowa Legislature's efforts to shield confinement operators from nuisance claims, often at the expense of

long-time neighbors. It presents fundamental questions of public policy due to the district court's erroneous interpretation of the interplay between purported statutory immunity for CAFOs and civil procedure rules designed to encourage voluntary dismissals. As the facts imply, Merrill and Frescoln were part of efforts by former counsel for plaintiffs to maximize the number of plaintiffs beyond those traditionally involved in Iowa nuisance cases across several counties. Through no fault of Merrill and Frescoln, said former counsel failed to follow certain mediation preconditions to bringing suit and used up the first shot at voluntary dismissal under Rule 1.943. When new counsel came in and ultimately encouraged Merrill and Frescoln to voluntarily dismiss their claims, Merrill and Frescoln were left holding the bag for costs and expenses—even though there was never a trial or judgment and some of those costs and expenses originated in litigation to which Merrill and Frescoln were never parties. This was all contrary to Iowa law.

The district court erred in awarding costs and expenses of litigation to the CAFO Defendants following two lawful dismissals each by Merrill and Frescoln. "Plaintiffs should not at any time be discouraged from dismissing claims, especially ones that prove to be wholly without merit." *Schark v.*

Gorski, 421 N.W.2d 527, 529 (Iowa 1988). This Court should reverse the district court as detailed below.

Issue I states why Merrill and Frescoln's two voluntary dismissals of their claims do not constitute a "losing cause of action" for purposes of Iowa Code section 657.11(5), and that an award of costs and expenses under this provision was additionally unjustified because neither of them brought frivolous claims. Issue II sets forth the district court's error in further finding liability for costs and expense under Iowa Code Chapter 625. Issue III concerns the district court's error in the specific categories of costs and expenses awarded. Finally, Issue IV contains Merrill and Frescoln's request for appellate attorney fees.

ISSUE I: THE DISTRICT COURT ERRED IN FINDING PLAINTIFFS LIABLE FOR COSTS AND EXPENSES UNDER IOWA CODE SECTION 657.11(5) BECAUSE THEY DID NOT BRING CLAIMS AS PART OF A LOSING CAUSE OF ACTION AND THEIR CLAIMS WERE NOT FRIVOLOUS.

PRESERVATION OF ERROR

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002)

(internal citation omitted). Plaintiffs preserved error in contesting the issues and errors argued below in the following filings preceding the Judgment Entry:

- June 24, 2016 Resistance of Former Plaintiff Michael Merrill to Motion for Judgment Costs and Expenses filed by Defendants JBS Pork, LLC and Valley View Swine, LLC filed on June 10, 2016. App. 375;

- October 22, 2018 Resistance of Former Plaintiff Karen Frescoln to Motion for Judgment Costs and Expenses filed by Defendants JBS Pork, LLC and Valley View Swine, LLC on October 11, 2018. App. 547;

- October 22, 2018 Joinder of Merrill to Frescoln Resistance. App. 545;

- February 13, 2019 Resistance by Former Plaintiffs Merrill and Frescoln to Rule 1.904(2) Motions to Enlarge and Amend filed by Defendants JBS Pork, LLC on February 5, 2019, and Valley View Swine, LLC on February 8, 2019,respectively;

- March 15, 2019 Objections by Merrill and Frescoln to Motions to [Quantify Costs and Expenses] filed by Defendants [App.797, 803] pursuant to the Order for Hearing and Directing Proceedings entered February 18, 2019; and

- 2019.03.16 Notice of Errata to Objections by Merrill and Frescoln.

Plaintiffs further preserved error and contested the issues and errors argued below in hearings before the district court on November 20, 2018, and March 22, 2019. App. 1514-1549, Motion for Judgment and Costs Tr. at 32-67; App. 1596-1631, Hearing to Quantify Costs and Expenses Tr. at 32-67.

STANDARD OF REVIEW

The standard of review is for correction of errors at law. *See City of Sioux City v. Freese,* 611 N.W.2d 777, 779 (Iowa 2000) (citation omitted) (interpretation of the Iowa Rules of Civil Procedure); *Noll v. Iowa Dist. Ct. for Muscatine Cty.*, 919 N.W.2d 232, 234 (Iowa 2018) (interpretation of statutes); *Jahnke v. Deere & Co.*, 912 N.W.2d 136, 141 (Iowa 2018) (same).

