IN THE SUPREME COURT OF IOWA

No. 23-0093

GARY DEAN JANSSEN and LARRY DALE JANSSEN,

Plaintiffs-Appellants,
v.
THE SECURITY NATIONAL BANK OF SIOUX CITY, as Executor of the Estate of Richard D. Janssen, and **SHERYL ANN COLLINS,** Individually,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF WOODBURY COUNTY
NO. ESPR055208
HON. ZACHARY S. HINDMAN

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

SMITH LAW FIRM, PLC
Tyler M. Smith (ATT 0007399)
201 9th Street NE
Altoona, IA 50009
Telephone: 515/212-4000 Facsimile: 515/869-0064
Email: tyler@smithlawiowa.com

HANSEN, McCLINTOCK & RILEY
Alexander E. Wonio (AT0008559)
Fifth Floor - U.S. Bank Building
520 Walnut St.
Des Moines, IA 50309-4119
T: (515) 244-2141
F: (515) 244-2931
E: awonio@hrmlawfirm.com

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because: This brief contains 3,733 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903.

2. This 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 based on Word 14 in Times New Roman font.

/s/ Tyler M. Smith
TYLER M. SMITH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPELLANT'S REPLY BRIEF

I. INTRODUCTION

The Defendant-Appellee Sheryl Ann Collins and Appellee the Security National Bank of Sioux City, Iowa, as Executor of the Estate of Richard D. Janssen, (hereinafter collectively referred to as "Appellees") raise the following two main arguments in their briefs: 1) Plaintiffs Did Not Comply With I.C.A. § 633.312 & Rule 1.234, and 2) The District Court Did Not Retain Authority To Hear The Case Even In The Absence Of Strict Compliance With I.C.A. § 633.312. For the reasons stated below and in the Initial Brief of Plaintiffs-Appellants ("Initial Brief"), Appellants reaffirm the arguments stated in their Initial Brief, and respectfully submit that the trial court's decision should be reversed.

II. ARGUMENT.

"Defendant cannot have the benefit of self-created error. As we said in *Hackman*: 'it is elementary a litigant cannot complain of error which he was invited or to which he has assented.'"

Knudsen v. Merle Hay Plaza, Inc., 160 N.W.2d 279, 285 (Iowa 1968)(internal citation omitted); *Hackman v. Beckwith*, 245 Iowa 791, 800, 64 N.W.2d 275, 281; *Horsfield Const., Inc. v. City of Dyersville*, 823 N.W.2d 418 (Iowa App. 2012)(Table).

A. PLAINTIFFS COMPLIED WITH IOWA CODE §633.312 BY SERVING SHULTZ WITH NOTICE AND JOINING HER AS A DEFENDANT.

Both the Appellees and the Trial Court's Ruling (App. p. 847) failed to recognize a critical distinguishing factor between the cases cited and the present case. In this case, Debra Collin's (hereinafter "Debra") status was as a party joined who was served with notice. Meanwhile the status of the parties in the cases cited in the Order were ***never*** joined in the action and were ***never*** served with notice. In each of the cases cited in the Order, remand or new trial was required by the fact that those parties were never joined or served. *See* Order re: Post-Trial Motions (App. pp. 861-866); *Ussery v. Terry*, 201 So. 3d 544 (Ala 2016) (beneficiaries specified in a Will were never joined in the action or served with the lawsuit), *True Matter of Last Will and Testament of True*, 220 So. 3d 276 (Miss. Ct. App. 2017) (beneficiaries under the Will were never joined as parties or served with the lawsuit), *Goedke Moll v. Goedeke*, 25 N.E.2d 258 (Ind. Ct. App. 1940) (beneficiaries under the Trust were never joined as parties or served with the lawsuit), *Machovina v. Machovina*, 5 N.E.2d 496 (Ohio 1936) (beneficiaries to a subsequent estate planning instrument were proper but not necessary parties-no joinder and no service was made on them), *Shehan v. Shehan*, 934 S.W.2d 254, 257 (Ky. 1996); (residual beneficiaries were indispensable parties to an appeal after concluding they would be necessary parties on any remand-they had not been joined or noticed), *Baca v. Baca*,

388 P.2d 392 (neither sole beneficiary nor his personal representative after death were joined or served), *Burke v. Kehr*, 826 S.W.2d 855 (Mo. Ct. App. 1992) (court assessed whether specific devisees were indispensable parties after they had not been joined or served notice), *Rice v. Seventeen Twenty* Associates, No. 99-0424, 2000 WL 278752 (Iowa Ct. App. Mar. 15 2000) (parties interested in the land at issue never joined or served). *See also* Order re: Post-Trial Motions, p.10 (citing *Brown v. Kay*, 889 F. Supp. 2d 468, 488 (S.D.N.Y. 2012), aff'd, 514 F. App'x 58 (2d Cir. 2013) (requiring joinder of an heir not previously joined or served)).

