

IN THE IOWA SUPREME COURT

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NO. 22-0293

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MARCELINO ALVAREZ VICTORIANO,

Plaintiffs/Appellants,

VS.

CITY OF WATERLOO, Municipal Corporation; OFFICER C.J. NICHOLS,  
in his/her Individual and Official Capacity as  
Officer of WATERLOO POLICE DEPARTMENT,

Defendants/Appellees

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR BLACK HAWK COUNTY, IOWA  
Case No. CVCV143685  
THE HONORABLE JOEL A. DALRYMPLE

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**FINAL BRIEF OF APPELLANT  
MARCELINO ALVAREZ VICTORIANO**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE PLAINTIFF HAD AN ABSOLUTE RIGHT TO A VOLUNTARY DISMISSAL PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.943.

Cases:

*Lawson v. Kurtzhals*, 792 N.W.2d 251 (Iowa 2010)  
*Venard v. Winter*, 524 N.W.2d 163, 164 (Iowa 1994)  
*State Farm Mutual Auto Ins. Co. v. Morphey*,  
826 N.W.2d 516 (Iowa App. 2012)  
*Blair v. Werner Enterprises*, 675 N.W.2d 533 (Iowa 2004)

Statutes:

IRCP 1.943  
Iowa Code §668.5(1)  
Iowa Code §670.4A

- II. WHETHER CODE OF IOWA §670.4A(3) CONFLICTS WITH IOWA RULE OF CIVIL PROCEDURE 1.943.

Cases:

*Coleman v. Iowa Dist. Ct.*, 446 N.W.2d 806, 807 (Iowa 1989)  
*Dillon v. City of Davenport*, 366 N.W.2d 918, 922 (Iowa 1985)  
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Statutes:

IRCP 1.943  
Iowa Code §670.4A  
Iowa Code §668.11

- III. WHETHER THE COURT HAD JURISDICTION TO CONSIDER ANY LEGAL ARGUMENTS OTHER THAN THE DEFENDANTS' MOTION TO SET ASIDE THE PLAINTIFF'S VOLUNTARY DISMISSAL PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.943.

Cases:

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

Statutes:

IRCP 1.943  
Iowa Code §670.4A(3)  
Iowa Code §670.4A

### **ROUTING STATEMENT**

The Plaintiff believes this matter should be routed to the Iowa Court of Appeals because it presents no new issues for which the Supreme Court is the appropriate Court under Iowa R. Civ. P. 6.1101(3)(b). The Trial Court committed error when it deprived the Plaintiff of his absolute right to a voluntary dismissal without prejudice at this stage of litigation. Further, the Trial Court committed error when it improperly shifted the burden to the Plaintiff at hearing. Last, the Trial Court committed error when it heard, considered, and decided evidence and legal arguments on legal issues other than the Defendants' Motion to Set Aside the Plaintiff's voluntary dismissal pursuant to Iowa Rule of Civil Procedure 1.943. All of which were plain error.

### **STATEMENT OF THE CASE**

This is an appeal from a grant of Judgment on the pleadings by the Trial Court finding that 1) Code of Iowa §670.4A effective June 17, 2021, was applicable to the Plaintiff's cause of action; 2) Iowa Rule of Civil Procedure 1.943 conflicts with §670.4A and 3) based on such conflict, the Plaintiff's voluntary dismissal shall be set aside and recast to dismissal without prejudice.

## **STATEMENT OF FACTS**

This is a case of an unjustified police-involved shooting that left the Plaintiff, Marcelino Alvarez-Victoriano, paralyzed from the waist down. (App. 5-8). The Defendants are the Waterloo Police Department and Officer C.J. Nichols, who was originally named as Officer Doe. The shooting of the Plaintiff and the facts that give rise the Plaintiff's lawsuit took place on April 7, 2021.