ARGUMENT

When the district court found that two voluntary dismissals pursuant to Iowa Rule of Civil Procedure 1.943 constitute a “losing cause of action” for purposes of 657.11(5), it failed to read the statute as a whole. Instead, it interpreted 657.11(5) in a manner that leads to an absurd result and diverges from historic Iowa precedent encouraging dismissals to prevent vexatious litigation. *See e.g. Scharck v. Gorski*, 421 N.W.2d 527, 529 (Iowa 1988); *see also Smith v. Lally*, 379 N.W.2d 914, 916 (Iowa 1986).

This appeal requires interpretation, as a matter of first impression, of the meaning of “losing cause of action” in Iowa Code Section 657.11(5):

> If a court determines that a claim is frivolous, a person who brings the claim as part of a losing cause of action against a person who may raise a defense under this section shall be liable to the person against whom

> the action was brought for all costs and expenses incurred in the defense of the action.

Iowa Code § 657.11(5)(2019). Reading the statute as a whole, a "losing cause of action" must exist before a determination of whether the cause is "frivolous" occurs.

Costs are not available as a matter of right, but "are taxable only to the extent provided by statute." *Coker v. Abell-Howe Co.,* 491 N.W.2d 143, 151 (Iowa 1992) (citing *Gorski*, 421 N.W.2d at 528). Common law did not provide for a recovery of costs, and so "statutes providing for their recovery are strictly construed." *Id*.

Part A below sets forth why Merrill and Frescoln were not "losing" parties within the meaning of section 657.11(5), while part B shows their claims were not frivolous. As section 657.11(5) requires finding both of these elements before costs and expenses can be awarded, each one is an independent ground for reversal. Part C sets forth a third ground, namely that the district court had been divested of jurisdiction.

A.Two Voluntary Dismissals with Prejudice Do Not Constitute a "Losing Cause of Action" for Purposes of Assessing Costs and Expenses Under Iowa Code section 657.11(5).

The legislature chose to limit section 657.11(5) to claims that constitute a "losing cause of action." *See* Iowa Code § 657.11(5). The legislature *might*

have left that clause out altogether, and simply written, "If a court determines that a claim is frivolous, a person who brings the claim shall be liable to the person against whom the action was brought for all costs and expenses incurred in the defense of the action." But it didn't. And, as this Court recently recounted:

> When interpreting a statute, we look at the language the legislature chose to use, not the language it might have used. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). In other words, we cannot change the meaning of a statute, as expressed by the words the legislature used, if the words used by the legislature do not allow for such a meaning. *Id.*

Noll, 919 N.W.2d at 235. When interpreting statutes, "the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Iowa R. App. Pro. 6.904(3)(m).

Legislative intent is the primary goal of statutory interpretation. *Gardin v. Long Beach Mortgage Co*., 661 N.W.2d 193, 197 (Iowa 2003). Statutes must not be construed so as to produce absurd or impractical results, and the statute as a whole must be read and given its "plain and obvious meaning." *Id*. As this Court stated:

> "When the legislature has not defined words of a statute, we look to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage." *Gardin v. Long Beach Mortg. Co*., 661 N.W.2d 193, 197 (Iowa 2003). "[W]e

> must read a statute as a whole and give it 'its plain and obvious meaning, a sensible and logical construction.' " *Id.* (quoting *Hamilton v. City of Urbandale*, 291 N.W.2d 15, 17 (Iowa 1980)). "Generally, we presume words used in a statute have their ordinary and commonly understood meaning." *McGill v. Fish*, 790 N.W.2d 113, 119 (Iowa 2010).

Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014).

Accordingly, the words "losing cause of action" should be given their plain, ordinary and commonly understood meaning. In interpreting similar language in a different statutory scheme concerning award of costs and expenses, this Court found:

> Iowa Code section 625.1 states that "[c]osts shall be recovered by the *successful* [party] against the losing party." (Emphasis added.) Iowa Code section 625.5 states that "[a]ll costs accrued at the instance of the *successful* party, which cannot be collected of the other party, may be recovered on motion by the person entitled to them against the successful party." (Emphasis added.) The word "successful" in both statutes suggests to us that no party is entitled to costs until a judgment is recovered.

