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

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FINAL REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI

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ARGUMENT

The Defendant presents an opinion-laced statement of facts intended to construe Dr. Davis' underlying claims as baseless and to cast both Dr. Davis and his counsel as negligent in their respective fields.

Dr. Davis disagrees completely with the Defendant's characterization and recitation of the factual and legal arguments of the underlying case.

Summary judgment was granted in the Defendants' favor solely on the basis of federal immunity (HCQIA), not on "fatal deficiencies" about which the Defendant now speculates the judge would have warned Dr. Davis if he had chosen to conduct a settlement conference. Def. Brief at p. 30.

The fact that the physician members of Davenport Surgical Group used their status and influence to exploit the peer review process at Genesis in order to oust Dr. Davis and evade blame for an amputation case to whom two DSG members provided care and treatment (and likely exacerbated or caused, upon arrival in the ER, the injury which resulted in amputation) prior to Dr. Davis'

involvement is simply not relevant to this writ. Dr. Davis will not waste bait on this red herring.

While this irrelevant first half of Defendant's Brief is posturing, the other half is an attempt to warp what was a standard pretrial settlement conference into some unique "case-specific" demand for mediation by the Court. This was never a mediation. It was a run-of-the-mill pre-trial conference pursuant to Iowa Rules of Civil Procedure.

Defendant's (often-repeated) argument is that a district court has the authority, "… to command parties to attend a pretrial settlement conference and its power to a sanction a party who disregarded a case-specific order setting such a mediation and commanding that party to attend personally." Def. Brief at p. 21. This statement, an amalgamation of the arguments made throughout Defendant's brief, presents a false description of the proceedings.

The Defendant emphasizes there were "*two*" orders by Chief Judge Greve, which clearly state that the parties and their attorneys were to attend. Def. Brief at p. 27-28. *Also noted* in Judge Lawson's "Ruling on Plaintiff's Motion to Rescind Sanction," at App. p. 92.

In the Defendant's own words, "The express language mandating the pre-trial settlement conference specified that lawyer attendance was not enough …." The Defendant repeatedly complains that Dr. Davis was in "non-

compliance," "disobeyed court orders," or "disregarded court orders," and "brazenly disregarded its clear settlement conference order…." Def. Brief at p. 17, 18, 21, 23, and 29.

Dr. Davis would invite the Court to *actually look* at the August 11, 2016, and January 25, 2018, "Order Setting Trial and Approving Plan." App. p. 16, 19.

These Orders appear to be template-generated documents issued subsequent to (and, in regard to the August 11th Order, filed the same day as) the "Trial Scheduling and Discovery Plan" being filed pursuant to Iowa Ct. R. 23.5. These Orders verify discovery deadlines, "settlement/pre-trial conference" and the trial date; and are obviously boilerplate notices as evidenced by the fact that both the August 11, 2016, and January 25, 2018, Orders are identical save for the dates.

The Chief Judge for the district did not individually draft and issue these orders that Defendant claims demand that *all parties and their attorneys* be present at the settlement conference. These Orders certainly do not demand (or even mention) a mediation. Other than the case number and dates, these boilerplate notices are not even case-specific.

Furthermore, the language of these Orders do not demand that, "… lawyer attendance was not enough."

The pertinent parts of these Orders (using the Jan. 25, 2018 date at App. p. 19) state:

> **SETTLEMENT/PRE-TRIAL CONFERENCE**. Settlement Conference is scheduled on 06/03/2019 at 02:00 PM at the Scott County Courthouse 400 W 4th St., Davenport, IA 52801. All parties with authority to settle must be present.

Counsel for Dr. Davis consulted with Dr. Davis extensively about what terms of settlement that were acceptable to Dr. Davis. Counsel for Dr. Davis came prepared to settle in good faith, had the authority to settle, and made sure that Dr. Davis was available by phone, if necessary. Dr. Davis complied with the requirements of all notices and orders filed before the pretrial conference. Counsel for Dr. Davis had authority to settle. Dr. Davis complied with all Orders.

Counsel for Defendants pat themselves on the back because they asked to be excused from the settlement conference. Def. Brief at p. 30-31. However, it is clear from the pleading filed that they intended to be excused from participating entirely, including both attorney and client, stating the Defendant, "… does not intend to make any settlement offer at the May 16, 2019 settlement conference … there is no chance that Plaintiff and Defendant DSG will settle … such participation would be futile and not a good use of the parties' or the Court's resources." "Defendant Davenport Surgical

Group's Unresisted Motion to Excuse Itself from Appearing at the Settlement Conference." App. p. 23.