This incorrect classification of Debra's status, from the outset, misguided the Court's analysis of her station in the litigation and the impact of her consented dismissal on any interests she had in the litigation.

This same distinction between parties joined and served with notice, versus those who were not, distinguishes the *Ditch* case. In *Ditch*, as with all the other cases supportive of the conclusions in the Order, the absent parties who were considered indispensable were never joined in the lawsuit, never participated in the lawsuit, and were never served notice of the lawsuit.

As the Court details in its Order re: Post-Trial Motions, the *Ditch* case stands for the proposition that an indispensable party issue, involving absent

parties who were not joined to the action and not served with notice, may be raised for the first time on appeal and, thereafter, the case should be remanded to join and serve the indispensable parties for the first time. (App. p. 863). Again, the cases cited by the Court all fall in the same line: contemplating parties never before the Court: *Crisman* (contractor was indispensable party and was never joined or served), *Cox* (eight indispensable property owners were ordered joined on remand after they were never joined or served with notice), *Whitmer* (Court ordered Pleasant Hill District be added as a defendant on remand after they had not been joined or served in the action), *Crosby* (Court ordered individual attempting redemption to be joined as a party on remand after he was not joined or served notice to the action), *Brown v. Vonnahme* (reversing judgment where no indispensable parties were ever joined in action affecting homestead rights). The Court's Order thereafter adopted this as the "*Ditch* rule." (App. pp. 864-865).

The Court then cited a more recent application of this "*Ditch* rule" in the *Rice* case. As the Court summarized *Rice*: "The defendant, for the first time on appeal, argued that the owner of a neighboring lot **who had not been joined in the action** was an indispensable party." (App. p. 864), (emphasis added) In *Rice*, the Court of Appeals of Iowa cites to *Ditch* only for the proposition that indispensable party issues can be raised for the first

time on appeal in certain circumstances (notably this case did not contemplate will contests under the probate code). It does not otherwise inform the analysis in this case. As with the other cases cited, this case specifically contemplated two parties to an easement as indispensable parties who had never been joined or noticed.

The Court does offer one case where parties were joined and served, and later determined to be indispensable parties: *Florida Land Rock Phosphate v. Anderson,* 39 So. 392 (Fla. 1905). (App. p. 866) In that case party defendants had been joined and served, and participated to a limited extent, before they were dismissed. On appeal, the reviewing court, sua sponte raised the issue. However, this case is distinguishable in many material ways. First, there was significant confusion as to their status in the case throughout[1]. The Supreme Court of Florida indicated that the purported dismissal of the defendants was flawed and, more to the point, the **absent defendants were the direct targets of the claimed fraud**. *Florida Land Rock Phosphate Co. v. Anderson,* 50 Fla. 501, 514 (1905)("An examination of the bill discloses that these absent defendants are directly charged with fraud and with having made a fraudulent conveyance.")(emphasis added).

[1] The Court was so critical of the confusing pleadings, it considered dismissing the case in its entirety.

This would be analogous to this case proceeding on the claim of undue influence without the accused, Sheryl, but is not analogous to the present matter as there are no claims being made directly against Deb (in fact the Partial Dismissal makes clear that only the claims made against Deb are dismissed; the others remain unchanged[2]).

Notably, the Court does identify an Iowa case wherein a beneficiary under a Will was made a party and later dismissed; his rejoinder was later denied. *James v. Fairall*, 148 N.W. 1029 (Iowa 1914). Despite no overruling or contrary authority, the Court dismisses *James* as being "no