Grant v. Iowa Dist. Ct. for Hancock Cty., 492 N.W.2d 683, 685 (Iowa 1992). Although section 657.5(11) does not expressly use the word "successful," it is implied as an antonym of "losing." This Court should likewise find that "losing" means a judgment has been entered against the party on that cause of action.

Meanwhile, Rule 1.943 prohibits a plaintiff who dismisses a claim for a second time from thereafter filing again on the same claim. The purpose "is to prevent indiscriminate dismissals of actions by litigants. Repeated filings and dismissals have a harassing effect that the two-dismissal rule is designed to prevent." *Smith,* 379 N.W.2d at 916 (internal citations omitted). When a plaintiff voluntarily dismisses a claim for a second time, the rule states that the second dismissal "shall operate as an adjudication against that party on the merits." Iowa R. Civ. P. 1.943.

Here, there is no support in statute or case law for the district court's ruling that a second dismissal operates to transform Merrill and Frescoln's dismissed claims into a "losing cause of action."[10] A second dismissal does not mean that a plaintiff's claims have been rendered into a judgment that is adverse to the plaintiff, and thus a second dismissal does not result in a "losing cause of action." The district court's error affected both its Ruling on Motions and its Judgment Entry, when it held that a second dismissal equates to a loss

[10] The district court found: "A second dismissal, for any reason, under Iowa Rule of Civil Procedure 1.943 constitutes an adjudication against the dismissing party on the merits of the litigation – thus triggering the application of Iowa Code Chapter 625 on assessment of court costs and related expenses." App. 1635.

after trial allowing assignment of costs and expenses under Iowa Code Chapter 625 and Iowa Code section 675.11(5). App. 1635, 1647. Two voluntary dismissals do not constitute a "losing cause of action" under section 657.11(5).[11]

In enacting 657.11, the legislature sought to protect the CAFO industry. "'The legislature's objective of promoting animal agriculture in this state promotes the interests of the public generally and the immunity granted in this statute bears a reasonable relationship to this legislative objective' even though the statutory immunity directly benefitted animal agricultural producers." *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 235 (Iowa 2018) citing *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 178 (Iowa 2004) and Iowa Code Ann. section 657.11(1) (2019).[12] The legislative intent

[11] Plaintiffs explain why the phrase "on the merits," contained in the 1.943 "two dismissal rule" does not equate to a "losing cause of action" in Issue II.
[12] "1. The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations." Iowa Code Ann. § 657.11 (2019).

is clear and confirmed by this Court to be within the police power of the state. *Id.*

The district court's improper interpretation of 657.11(5) results in absurdity and impracticality. First, it goes well beyond any permissible legislative intent to protect the CAFO industry. This Court should not sanction any use of the police power to erode our state's well-established and well-reasoned public policy of encouraging voluntary dismissals. Second, it is actually contrary to the stated legislative intent of protecting the CAFO industry. Plaintiffs who realize during the course of litigation that their claims might not be successful may persist in protracted and expensive litigation instead of dismissing due to a fear this would subject them to fees and expenses. Instead of assisting the CAFO industry, this could lead to defense of claims that otherwise would have been dismissed. This is an absurd and impractical interpretation of the statute, and runs contrary to established supreme court precedent that plaintiffs should never be discouraged from voluntarily dismissing claims. *Gorski*, 421 N.W.2d at 529. Encouraging plaintiffs who are not confident in a successful outcome against a CAFO operator to voluntarily dismiss their claims results in a net benefit to the industry by avoiding "to the death" approaches to litigation.

Whether a claim is a winning cause or a losing cause can only be determined by entry of a judgment and a voluntary dismissal of a claim provides no means for a court to decide either way. Moreover, the district court's interpretation of Rule 1.943 and section 657.11(5) is particularly unfair when the impact operates as a punishment because the first dismissal was entirely due to the failure of plaintiffs' first counsel to comply with statutory mediation requirements, though no fault of Merrill and Frescoln.