Nothing in Defendant's "Motion to Excuse," indicates that Defendants intended to request that just her client would be excused from attendance but that the attorney still intended to attend the settlement conference.[1] In fact, counsel for Defendant even admitted to all present at the Courthouse on May 16, 2019, that she was not aware that her client was expected to be present until she was advised as such by local counsel for Genesis. Affidavit of Trent Nelson. App. p. 109. This "… Motion to Excuse Itself from Appearing" is stating that the Defendant will not negotiate or settle and does not want to attend at all. It is not some request that the client *alone* be excused.

In response the Court ruled:

> The attorney for Defendant Davenport Surgical Group PC has filed a motion to be excused from attending a settlement conference on May 16, 2019. 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. App. p. 25.

[1] This is further evidenced by the fact that on August 13, 2019, DSG filed its, "… Motion to Excuse Itself from Appearing at the Hearing Regarding Plaintiff's Motion to Reconsider, Enlarge or Amend Judgment …." App. p. 4. This time DSG's Motion was granted and neither counsel nor client appeared at the hearing.

Again, it is reasonable for an attorney to interpret that this order does not deny excusing participation of the client; this order denies excusing participation of the party *as a whole – client and attorney both*. Even if the district court *intended* to indicate that the client and counsel must both be present, the order simply does not convey that requirement. This is especially true considering common practice and the Iowa Rules of Civil Procedure. *See* Dr. Davis' Brief at p. 19-24. *See* also Iowa R. Civ. P. 1.602(1) at App. p. 99-100.

The Defendant argues at great length that the use of the term "party" can only mean the individual client – the actual name that appears in the caption. Based on a cursory look at this Court's own rules; Rule 6.905 demands that "The *parties* are encouraged to agree as to the contents of the appendix." Iowa R. App. P. 6.905(1). App. p. 105. (Emphasis added). The undersigned is not sure of the readability score of this statement, but presumably, this court did not mean this rule to apply in this case to require that Drs. Lohmuller and Davis meet in person to hash out the contents of an appendix. If so, then both parties are in violation of this mandate. *See* also Iowa R. App. P. 6.901(3), "… each party must file the party's brief." App. p. 104. *Does this Court mandate that a client file its own brief in final form for this writ?*

Similarly, Iowa R. App. P. 6.1007(2) demands the contact information of "… counsel or the self-represented party," on filings. App. p. 103. When the Court wants to make it clear that a specific individual or entity must take action, it does so. *See also* Dr. Davis Brief at p. 25. The same should be expected of the judicial districts when, contrary to the statewide Rules of Procedure, it intends to compel the physical presence of a named party in addition to counsel. This is especially true if the Seventh Judicial District intends to sanction a party for non-compliance with that rule.

The Defendant states the district court, "… convened a mandatory settlement conference pursuant to local rule …." Def. Brief at p. 17. In no court order, motion or pleading is Rule 7.1, even mentioned prior to the settlement conference taking place.

Despite the claim that the settlement conference was convened pursuant to local rule, the Defendant pays little attention to Rule 7.1 (which is published in the 7th District's "*Guidelines* of Practice and Administration") in its brief. This is because no party was compliant with Rule 7.1, and the Rule itself does not even require compulsory attendance of both counsel and client. *See* Dr. Davis' Brief at p. 31 and Guidelines of Practice and Administration Rule 7.1 at App. p. 96-98.

Rule 7.1 requires the parties to (1) conference prior to the settlement conference (Rule 7.1(A) App. p. 97; (2) file a stipulation or statement of uncontested facts (Rule 7.1(B)(1)) App. p. 97; (3) provide a schedule of all exhibits intended to be introduced at trial (Rule 7.1(B)(3)) App. p. 97; (4) provide any pretrial briefs (Rule 7.1(B)(4)) App. p. 97; (5) provide a copy of any proposed jury instructions (Rule 7.1(B)(5)). **None** of the parties (client nor counsel) complied with **any** of these requirements.

Rule 7.1(C) states:

> 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. App. p. 98.

There were four individuals named as Defendants. *See* caption at App. p. 19. Only one was present. At no place in subsection (C) does it state that attorneys and clients must be present, but rather only requires the presence of the person who has the authority to make decisions and authorize payment. App. p. 98. If a client cannot be represented by an attorney in a settlement conference in

Scott County, then the second subsection of Rule 7.1(C) – that attorneys must be prepared to disclose the extent of their authority - makes no sense.

