

IN THE SUPREME COURT OF IOWA

No 22-0405

Pottawattamie County No. LACV 121621

**JAHN PATRIC KIRLIN and SARA
LOUISE KIRLIN,
Plaintiffs-Appellants,**

vs.

**DR. BARCLAY A. MONASTER, M.D.,
and DR CHRISTIAN WILLIAM JONES,
M.D., and PHYSICIANS CLINIC, INC.,
d.b.a. METHODIST PHYSICIANS
CLINIC – COUNCIL BLUFFS,
Defendants-Appellees.**

PLAINTIFFS-APPELLANTS FINAL REPLY BRIEF

Kelly N. Wyman AT0013001
523 6th Avenue
Council Bluffs, IA 51503
T 712-890-0015
F 712-890-0020
kelly@kellywymanlaw.com

Dean T. Jennings
523 6th Avenue
Council Bluffs, IA 51503
T 712-256-1400
F 712-890-0019
dean@deanjenningslaw.com
ATTORNEYS FOR THE
PLAINTIFFS-APPELLANTS

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State Cases

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1 Iowa 421, 421 (1855)

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

Struck v. Mercy Health Servs.-Iowa Corp.
No. 20-1228 (Iowa Apr. 22, 2022)

ACC Holdings, LLC v. Rooney
No. 21-0479, at *2 (Iowa Apr. 29, 2022)

Blair v. Werner Enters.
675 N.W.2d 533 (Iowa 2004)

Montgomery Ward Dev. Corp. v. Bd. of Review
488 N.W.2d 436, 443 (Iowa 1992)

State Rules

Iowa R. Civ. P. 1.943

Iowa Code §147.140

**STATEMENT OF ISSUES PRESENTED
FOR REVIEW**

**1. PLAINTIFF'S VOLUNTARY DISMISSAL RIGHT
CODIFIED IN IOWA R. CIV. P. 1.943 IS ABSOLUTE.**

State Cases

*Witt Mech. Contractors, Inc. v. United Bhd. of Carpenters &
Joiners of Am., Loc. 772 (A.F.L.-C.I.O.)*
237 N.W.2d 450 (Iowa 1976)

Burlington & M.R. Co. v. Sater
1 Iowa 421, 421 (1855)

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675 N.W.2d 533 (Iowa 2004)

Montgomery Ward Dev. Corp. v. Bd. of Review
488 N.W.2d 436, 443 (Iowa 1992)

State Rules

Iowa R. Civ. P. 1.943

**2. THERE IS NO AUTOMATIC DISMISSAL
CONTAINED WITHIN IOWA CODE §147.140 REQUIRING
DISMISSAL WITH PREJUDICE UPON A DEFENDANT'S
MOTION**

State Cases

State Rules

Iowa Code §147.140

3. PLAINTIFFS' SUBSEQUENT ACTION IS NOT BARRED BY RES JUDICATA

State Cases

State Rules

ANALYSIS

1. PLAINTIFF'S VOLUNTARY DISMISSAL RIGHT CODIFIED AT IOWA R. CIV. P. 1.943 IS ABSOLUTE.

A. Argument

Contrary to Defendants argument, the conflict between Plaintiffs' absolute right to dismiss their case, and Defendants' right to dismissal with prejudice is not the end of the analysis. Defendants fail to address that they took no action upon the filing of plaintiffs voluntary dismissal without prejudice of their prior complaint.

Defendant Monaster argues that the recent Iowa Supreme Court opinion in *Struck v. Mercy* is applicable here. In *Struck* the defendant doctors did NOT timely file a Certificate of Merit. The

Court in *Struck* stated, “Failure to substantially comply with [the certificate of merit requirement] shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case.” §147.140(6). *Struck v. Mercy Health Servs.-Iowa Corp.*, No. 20-1228 (Iowa Apr. 22, 2022). The distinguishing factor in the present case is that the plaintiffs DID timely file a certificate of merit (in the first case) and the question for the court was substantial compliance. Plaintiffs exercised their absolute right to dismiss pursuant to Iowa Rule of Civil Procedure 1.943 and voluntarily dismissed their case. Defendants took no action to resist, vacate, seek sanctions or otherwise seek any relief from Plaintiff’s voluntary dismissal of the first action.

Defendants in the present case took no action. They are seeking relief that is not consistent with the case law on which they rely. For example, defendants also cite *Witt Mech. Contractors, Inc. v. United Bhd. of Carpenters & Joiners of Am., Loc. 772 (A.F.L.-C.I.O.)*, 237 N.W.2d 450 (Iowa 1976), in *Witt* the Plaintiff voluntarily dismissed its petition shortly after filing and

securing a request for a restraining order. Defendant filed a motion seeking to vacate Plaintiff's dismissal and essentially seeking to force Plaintiff to try its claims as pled. The trial court denied defendant's motion, and defendant appealed. In affirming the trial court's denial of defendant's motion to reinstate, this Court stated:

“It is well settled a plaintiff has an absolute right to dismiss his cause of action at any time before final submission thereof to the jury, or the court when the trial is without a jury. The effect of such dismissal when defendant's pleadings are solely defensive is final and terminates the jurisdiction of the court thereof.”