B.Plaintiffs' Claims Were Not Frivolous.

Whether a claim is "frivolous" "is neither easily defined nor quickly recognizable," but may require both objective and subjective analyses. *Cohen v. Iowa Dist. Court for Des Moines County*, 508 N.W.2d 78 (Iowa App. 1993).

> "It can be said that in its 'objective sense' a claim or defense is frivolous if the proponents can present no rational argument based upon evidence or law in support of that claim or defense. In the 'subjective sense,' a claim or defense may be said to be frivolous if it is taken primarily for the purpose of harassing or maliciously injuring a person."

Id. (internal citations omitted). "Frivolous" is defined as "[l]acking a legal basis or legal merit," while a "frivolous suit" is "[a] lawsuit having no legal

basis, often filed to harass or extort money from the defendant." BLACK'S LAW DICTIONARY, 303 (3rd Pocket Ed. 2006)[13]

The district court erred in finding Merrill's and Frescoln's claims frivolous based on a review of the record from the 2015 summary judgment filings. App. 1634-1644. The district court purported to revisit its 2015 fact-finding analysis wherein it found enough evidence to allow Merrill and Frescoln to proceed to trial, yet used those same findings of fact to justify its contradictory 2018 determination their claims were frivolous.

Findings of fact are only binding if supported by substantial evidence. *Zimmerman v. Iowa Dist. Ct. for Benton County*, 480 N.W.2d 70, 74 (Iowa 1992). "Substantial evidence exists when "a reasonable person would find [the evidence] adequate to reach a conclusion." *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 75 (Iowa 2018) (citations omitted).

A reasonable person would not find the same evidence adequate to initially support denial of summary judgment on a nuisance claim, and later support a finding that the same nuisance claim was in fact frivolous. Such evidence cannot be reasonably characterized as substantial, or adequate,

[13] Not all losing causes of action are frivolous. As shown above, the district court should have first analyzed whether Merrill and Frescoln brought "losing causes of action."

support of two such divergent findings. Consequently, the district court erred in finding that Mike and Karen brought frivolous claims, as that finding is unsupported by substantial evidence.

C.Voluntary Dismissal by a Plaintiff Divests a Court of Jurisdiction to Determine Whether a Claim is a "Losing Cause of Action" Under 657.11(5).

Once Merrill and Frescoln dismissed their suits for the second time, they divested the district court of jurisdiction to rule on their claims. Following their second voluntary dismissals, the district court was divested of jurisdiction to assess costs and expenses of defending the action against them. *Gorski*, 421 N.W.2d at 529.

The general rule is that a voluntary dismissal by the plaintiff divests the court of jurisdiction over the controversy. *Darrah v. Des Moines Gen. Hosp*., 436 N.W.2d 53, 55 (Iowa 1989). There is a narrow exception to this rule that permits the court, upon timely motion, to issue sanctions for violations of Iowa Rule of Civil Procedure 1.413.[14] *Id*. In *Darrah*, the Iowa Supreme Court

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[14] Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause and unnecessary

reasoned that divesting courts of jurisdiction over violations of Rule 1.413 when a motion for sanctions has been timely filed would defeat the purpose of the rule. *Id.* ("In light of the sanction nature of rule 80(a) [now 1.413], 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."). The *Darrah* Court pointed out that

> Common sense tells us that neither the court nor an adverse party generally will be in a position to determine whether a pleading is subject to a rule 80(a) [now rule 1.413] sanction until after the completion of discovery. Even then, the violation may not be readily apparent until a later stage of the proceedings. If the plaintiff can terminate the ability of the court to impose sanctions by a voluntary dismissal, the rule's effectiveness would be significantly undermined.

Id. at 54.

Here, the district court declined to grant the portion of the CAFO Defendants' motions that requested sanctions pursuant to Iowa Rule of Civil Procedure 1.413. Rather, the district court ordered that "[u]nder the unique circumstances of efficient conjoiner of CAFO case preparation in Wapello

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> delay or needless increase in the cost of litigation...if a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. Iowa Rule of Civil Procedure 1.413 (2019).