[2] To the Appellants' surprise, after the parties consented to, and the Court accepted, the dismissal expressly limited to only those claims made against Debra individually, the Court later recast it as a global dismissal. At hearing, the Court approvingly characterized the Partial Dismissal as the "types of litigation decisions like this made by attorneys," "litigation strategy," or "tactical reason." (App. p. 1103) But, in the Court's later ruling, its view of this decision somehow morphed into "shenanigans" supposed to ambush the Defendants. The Court's post-trial u-turn on this is disappointing for two reasons: (1) The Court previously raised this exact issue—expressly for Defendants' benefit—in a Ruling (Order Denying Directed Verdict dated Nov. 6, 2019 p. 9) more than eighteen (18) months before trial, and (2) Not once during the multiple hearings held on this issue did the Court suggest any reservation or give Plaintiffs an opportunity to address whatever speculations the Court might have had, if any. More than anything, the timing of the Partial Dismissal was the result of an eve of trial meeting Plaintiffs' counsel were able to secure with the forewoman from the prior trial. This meeting shed light on the challenges in presenting the individual claims against Debra. The insinuation that this decision was made anytime in advance of that meeting, or for any other purpose, is simply inaccurate and purely speculative. (Sept. 16, 2021 hearing Tr. 78)

longer good law." (App. pp. 866-867, fn. 2) in so doing the Court reasons: "But this case is inconsistent with the more recent cases cited in this ruling that state an indispensable party issue may be raised for the first time on appeal, and which suggests the court should address such an issue *sua sponte*." *Id.* This is where the Court forcibly classifies all of these cases together, despite their material factual distinctions.

The *Ditch* case (*Ditch v. Hess*, 212 N.W.2d 442 (Iowa 1973)), and the others identified as "more recent cases" do not address the situation of a party who has been joined, who was served with notice, and who had materially participated in the litigation. The *James* case is the only case cited by the Court in its Order that contemplates such a scenario and the Court was not compelled to take any action. The *James* case is not inconsistent with *Ditch*; it applies to a different fact pattern. Other authorities support this distinction.

The *Provident Tradesmens* case, an often-cited case from the Supreme Court of the United States on the indispensable party issue weighs in as follows: "When necessary, however, a court of appeals should, on its own initiative, take steps to protect and absent party, who of course had ***no opportunity*** to plead and prove his interest below." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102,

111 (1968)(emphasis added) In ultimately passing on whether or not the absent party was estopped from raising the issue because he was afforded adequate opportunity to intervene (because the Court found no prejudice to his interests), the Supreme Court stated:

> At that point it might be argued that [absent party] should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, [absent party] is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered by the Court of Appeals vanishes, for any rights of [absent party] have been lost by his own inaction.

Id. at 114. These comments from the Supreme Court are important in this analysis for many reasons. First, they make clear that the indispensable party issue is waivable. Second, this commentary suggests that substantial compliance, as little as an "opportunity" to intervene, is sufficient to satisfy the requirement to join indispensable parties. Third, it makes clear that the facts and circumstances of a given case control and not some rigid application of mechanical law. Finally, and most importantly, the Supreme Court is clearly delineating a bright line between those absent parties who were never joined and never served notice. *See also*, *J.R. McClenney & Son, Inc. v. Reimer*, 435 So.2d 50, 52 (Ala. 1983) (Court concluded it would be inequitable to vacate a judgment on defendant's

indispensable party motion when the absent party could have been made a party and defendant was readily aware of its absence-opportunity).

Where the *James* case teaches that a party once joined to a will contest and later properly dismissed does not require re-joinder, the *Ditch* case, properly interpreted, represents the converse—that failure to ever join a necessary party compels joinder of the absent party. The District Court improperly overturned *James* and with it this critical distinction, resulting in two points of reversible error.

B. THE DISTRICT COURT ERRED IN FINDING THAT IT DID NOT HAVE AUTHORITY TO HEAR THE CASE EVEN IN THE ABSENCE OF STRICT COMPLIANCE WITH IOWA CODE § 633.312.

In addition to the arguments advanced by the Appellant in their initial brief, it is important to also note that both the Appellee's briefs and the trial court's order in this case fail to recognize the well-settled, general rule that if jurisdiction exists at the time when the action was brought, it cannot be ousted by subsequent events. *See In re L.C.S.C.*, 725 N.W.2d 659 (Iowa Ct. App. 2006)(citing, *In re H.G.*, 601 N.W.2d 84, 86 (Iowa 1999) ("Subject matter jurisdiction cannot be ousted by the parties or by any procedures employed by the parties during the course of the proceeding."); *State ex rel. Iowa State Highway Comm'n v. Read*, 228 N.W.2d 199, 202 (Iowa 1975);

Grant County Deposit Bank v. McCampbell, 194 F.2d 469, 31 A.L.R.2d 909 (6th Cir. 1952) *citing Mullen v. Torrance*, 9 Wheat 537, 539, 6 L.Ed. 154 (1825); *Kirby v. American Soda Fountain Co.*, 194 U.S. 141, 24 S.Ct. 619, 48 L.Ed. 911 (1904); *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U.S. 48, 64, 43 S.Ct. 51, 67 L.Ed. 124 (1922).