(emphasis supplied) *Witt Mech. Contractors, Inc. v. United Bhd. of Carpenters & Joiners of Am., Loc. 772 (A.F.L.-C.I.O.)*, 237 N.W.2d 450, 451 (Iowa 1976), *citing*, *Lunt Farm Co. v. Hamilton*, 217 Iowa 22, 27, 250 N.W. 698, 701; *Lyon v. Craig*, 213 Iowa 36, 40, 238 N.W. 452, 454; *Ryan v. Phoenix Ins. Co.*, 204 Iowa 655, 656, 215 N.W. 749, 750 (1928); *Eclipse Lbr. Co. v. City of Waukon*, 204 Iowa 278, 283, 213 N.W. 804, 807 (1927). *See also*, 24 *Am. Jur.2d, Dismissal, Discontinuance and Nonsuit*, § 6; 27 *C.J.S. Dismissal & Nonsuits* 7, p. 325. This Court again stressed the “absolute” nature of Plaintiff's right to dismiss as it has in cases as far back as 1860

(*See, Kuhn v. Bone*, 10 Iowa 392, 392 (1860)); however, in *Witt*, the Court qualified the right in the second sentence noting “when defendant’s pleadings are solely defensive.”

Where a defendant has filed a responsive cross-petition, or counterclaim, Plaintiff’s voluntary dismissal of her claim does not result in dismissal of the defendant’s claims. *Burlington & M.R. Co. v. Sater*, 1 Iowa 421, 421 (1855) (“When a defendant claims a set-off, or sets up a cross claim, or demand, the suit cannot be dismissed, so as to deprive him of his right to be heard in his cross action.”).

In this case, Defendants did not file a cross-petition or counterclaim claim. Defendants claim the filing of a motion to dismiss changed their position from solely defensive denials of Plaintiffs’ claims yielding a right of survival of Plaintiff’s absolute right to dismissal; they however failed to plead, preserve, or otherwise assert any claim of survival. Defendants motion to dismiss is not bestowed the same right of survival as a counter claim or cross claim. This argument is without merit and was not

raised at the time of plaintiff's voluntary dismissal in the first proceeding.

Further distinguishing the present case from *Witt*, the defendants in *Witt* filed a motion to vacate the plaintiff's dismissal; here the defendants did nothing when Plaintiffs filed their voluntary dismissal without prejudice on December 28, 2020 and did nothing before Plaintiff's filed their second petition on April 14, 2021. The defendants did seek any relief from the court.

In the present case the defendants continually claim they were left with no remedy to address their motion to dismiss in the first proceeding, claiming, the trial court no longer had a case in which Defendants could file a motion to seek enforcement of their claimed right to a dismissal with prejudice. Nonetheless, the same Defendants continue to cite to this court cases wherein other defendants took action to protect their rights following a voluntary dismissal by a plaintiff. **They cannot have it both ways.**

In *Witt*, the defendants filed a motion to vacate. In *Darrah v. Des Moines Gen. Hosp.*, 436 N.W.2d 53, 55 (1989) defendants filed a motion for sanctions after the voluntary dismissal.

Defendant's reliance upon *Darrah* and *Witt* is misplaced; they ask this court to treat them the same, but they all failed to seek any timely relief of these alleged rights of survival. The trial court erred in granting the defendants what he equated as *Darrah* relief.

Defendant Monaster states in the present case, Defendant filed a motion to dismiss *before* Plaintiffs attempted to voluntarily dismiss their action; and *Darrah*, on the other hand, presents circumstances in which the court retained jurisdiction to rule upon motions filed even *after* a voluntary dismissal. This distinction is inaccurate, *Darrah* defendants sought relief after a voluntary dismissal, the distinction is the *Darrah* defendants took action and immediately sought relief.

Defendants further argue if the court retains jurisdiction to rule on motions filed after a voluntary dismissal, the court retains jurisdiction to rule on motions filed prior to such dismissal. That is not the dispute before this court. The dispute is twofold, here the defendants did not seek relief from the district court to rule on any motions pending before the plaintiff's voluntary dismissal of the first case; ***and*** defendants ***only*** sought relief in a different

case, and from a court that never had jurisdiction of the claims. A look back into a different case with a different judge and at a different point in time is not the relief that *Darrah* or *Witt* stand for in precedent.