County LALA105144 (Divisions A and C) and Poweshiek County LALA002187, defense costs and expenses attributable to the Merrill and Frescoln claims shall be computed fairly under Iowa Code Section 657.11 (5)." App. 1647.

Therefore, the narrow exception in *Darrah* that operates to extend jurisdiction over dismissing plaintiffs for determination Rule 1.413 sanctions is inapplicable in the case at bar. Consequently, the second dismissals by Mike and Karen divested the district court of jurisdiction to grant the CAFO Defendants costs and fees pursuant to ICA section 657.11(5), and this Court should overturn those awards in their entirety.

ISSUE II: THE DISTRICT COURT ALSO ERRED IN FINDING THAT A SECOND VOLUNTARY DISMISSAL UNDER IOWA R. CIV. P. 1.943 EXPOSES A PLAINTIFF TO ALL COSTS AVAILABLE UNDER IOWA CODE CHAPTER 625.

Preservation of Error

Plaintiffs preserved error in contesting the issues and errors argued below in the same filings identified for Issue I that preceded the April 19, 2019, Judgment Entry and at the hearings before the district court on November 20, 2018 and March 22, 2019. App. 1514-1549, Motion for

Judgment and Costs Tr. at 32-67; App. 1596-1631, Hearing to Quantify Costs and Expenses Tr. at 32-67.

Standard of Review

As with Issue I, the standard of review is for correction of errors at law. *See Freese,* 611 N.W.2d at 779 (Iowa 2000) (citation omitted) (interpretation of the Iowa Rules of Civil Procedure); *Noll* , 919 N.W.2d at 234 (interpretation of statutes); *Jahnke,* 912 N.W.2d at 141 (same).

Argument

The district court erred in finding Merrill and Frescoln liable under Iowa Code Chapter 625. Their second voluntary dismissal under Rule 1.943 did not expose them to costs under Iowa Code Chapter 625 because they were not "losing" parties. App. 1635. The district court erred in concluding "Chapter 625 does not condition recovery of court costs and allowable expenses on the occurrence of a trial." *Id.*[15] As stated in Issue I, statutes awarding costs are strictly construed.

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[15] The district court specifically stated in its April 19, 2019, Judgment Entry that "The predicate law of the case as set forth in the court's December 11, 2018 Ruling on Motions for [Costs, Expenses, and Fees], is reaffirmed." App. 1647. In the footnote thereto, the district court indicates it was assessing costs pursuant to 657.11(5), and that therefore caselaw construing what costs are recoverable are merely guidance, and not controlling. This seems to indicate that the district court is only assessing costs pursuant to

The entirety of the district court's rationale for the application of Iowa Code Chapter 625 to this case is set forth in a single sentence:

> "A second dismissal, for any reason, under Iowa Rule of Civil Procedure 1.943 constitutes an adjudication against the dismissing party on the merits of the litigation – thus triggering the application of Iowa Code Chapter 625 on assessment of court costs and related expenses."

App. 1635. The district court cited no caselaw or other support for its conclusion and did not explain its reasoning.

A second dismissal under Rule 1.943 is not the equivalent of a judgment entered against that plaintiff following trial, triggering the application of Iowa Code Chapter 625.

> "The phrase "on the merits" has been used for a long time, and is continued today ... in judicial usage.... **It is an unfortunate phrase, which could easily distract attention from the fundamental characteristics that entitle a judgment to greater or lesser preclusive effects.** **The characteristics that determine the extent of preclusion may have little to do with actual resolution of the merits, although the paradigm will always be a judgment entered after full trial of all disputed matters**. Thus it is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted… **The only virtue that redeems the "on-the-merits" phrase from oblivion is its service as**

657.11(5), and not under Chapter 625, despite its earlier ruling on December 11, 2018, that costs were recoverable under Iowa Chapter 625. Merrill and Frescoln argue both avenues for recovery are inappropriate and include an analysis of Chapter 625 costs in an abundance of caution.

> **a shorthand reminder that the extent of preclusion is measured by factors beyond validity and finality**."

Peppmeier v. Murphy, 708 N.W.2d 57, 65 (Iowa 2005) (quoting 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* section 4435, at 132-35 & 134 n.7 (2d ed. 2002) (emphasis added).