On September 22, 2021, the Plaintiff filed his Petition at Law and Jury Demand, and on November 8, 2021, the Plaintiff filed his First Amended Petition at Law and Jury Demand. (App. 9) On December 17, 2021, the Defendants filed their Combined Pre-Answer Motion to Dismiss, to Recast or Strike, or For a More Specific Statement. (App. 13) On December 27, 2021, an Order was entered setting a hearing on the matter for January 13, 2022. (App. 19) On January 3, 2022, the Plaintiff filed his Resistance and Brief in Support of his Resistance to the Defendants' Motion to Dismiss. (App. 21-29) On January 12, 2022, the Defendants filed a Brief in Support of their Motion to Dismiss. (App. 30) Later, on January 12, 2022, the Plaintiff filed a voluntary dismissal. (App. 73) On January 14, 2022, the Defendants filed a Motion to Set Aside and Resistance to Plaintiff's Voluntary Dismissal. (App. 75) On January 18, 2022, an Order was entered setting a hearing on the matter on February 2, 2022. (App. 81) On January 24, 2022, the

Plaintiff filed his Resistance and Reply to the Defendants' Motion to Set Aside and Resistance to Plaintiff's Voluntary Dismissal. (App. 83) A hearing was held on February 2, 2022, and on February 8, 2022, the trial court entered an order on the matter dismissing the case without prejudice in one line of the Trial Court order and with prejudice in another line. (App. 94-95) The Plaintiff filed a timely Notice of Appeal on February 14, 2022. (App. 97)

#### **ARGUMENT I**

**JUDGMENT ON THE PLEADINGS WAS INAPPROPRIATE BECAUSE THE PLAINTIFF HAS AN ABSOLUTE RIGHT TO A VOLUNTARY DISMISSAL WITHOUT PREJUDICE PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.943.**

This case was resolved by Judgment on the pleadings based on the Defendants' Motion to Set Aside, and Resistance to Plaintiff's Voluntary Dismissal Without Prejudice pursuant to Iowa Rule of Civil Procedure 1.943 that was an incorrect interpretation and application of law by the Trial Court. Further, the Trial Court Ruling contained inconsistencies as to the legal conclusion of the issue at the heart of the matter; reciting the Plaintiff's case was dismissed with prejudice and dismissed without prejudice.

It is well-settled law that a plaintiff retains the right to dismiss without prejudice their own petition without order of court and the court retains no discretion to prevent such dismissal unless the action is scheduled for trial in ten days or less.

Lawson v. Kurtzhals, 792 N.W.2d 251 (Iowa 2010), Venard v. Winter, 524 N.W.2d 163, 164 (Iowa 1994). In fact, “[i]t is clear from the plain language of I.R.C.P. 1.943 that the court lacks discretion to deny a party’s motion to voluntarily dismiss ‘at any time up until ten days before the trial is scheduled to begin.’” State Farm Mutual Auto Ins. Co. v. Morpew, 826 N.W.2d 516 (Iowa App. 2012). It is clear from the pleadings and court record that the plaintiff initially filed his cause of action on September 22, 2021, and a trial date had yet to be set at the time of the plaintiff’s voluntary dismissal. Therefore, the plaintiff was well within the plain meaning of the rule.

Iowa case law has examined the potential for limitation on this absolute right in the context of cases when a defendant is prejudiced in some way by the plaintiff’s voluntary dismissal. In Blair v. Werner Enterprises, 675 N.W.2d 533 (Iowa 2004), the Iowa Supreme Court delineated the type of prejudice a defendant must be at risk of suffering in order to deprive a plaintiff of a right to a voluntary dismissal. The Court held that the prejudice “must be of a character that deprives him or her of some substantive rights concerning defenses not available in a second suit or that may be endangered by the dismissal.” Id at 537.