Contrary to defendant Monaster's concern that if plaintiff had an unlimited right to voluntarily dismiss their claims, and refile before adjudication, the statute would be meaningless - there is no such unlimited right. "Iowa Rule of Civil Procedure 1.943 allows plaintiffs to dismiss their petitions without prejudice and start over-once." *ACC Holdings, LLC v. Rooney*, No. 21-0479, at *2 (Iowa Apr. 29, 2022). Plaintiff's absolute right to voluntarily dismiss is not unlimited in scope or nature; but it is absolute; and this Court has so opined.

Defendant Monaster also argues that *Blair v. Werner Enters.* 675 N.W.2d 533 (Iowa 2004) conferred a right to automatic dismissal and for the court to retain jurisdiction to grant them a dismissal of the first case. In *Blair* the Court focused on the statute involved, i.e. contribution when determining if defendant would suffer a prejudice. *Blair* is also distinguished by the fact that the

defendants filed for relief in the court to seek a determination of the survival of their claims. They sought the relief from the same court and within the same proceeding following plaintiffs' voluntary dismissal. These defendants took no such action.

Defendants in the current case continue to show the court cases wherein the district courts retained jurisdiction to rule on motions after the voluntary dismissals of a plaintiff. What they fail to explain to this Court is why these defendants (all of them) failed to seek any relief from the court following plaintiffs' voluntary dismissal of the first case without prejudice. The first district court may have retained jurisdiction to hear defendants' timely motion to vacate or for sanctions, but there was no such request made by any defendant. Clearly the first district court's jurisdiction ended and the seeking of relief from the second court is in error.

“After voluntary dismissal, the case is considered "nonexistent" and the matter usually deemed "unreviewable." See *Montgomery Ward Dev. Corp. v. Bd. of Review*, 488 N.W.2d 436, 443 (Iowa 1992)”. The initiation of a later suit that had been

voluntarily dismissed is a separate civil complaint. It is a separate proceeding. Defendants should not be permitted to complain about a voluntary dismissal of the first proceeding in the new proceeding. It is not one continuous running of one claim and the second district court erred in granting relief based upon the first proceeding.

In the present case Defendants further claim they had no reason to seek post dismissal relief in the first case; claiming as far as they knew Plaintiff's had simply abandoned their claim and no further lawsuit was forthcoming. Plaintiffs filed a document titled *Voluntary Dismissal Without Prejudice*; the right retained by plaintiffs to refile could not be clearer. Defendants just failed to act upon the dismissal of the first proceeding.

2. THERE IS NO AUTOMATIC DISMISSAL CONTAINED WITHIN IOWA CODE §147.140 REQUIRING DISMISSAL WITH PREJUDICE UPON A DEFENDANT'S MOTION

A. Argument

Defendants argue Plaintiffs' first proceeding was dismissed with prejudice upon Defendant's motion. That is not true. Iowa Code §147.140 does not contain an automatic dismissal clause,

upon making an allegation of lack of substantial compliance. It requires a motion and a hearing. There is no court order of dismissal of plaintiff's initial proceeding.

When a plaintiff does file a timely certificate of merit, as plaintiffs did in this case did, pursuant to Iowa Code §147.140 it becomes a question as to whether there was substantial compliance. This requires an analysis by a Court with jurisdiction over the motion. That did not happen. Defendants sought no relief. The initial district court has never addressed the substantial compliance.

Defendants incorrectly contend Plaintiffs could not exercise their absolute right to voluntary dismissal after Defendant first had moved to have the case against them dismissed with prejudice. However, motion does not equal dismissal. The second district court ruled upon the defendant's motion to dismiss from the initial proceeding with no jurisdiction, no hearing, and no due process. It was improper for the second district court to make a substantive ruling in a case in which he never had jurisdiction, never heard evidence and on an issue not before his court.

3. PLAINTIFFS' SUBSEQUENT ACTION IS NOT BARRED BY RES JUDICATA

A. Argument

Plaintiffs' dismissal of the first case was clearly governed by Iowa R. Civ. P. 1.943, a voluntary dismissal without prejudice and plaintiff's second petition was not dismissed based on res judicata. There has not been an adjudication of the merits of the initial case.

CONCLUSION

For the reasons stated above, the District Court erred in granting Defendants' Motions for Summary Judgment. This decision by the District Court should be reversed and remanded to the District Court for trial on the merits.

PROOF OF FILING AND SERVICE

The undersigned hereby certifies that she, electronically filed the Appellants Reply Brief on the 10th day of June 2022, and further certifies that she served the Reply Brief on all other parties to this appeal via EDMS.

By: /s/ Kelly N. Wyman

Kelly N. Wyman
AT0013001

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ATTORNEY COST CERTIFICATE

I hereby certify the cost of printing the foregoing Plaintiffs-Appellants' Reply Brief was the sum of **\$0.00.**

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June 7, 2022
Date