Despite the Defendant's attempt to pivot the question in this case to a merely academic one (whether a district court has the authority to compel the actual named party in a lawsuit to appear in person at a *mediation*); Judge Lawson found that Dr. Davis and his counsel violated "Rule 7.1," stating that counsel, "… impresses the Court as being somewhat cavalier concerning the requirements of this district." App. p. 28. That is all. There is no mention of the Iowa Rules of Civil Procedure. App. p. 27-30. There is no mention of the *two* Orders. App. p. 27-30.[2] This Court must look at the bases advanced by the District Court in its decision and cannot entertain Defendant's treatises about in what other circumstances or court-ordered mediations that sanctions might be appropriate (ignoring the fact that the Court later removed the "label of 'sanction.'" App. p. 93-94.)

Furthermore, none of these various Orders or motions refer to this pre-trial settlement conference as a mediation. Not even in the district court's *two* Orders did the judge attempt to construe this as a mediation. That this was

[2] These matters were raised in the Court's later "Ruling on Plaintiff's Motion to Rescind Sanction." App. p. 91-95.

somehow actually a mediation[3], and this was made known to the parties is a fiction created by counsel as a ruse to bolster its claim that Dr. Davis was somehow expected to be present in the flesh. *See,* Def. Brief at p. 19.

The Defendant also rewrites case law.

Sterner does not endorse Rule 7.1. (Def. Brief at p. 22). Rule 7.1 was not affirmed in *Sterner*. *Id. Sterner* does not state that disregard of Rule 7.1, "… need not be condoned or excused." Def. Brief at p. 21. *Sterner* does not empower the 7th Judicial District to enforce its settlement conference policy. Def. Brief at p. 24. *Sterner* does not state that a settlement conference without the physical presence of a client renders such procedures "unproductive." Def. Brief at p. 30-31. *Sterner* was simply a challenge to the same local rule made 26 years ago, which was dismissed because it was procedurally untimely *Sterner v. Fischer*, 505 N.W.2d 490, 491 (Iowa 1993), *see Sterner* in its entirety at App. p. 106-107. *Sterner* is a six-paragraph opinion in which not even the dicta come remotely close to the arguments Defendant makes. App.

[3] Iowa Code Chapter 679C is the "Uniform Mediation Act." This Act has its own specific rules about how mediations are to be conducted. If the Defendant intended to order a mediation it should have done so invoking Iowa Code Chapter 679C just as it should have made clear that both client and counsel were expected to attend a settlement conference despite the Iowa Rules of Civil Procedure. This argument that the District Court may, without notice, arbitrarily invoke whatever power or procedure it desires without limitation or warning to the parties and with no regard for the fairness to the parties sets a dangerous precedent opening the door to abuse.

p. 106-107. These are simply false statements and indicative of the Defendant's Brief as a whole.

The Defendant then seems to advocate that Iowa case law allows a court to ignore the Iowa Rules of Civil Procedure at its pleasure – or to "regulate litigants and litigation practices and procedures by rule and order," however it pleases. Def. Brief at p. 23.

The Defendant first cites *Critelli*. Def. Brief at p. 24.

In *Critelli*, the judges of Polk County issued a new rule designed to expedite criminal cases. In Polk County at that time:

> The record shows a greater number of criminal cases are docketed in Polk County than in any other county of the state. Statistical records maintained by our administrator show 12.1 percent of all indictable criminal cases docketed in the state during 1975 were docketed in Polk County. During the same period, 21.6 percent of all trials in such cases in the state occurred in Polk County. As of November 1, 1975, when rule 26(F) was adopted, a backlog of about 800 indictable cases existed there. *Iowa Civ. Liberties Union v. Critelli*, 244 N.W.2d 564, 570 (Iowa 1976).

This Court found that this "unique local condition" justified a departure from the uniform rules, specifically to assure that criminal defendants were provided their constitutional right to a speedy trial and because Polk County faced a backlog of cases. *Id.* at 569. In considering the case in *Critelli*, the

Court suggested that, "… it would be strange if the legislature would charge the courts with a duty to implement the speedy trial provisions of s 795.2, The Code, and at the same time not expect them to adopt rules designed to expedite trials of criminal cases." *Id.*

In *Critelli*, this Court warned, "In the interest of uniformity of rules of practice in the district courts of this state, we do not encourage a proliferation of idiosyncratic local rules. At the same time, we recognize the necessity of occasional departures from uniformity because of unique local conditions." *Iowa Civ. Liberties Union v. Critelli*, 244 N.W.2d 564, 569 (Iowa 1976).