In coming to this conclusion, the Court examined whether a party, the plaintiff and counter-claim defendant and appellee, had a right to voluntarily dismiss his case in Iowa to join



litigation over the same motor-vehicle collision that had commenced in the state of Texas. The defendant and counter-claim plaintiff, Werner Enterprises, sought to prevent this dismissal because it had asserted a contribution claim against a third party who could not be joined in the Texas litigation due to personal jurisdiction limitations where a dismissal of the plaintiff's action would deprive the trial court of jurisdiction of the contribution claim. However, the Court found that even with the dismissal of the underlying motor-vehicle action and contribution claim, Werner would still be able to enforce a contribution claim against the party who was not subject to the court action in Texas due to principles of personal jurisdiction based on Iowa Code §668.5(1).

The Blair case closes by further discussing that the Court does recognize this right to a voluntary dismissal even with a risk of future potential or certain litigation involving the same defendant. The Court acknowledged that ordinary inconveniences such as double litigation alone do not rise to the level of prejudice to justify denial of a plaintiff's dismissal. Blair v. Werner Enterprises, 675 N.W.2d 533 at 537.

The Trial Court in this case committed error when it postured the case as "plaintiff's motion to dismiss" at the hearing and in its ruling. (App. 94). I.R.C.P. 1.943 does not require court action or order by the court to be final. This case had not been

set for trial yet. There was nothing in the voluntary dismissal without prejudice that precludes the Defendants from raising any affirmative defenses, including ones relating to §670.4A, in future actions.

## ARGUMENT II

### **WHETHER CODE OF IOWA §670.4A(3) CONFLICTS WITH IOWA RULE OF CIVIL PROCEDURE 1.943.**

The only case cited by the Defendants and by inference relied upon by the trial court in concluding that a conflict existed between Iowa Rule of Civil Procedure 1.943 and Iowa Code §670.4A was Venard v. Winter, 524 N.W.2d (Iowa 1994). In Venard, a legal malpractice case, where plaintiff missed the expert designation required under Iowa Code §668.11 and sought to dismiss his case in order to re-file his action and avoid a potentially adverse outcome from a motion for summary judgment filed by the defendant. The plaintiff re-filed his petition alleging same facts and added three new legal theories. The defendant filed a motion to dismiss the action. The Supreme Court re-stated that the trial court does not have discretion when reviewing a voluntary dismissal. Venard v. Winter, 524 N.W.2d at 165.

The Court in Venard went on to analyze the relationship between Iowa Code §668.11 and Rule 215, the predecessor to I.R.C.P. 1.943 (and specifically reviewed the language of §668.11 for language that references the requirement of dismissal for lack of compliance or that the code deprives a party of any right otherwise

available under Rule 215). The Court concluded that if that is what the legislature intended, they could have said so. Id at 167.

There is nothing to suggest I.C.A. §670.4A presents a direct conflict or intent to change existing law. Iowa law requires that unless two statutes directly conflict, the courts are to carry out the meaning and purpose of both. In re Estate of Kirk, 591 N.W.2d 630 (Iowa 1999), *citing* Coleman v. Iowa Dist. Ct., 446 N.W.2d 806, 807 (Iowa 1989), Dillon v. City of Davenport, 366 N.W.2d 918, 922 (Iowa 1985). That is easily done in this case as in the many cases that preceded it.

When viewing the case at hand and arguments relating to Code §670.4A and Venard, the current case can be clearly and plainly resolved based on the Venard holding. Just as Code §668.11 did not clearly conflict with Rule 215; I.C.A. §670.4A does not conflict in any way with I.R.C.P. 1.943. Last, the trial court here rests its Ruling on the "sentiments of the defense" and concludes that I.R.C.P. 1.943 conflicts with I.C.A. § 670.4A but provides no reasoning as to how the rule and statute conflict, and how both cannot be carried out as required by In re Estate of Kirk.