Under *Peppmeier*, Merrill and Frescoln's two dismissals operate "on the merits" only as judgments rendered "on technical or procedural grounds," and not judgments based on the evidence. *Peppmeier*, 708 N.W.2d at 65. Merrill and Frescoln are procedurally barred from refiling their claims, but they did not "lose" or have judgment rendered against them. Two dismissals have no bearing on the merits of the claim or whether it would be a "successful" or "losing" effort. Iowa Code section 625.1 limits recovery of costs to those incurred by a "successful" party "against the losing party." Iowa Code section 625.1 (2019). As noted in Issue I, this Court has interpreted section 625.1 as only entitling a party to costs after recovery of a judgment. *See Grant v. Iowa Dist. Court for Hancock Cty.,* 492 N.W.2d 683, 685 (Iowa 1992). Merrill and Frescoln did not lose under a judgment; they dismissed.

Iowa Code section 625.11, which permits recovery of "costs" against a plaintiff in a dismissed action or an action that has abated should be read as a savings statute intended to permit the court to recover costs in the event the

plaintiff fails to pay fees associated with court activity. A prime example would be court reporter fees for hearings.

It cannot be the intention of Iowa Code section 625.11 to assess costs in the present instance because that would run directly contrary to the strict interpretations of other laws dealing with costs. Costs, at least those attributable to the opposing party, are limited by statute and have been held to be only recoverable after trial. *Woody v. Machin*, 380 N.W.2d 727, 730 (Iowa 1986). Assessed costs that exceed the limitations set forth in statute are held to be error. *Coker*, 491 N.W.2d at 151.

Assessing costs and expenses attributable to the opposing party to a plaintiff who has voluntarily dismissed a claim "or any part thereof" does not harmonize with the strict interpretations of other sections of the Iowa Code and civil procedure rules dealing with costs. Statutes should be harmonized so as to not contradict themselves. *United Electrical, Radio & Machine Workers of America v. Iowa Public Empl. Relations Bd*., 928 N.W.2d 101, 114 (Iowa 2019). Interpreting section 625.11 as exposing a plaintiff to almost $10,000.00 in costs also flies in the face of the maxim set forth in *Schark* - "Plaintiffs should not at any time be discouraged from dismissing claims,

especially ones that prove to be wholly without merit." *Schark,* 421 N.W.2d at 529.

For all the foregoing reasons, the district court erred in finding any liability of Merrill and Frescoln for costs and expenses under Iowa Code Chapter 625.

ISSUE III: THE DISTRICT COURT ERRED IN THE AMOUNT OF JUDGMENT ENTRY BECAUSE THE COSTS AND EXPENSES AWARDED ARE NOT RECOVERABLE.

Preservation of Error

Plaintiffs preserved error in contesting the issues and errors argued below in the same filings listed in Issue I that preceded the April 19, 2019, Judgment Entry and at the hearings before the district court on November 20, 2018, and March 22, 2019. App. 1514-1549, Motion for Judgment and Costs Tr. at 32-67; App. 1596-1631, Hearing to Quantify Costs and Expenses Tr. at 32-67.

Standard of Review

As with Issues I and II, the standard of review is for correction of errors at law. *Freese,* 611 N.W.2d at 779 (citation omitted) (interpretation of the Iowa Rules of Civil Procedure); *Noll,*, 919 N.W.2d at 234 (interpretation of statutes); *Jahnke*, 912 N.W.2d at 141 (same).

Argument

In awarding costs and expenses to JBS and Valley View under Iowa Code section 657.11(5), the district court made multiple errors at law.

First, the district court erred when it aggregated costs for bellwether Divisions A and C of the current litigation, despite the fact that Merrill and Frescoln were not parties to and had no claims against the defendants in Division C.

Second, the district court erred when it granted JBS and Valley View costs and expenses for litigation in *Winburn v. Hocksburgen,* Poweshiek County Case No. LALA002187.[16] Merrill and Frescoln were not parties to this litigation in Poweshiek County involving nuisance claims on property neither of them owned or occupied, which were dismissed on April 5, 2016, with all costs assessed against plaintiffs therein. *See generally* April 5, 2016 Order Confirming Dismissal and Assessing Costs.