There are no such unique circumstances in this case. The Court has not identified a special need in Scott County to have a plaintiff personally attend pre-trial conferences. A pre-trial conference in Scott County does not face any unorthodox or unique challenges that are not faced by any other county courthouse in the state. Judge Lawson, plainly, just wants to do it his way. Also, *Critelli* did not involve sanctions (or reimbursement).

In *Ostergren*, also cited by the Defendant, a county attorney challenged an administrative order in Muscatine County which allowed a person protected by a no-contact order to petition the court for a modification. *Ostergren v. Iowa Dist. Ct. for Muscatine County*, 863 N.W.2d 294, 296 (Iowa 2015). The county attorney initially claimed this administrative order was a

violation of statute (as opposed to Rules of Procedure), but then, "…conceded at oral argument that this statute permits the district court to reconsider a no-contact order on its own motion, without a request from the defendant or from a protected person." *Id*. at 298.

As such, this Court found, in *Ostergren*, that, "The challenged order does not establish a right to modification or termination of no-contact orders in criminal cases; it simply creates a procedure for seeking such relief. As such, the order is well within the district court's section 664A.3(3) authority." *Ostergren v. Iowa Dist. Ct. for Muscatine County*, 863 N.W.2d 294, 300 (Iowa 2015).

As was the case in *Critelli*, this Court in *Ostergren* again, in 2015, forty years after *Critelli*, issued a warning:

> We make one final observation. Although the district court had authority to issue the administrative order at issue in this case, we again discourage "a proliferation of idiosyncratic local rules." *Critelli*, 244 N.W.2d at 570; *see also Johnson*, 270 N.W.2d at 626. This observation applies with even more force to an administrative order establishing a procedural protocol for a single county within a judicial district. *Ostergren v. Iowa Dist. Ct. for Muscatine County*, 863 N.W.2d 294, 300 (Iowa 2015).

Also, *Ostergren* did not involve sanctions.

Obviously, contrary to what the Defendant advocates, this Court has not left the barn door open on rulemaking for judicial districts. Forty-five years after *Critelli*, the Defendant could not cite a case since in which this

Court justified a deviation from the Rules of Civil Procedure (not even in *Ostergren*). Even *Critelli* involved a conflict between the Iowa Code and Rules of Procedure, which is not involved here. The Seventh District makes its own rules simply because it wants to. *See Critelli, Ostergren* and *Sterner.*

In the case at bar, Rule 7.1, in (putatively) requiring the presence of both counsel and client at a settlement conference is in direct violation of the Iowa Rules of Civil Procedure. In addition, this Court has, by rule, stated, "… the court may in its discretion *direct the attorneys for the parties* and any unrepresented parties to appear before it for a conference … Facilitating the settlement of the case." Iowa R. Civ. P. 1.602(1) (Emphasis added). App. p. 99-100. *See also* argument at Dr. Davis Brief at p. 21-22. *This* is clear and unambiguous language.

The district court, even if it intended that all parties *and* attorneys with the authority to settle be present, is not provided such discretion under the Rules of Civil Procedure. App. p. 99-101. These *two* Orders (that Defendant states explicitly demanded Dr. Davis's presence) do not state they are deviating from the Iowa Rules of Civil Procedures, nor do they demand compliance with local rules. In fact, an attorney, as counsel for Dr. Davis did, would see the demand that "All parties with authority to settle must be present," as congruent with the Rule 1.602 provision that, "… the court may

in its discretion direct the *attorneys for the parties* …. appear …," as counsel for Dr. Davis arrived vested with the authority to settle.

Dr. Davis did not violate Iowa R. Civ. P. 1.602(1), and so the sanctions Defendant now claims are warranted under Iowa R. Civ. P. 1.602(4) are unfounded, and, pursuant to 1.602(4), unjust. It is disingenuous for any party or the court to say that either Dr. Davis or his counsel deliberately and willfully disobeyed an order of the court.