### ARGUMENT III

**WHETHER THE COURT HAD JURISDICTION TO CONSIDER ANY LEGAL ARGUMENTS OTHER THAN THE DEFENDANTS' MOTION TO SET ASIDE THE PLAINTIFF'S VOLUNTARY DISMISSAL PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.943.**

The Supreme Court has also upheld a plaintiff's absolute right to a voluntary dismissal, pursuant to Iowa Rule of Civil Procedure 215 the predecessor of Iowa Rule of Civil Procedure 1.943, even when the defendant has alleged affirmative defenses. In Witt Mechanical Contractors, Inc. v. United Broth. of Carpenters and Joiners of America, Local 772 (A.F.L.-C.I.O.), et al., 237 N.W.2d 450 (Iowa 1976), the plaintiff sought an injunction and alleged unfair labor practices in violation of state and federal law against the defendants who were picketing at plaintiff's construction site. The plaintiff posted bond upon receipt of the ex parte order. Id at 451. A week later the defendant filed a special appearance challenging the court's jurisdiction, stating that the National Labor Relations Board retained exclusive jurisdiction over matters involving labor disputes. However, after a hearing on the matter, the trial court overruled this argument stating that the labor board had not acted on the issue. Therefore, the Court's jurisdiction was proper. Id at 451. Subsequently, the defendant filed an answer denying the allegations of the plaintiff's petition and asserted federal pre-emption as an affirmative defense. Id at 451. Shortly after the defendant's answer was filed, the plaintiff filed a dismissal, requested that the injunction and restraining order be dissolved and the bond be canceled. Id at 451. The defendants filed a motion to vacate the dismissal and reinstate the action and argued it

would be prejudiced by such action. Id at 451. The Court disagreed with the defendant's contention. "The effect of such dismissal when defendant pleadings are solely defensive is final and terminates the jurisdiction of the court thereof." Id at 451.

The Defendants in the current action sought to set aside the Plaintiff's voluntary dismissal without prejudice and recast the pleading to a dismissal with prejudice based on Iowa Code §670.4A(3) titled Qualified Immunity. Qualified immunity is an affirmative defense available to law enforcement officers in civil suits. Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018). Like in Witt, the trial court in this matter had no jurisdiction to hear and consider any further argument relating to the Defendants' Motion to Dismiss filed on December 17, 2021, relating to any defense raised by Iowa Code §670.4A.

Since there was no reason to deprive the Plaintiff of his right to a voluntary dismissal pursuant to Iowa Rule of Civil Procedure 1.943 at the time of such filing, the Court was deprived of all jurisdiction of the case. Smith v. Lally, 379 N.W.2d 914 (Iowa 1986) *citing* Witt Mechanical Contractors, Inc. v. United Broth. of Carpenters and Joiners of America, Local 772 (A.F.L.-C.I.O.), et al., 237 N.W.2d 450 (Iowa 1976). Therefore, the Trial Court in this case had no authority to hear and consider any of the issues related to the Defendants' Motion to Dismiss relating

to Iowa Code §670.4A applicability to the Plaintiff's cause of action and compliance therewith.

**CONCLUSION**

The Plaintiff is entitled to a voluntary dismissal without prejudice pursuant to Iowa Rule of Civil Procedure and Smith v. Lally. There is no conflict between the newly enacted Iowa Code §670.4A and Iowa Rule of Civil Procedure 1.943 based on Venard, and the trial court had no jurisdiction to rule on any further legal issues relating to the Defendants' motions to dismiss relating to Iowa Code §670.4A.

Respectfully submitted,

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**REQUEST FOR ORAL ARGUMENT**

Appellant, MARCELINO ALVAREZ VICTORIANO, request oral argument in this matter.

Respectfully submitted,

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**CERTIFICATE OF FILING**

I, Molly M. Hamilton, hereby certify that I have filed the foregoing "Final Brief of Appellant" with the Clerk of the Supreme Court of Iowa through the ECF/EDMS System on the 9th day of June, 2022.

    /s/    Molly M. Hamilton      
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**CERTIFICATE OF SERVICE**

I, Molly M. Hamilton, hereby certify that on this same date, I served the attached "Final Brief of Appellant" through the ECF/EDMS System on the following:

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs.App.P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a monospaced typeface using Courier New in 12 characters per inch and contains 231 number of lines of text, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(2).

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