Third, the district court erred at law when it improperly ordered Merrill and Frescoln to pay both JBS and Valley View for the following costs and expenses incurred by each of those CAFO Defendants and not yet used at the trial in this matter scheduled to commence February 18, 2020:

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[16] Poweshiek County Case No. LALA002187

- the full cost of their own depositions;
- their so-called "prorated share" of:
  - the full costs of expert witness depositions, "billings" and reports for Division A and Division C of the Wapello County litigation, and the Winburn litigation in Poweshiek County;
  - JBS payments to the Special Master;
  - Division A hearing transcription expenses; and
  - Valley View expenses for the Division C jury summons and questionnaire.

App. 1648-1656.

In its Judgment Entry on Costs and Expenses, the district court assessed total costs of $9,317.27 against Mike Merrill and $9,184.25 against Karen Frescoln. App. 1656.

The district court ignored well-established precedent when finding these costs recoverable when a claim has been voluntarily dismissed. The plain language of Iowa Rule of Civil Procedure 1.716 precludes recovery of deposition costs that are not entered into evidence at trial:

> "The judgment shall award against the losing party only such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial."

Iowa R. Civ. P. 1.716 (2019).

Here, Merrill and Frescoln did not proceed to trial. Trial is not scheduled in this matter until February 18, 2020. November 28, 2018 Trial Scheduling Order. The costs of depositions are therefore not recoverable. *See* Iowa R. Civ. P. 1.716 *supra*. This plain and unambiguous language has long been interpreted to preclude the costs of depositions not offered or used at trial. "We believe this means that a cost award may include only the costs of depositions which are introduced into evidence in whole or in part at trial." *Woody v. Machin*, 380 N.W.2d 727, 730 (Iowa 1986) (emphasis added).

Costs associated with expert witnesses are similarly constrained.

> "We held that experts testifying at trial are entitled to an ordinary witness fee of ten dollars a day and their mileage pursuant to Iowa Code section 622.69, and an additional expert fee not to exceed $150 pursuant to Iowa Code Section 622.72. Experts giving deposition testimony are entitled only to the $150 fee. Taxation of costs for the doctors in excess of this amount was error."

Coker, 491 N.W.2d at 151.

All of the foregoing strictly construe the recoverable costs to be limited to those costs connected with a trial. The district court here failed to strictly construe costs statutes and instead permitted recovery of costs where no trial had occurred and is not set to occur until February 18, 2020. November 28, 2018 Trial Scheduling Order. Consequently, the district court's assertion that

"Chapter 625 does not condition recovery of court costs and allowable expenses on the occurrence of a trial" is clearly error at law. App. 1635.

Assuming for purposes of argument that voluntarily dismissing an action exposes Plaintiffs-Appellants to a "judgment for costs" as referenced in Iowa Code section 625.11, the rules of strict construction and prior caselaw limit such a judgment to "costs" due the court, and not an opposing party. Here, the district court instead solely awarded costs that were incurred by the opposing party. Costs assessed included deposition costs, transcription costs, and expert costs. Even if the supreme court determines that the "second dismissal rule" in Rule 1.943 transforms into liability under Chapter 625 and/or Iowa Code 657.11(5), the costs assessed by the district court are not recoverable against Merrill and Frescoln and should be vacated for all the foregoing reasons.

ISSUE IV: THIS COURT SHOULD AWARD MERRILL AND FRESCOLN APPELLATE ATTORNEY FEES.

Preservation of Error

This is the first opportunity Plaintiffs-Appellants have had to request appellate attorney fees.

Standard of Appellate Review

This Court maintains broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of attorney fees is not a matter of right, but rests within the appellate court's sound discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the parties' positions on appeal. *Okland*, 699 N.W.2d at 270.

Argument

The CAFO Defendants' income and ability to pay as limited liability companies far exceeds the resources Merrill and Frescoln have as private citizens, given Merrill's employment as a factory worker and part-time mechanic and Frescoln's retiree status. JBS and Valley View will continue to have a larger earning capacity than both Merrill and Frescoln in the future. Merrill and Frescoln will remain at a substantially disadvantaged economic position, especially given the funds they have had to expend for payment of cash bonds with interest to stay judgment by the CAFO Defendants.