The Defendant also argues, in a footnote, that Dr. Davis did not provide any evidence that the Seventh District did not seek approval for its "guidelines." Def. Brief at p. 22. If the Seventh District did not seek approval of the Court, then no evidence exists. Dr. Davis cannot prove something that did not occur. Dr. Davis could find no such evidence that the Seventh District made such an application. Dr. Davis can only state that the lack of evidence that Defendant complied, is evidence of non-compliance. It is the burden of the Defendant to show that it complied with procedural mandates for local rulemaking. The very fact that the Defendant created "guidelines" is evidence of the district's intent to evade court scrutiny. Contrary to Defendant's claim, nothing in *Sterner* endorsed Rule 7.1. *Sterner* was dismissed as procedurally untimely. *Sterner v. Fischer*, 505 N.W.2d 490, 491 (Iowa 1993), which states "We, therefore, have no jurisdiction to consider it." App. p. 107.

Throughout its brief, the Defendant argues Dr. Davis waived a number of claims.

Defendant states Dr. Davis waived "… any challenge to the District Court's inherent power to compel parties to attend pretrial conferences, including a court-supervised mediation." Def. Brief at p. 19. The Court, despite any intention otherwise, failed to compel both counsel and client to attend the pretrial conference. The Court is required; however, to follow the Iowa Rules of Civil Procedure, which only allow a Court to "… in its discretion direct the *attorney for the parties* … to appear before it …." Iowa R. Civ. P. 1.602(1). (Emphasis added). *See* Dr. Davis Brief at p. 19-24. There was no court-supervised mediation at issue. Defendant's Brief is the first time this conference was ever referred to as mediation. Dr. Davis cannot waive his right to challenge an argument or statement that has never been made.

Defendant states Dr. Davis, "… waived challenges to the inherent power of the District Court to enforce its orders and the discretion afforded to it to do so through the entry of sanctions under Iowa Rule of Civil Procedure 1.602." Def. Brief at p. 26-27, *and, also a*t p. 19. Dr. Davis disagrees. Dr. Davis particularly argued that he did not violate Iowa R. Civ. P. 1.602(1). Dr. Davis' Brief at p. 19-24. By arguing there was no violation of Iowa R. Civ. P. 1.602(1), Dr. Davis *inherently* argued he could not be sanctioned under Iowa

R. Civ. P. 1.602(5) as a result. Furthermore, Judge Lawson specifically removed, "… the label of 'sanction." App. p. 94. Therefore, there is no "sanction" to appeal. Judge Lawson did not have the authority to order this reimbursement or punitive measure. Dr. Davis' Brief at p. 38-39.

The defendants also state that, "… because Plaintiff did not challenge the amount of the sanction award, he waived argument on that point." Def. Brief at p. 26-27. Dr. Davis denies that the money awarded was a sanction. Dr. Davis' Brief at p. 38-39. However, Dr. Davis acknowledges he did not dispute any amount awarded. Instead, he disputed the award itself in its entirety.

CONCLUSION

The district court in this matter is attempting to award legal fees or reimbursement without a sanction based on the failure of a party to physically appear without any order specifically compelling that party to appear in person and based on the interpretation of a vague local rule, not approved by this Court, which exists in contradiction to standard practice and a written Iowa Rule of Civil Procedure. The Seventh District is stating all parties, clients, and counsel must be present at all settlement conferences *as a default*. This contradicts Iowa R. Civ. P. 1.602(1), which is what attorneys expect to be enforced when they walk into an Iowa courtroom. It is also what this Court

expects. *Iowa Civ. Liberties Union v. Critelli*, 244 N.W.2d 564, 569 (Iowa 1976); *Ostergren v. Iowa Dist. Ct. for Muscatine County*, 863 N.W.2d 294, 300 (Iowa 2015); and Iowa R. Civ. P. 1.1806 which 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). App. p. 102.

To be clear, Dr. Davis is not challenging some ethereal or philosophical right of the district court to generally affect justice as Defendant now tries to postulate, and, at times, simply makes up. This is a real-life concrete challenge of (1) the applicability of a local rule which is at odds with the Iowa Rules of Civil Procedure and then, only enforced against one party when no party was in compliance; and (2) whether that local rule, if *arguendo* applicable, provides adequate notice and warning to parties that both client and counsel are expected to attend settlement conference in the Seventh Judicial District of Iowa. Dr. Davis, obviously, believes Rule 7.1 is in violation of the Rules of Civil Procedure and otherwise fails to warn parties of that District's expectations. Dr. Davis asks for the relief requested.

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

1. This page Final Reply Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Final Reply Brief contains 4,217 words, excluding the parts of the Final Reply Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

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

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I, Michael M. Sellers, attorney for Plaintiff, hereby certify that I mailed one (1) copy of "Final Reply Brief In Support of Writ Of Certiorari" to the following attorney-of-record, by enclosing same in an envelope addressed to:

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