While parties generally cannot claim for attorney fees as damages without a statutory or written contractual provision allowing such an award, an exception exists "when the losing party has acted in bad faith, vexatiously,

wantonly, or for oppressive reasons." *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 181 (Iowa 2006).

> "[T]o obtain common law attorney fees, a party must prove 'that the culpability of the [opposing party's] conduct exceeds the 'willful and wanton disregard for the rights of another' standard required to prove punitive damages. *Hockenberg Equip. Co.,* 510 N.W.2d at 159. The opposing party's conduct "must rise to the level of oppression or connivance to harass or injure another." *Id.* at 159–60. "Oppressive" conduct "denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." *Id.* at 159. "Connivance" is defined as "voluntary blindness [or] an intentional failure to discover or prevent the wrong." *Id.* (citation omitted). "These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives. Such conduct lies far beyond a showing of mere 'lack of care' or 'disregard for the rights of another.' "

Williams v. Van Sickel, 659 N.W.2d 572, 579 (Iowa 2003) (quoting *Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co.,*510 N.W.2d 153, 159-60 (Iowa 1993)).

Here, the CAFO Defendants brought all the force of their regional, state-wide, and international legal might to bear against Merrill and Frescoln. The district court awarded JBS and Valley View costs claimed from other litigation—in another county—that was dismissed or tried prior to their motions for costs and expenses against Merrill and Frescoln. Merrill and Frescoln were never party-opponents in that litigation. This "willful and wanton disregard" for their rights is "connivance" tantamount to "voluntary

blindness" by JBS and Valley View. The wrongs perpetrated by JBS and Valley View upon Merrill and Frescoln are patently "cruel and tyrannical." *See id.* Forcing any plaintiff to defend against an award of costs when discovery has not yet closed, and trial is six months away is harassment intended to cause and indeed efficacious at causing injury to Merrill and Frescoln.

When JBS and Valley View successfully used Merrill and Frescoln as vehicles for recovery from litigation that did not involve them and submitted costs and expenses to the district court from a Poweshiek County case for recovery against voluntarily dismissed plaintiffs in Wapello County, the CAFO Defendants "crossed the line' into oppressive or conniving conduct." *See E. Iowa Plastics, Inc. v. PI, Inc.*, 889 F.3d 454, 458 (8th Cir. 2018) (emphasis in the original) citing *Williams v. Van Sickel*, 659 N.W.2d at 581.

This intentional, punitive conduct by JBS and Valley View justifies an award of appellate attorney fees to Merrill and Frescoln.

Accordingly, Merrill and Frescoln request that this Court award them joint appellate attorney fees of at least $10,000.00. This sum is not unreasonable and represents approximately the amount each posted as a cash

bond to stay execution of the April 11, 2019 Judgment. An affidavit of appellate attorney fees will be filed following the submission of final briefs.

CONCLUSION

For all the foregoing reasons, this Court should reverse the district court's April 19, 2019 Ruling and Judgment on Costs because Merrill and Frescoln are not liable in the first instance for costs and expenses under either Iowa Code 657.11(5) or Chapter 625 and/or because the costs and expenses awarded against them were not recoverable under Iowa law. Costs of appeal should be taxed to the CAFO Defendants Valley View and JBS.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants respectfully request to be heard orally upon the submission of this appeal.

Respectfully submitted,

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CERTIFICATE OF FILING

The undersigned hereby certifies that I, or someone acting on my behalf, filed the foregoing Plaintiffs-Appellants' Proof Brief via the Iowa Judicial Branch EDMS system on November 1, 2019

/s/ *Ben Arato*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 1, 2019 copy of the foregoing Plaintiffs-Appellants' Final Brief was served via the Iowa Judicial Branch EDMS system to the attorneys listed below:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This proof brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this proof brief contains 9,703 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.9903(1)(g)(1).

2. This proof 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 Times New Roman 14.

Dated: November 1, 2019

/s/ *Ben Arato*