Moreover, at least two states have specifically held that nonjoinder of parties is not a jurisdictional defect. For example, the *In the Interest of B.Y.B.*, No. 09-22-00402-CV, Court of Appeals of Texas, Ninth District, Beaumont, April 27, 2023, p. 9-10), the Court of Appeals of Texas held that ". . . [N]onjoinder of parties is not jurisdictional. . ." Likewise, under California law, "Failure to join an indispensable party is not a jurisdictional defect in the fundamental sense; even in the absence of an indispensable party, the court still has the power to render a decision as to the parties before it which will stand. It is for reasons of equity and convenience, and not because it is without power to proceed, that the court should not proceed with a case where it determines that an indispensable party is absent and cannot be joined." (*Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1358.) (internal quotations omitted).

Moreover, the Appellant argued in its Initial Brief that non-subject

matter jurisdictional defects can be averted via consent, waiver, or estoppel. (Initial Brief, p. 22) (See, e.g., *O'Kelley v. Lochner*, 259 Iowa 710, 716, 145 N.W.2d 626, 630 (1966) ("(O)ne who invokes or consents to a court's jurisdiction is estopped to question it on any ground Other than lack of jurisdiction of the subject matter."). The doctrine of estoppel described above *O'Kelley* is closely linked to, and occasionally even referred to, as the doctrine of invited error. *See, e.g., Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 87 Cal.Rptr.2d 453, 21 Cal.4th 383, 981 P. 2d 79 (Cal. 1999) ("The 'doctrine of invited error' is an 'application of the estoppel principle'") and *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005) (discussing estoppel and explaining the "invited error" doctrine). As will be shown below, it is well-settled law that a party cannot later complain of errors which it has committed, invited, induced the court to make, or to which it consented. And in the present case, because the parties who were dismissed from the case either did so voluntarily, or consented to their dismissal, they cannot now complain that such dismissal was done in error. There is a wealth of law on this issue across all jurisdictions in the United States. What follows below, is just a sampling of such law:

In *International Travelers Cheque Co. v. Bankamerica Corp.*, 660 F.2d 215 (7th Cir. 1981), the Seventh Circuit Court of Appeals held that

because the Plaintiff conceded that Bank of America was an indispensable party in the trial court, it could not complain that Bank of America was not an indispensable party when "any error was of its own making." Likewise, in *Thunderbird, Ltd. v. First Federal Sav. and Loan Ass'n of Jacksonville*, 908 F.2d 787 (11th Cir. 1990), the Eleventh Circuit Court of Appeals observed that based upon this rule, "Appellant, therefore, may not complain on appeal of the alleged error they themselves induced or invited; nor do we find any manifest error that would lead us to deviate from this principle."

Also, in the case of *In re BYB, supra*, the Court of Appeals of Texas held that where the Appellant failed to raise the issue of an indispensable party at trial, estoppel bars the argument on appeal. "Judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage. The doctrine functions to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage, and precludes a litigant from requesting a ruling from a court and then complaining that the court committed error in giving it to him."

Similarly, where a party was added to case by Plaintiff as an "indispensable party," and then later complained about by Plaintiff on appeal, the Georgia Court of Appeals held that "[A] party will not be heard

to complain of error induced by his own conduct, nor to complain of errors expressly invited by him during the trial of the case." *Nowlin v. Davis*, 245 Ga. App. 821, 822 538 S.E.2d 900, 901 (Ga. App. 2000). Moreover, Texas and California courts have held that the failure to raise the issue of indispensable party at trial results in waiver of argument on appeal. *See Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1126; *In the Interest of B.Y.B.*, No. 09-22-00402-CV, Court of Appeals of Texas, Ninth District, Beaumont, April 27, 2023, p. 9-10). Finally, and maybe most importantly, is that at least one non-Iowa court has held "that the doctrine of invited error ... can preclude even plain error review.')." *See State v. Moa*, 282 P.3d 985 (Utah 2012).

Of course, none of the above-cited cases are binding precedent in Iowa. Nevertheless, the doctrine of invited error has been the law in Iowa for at least 100 years or more. What follows is just a sampling of the Iowa caselaw affirming the doctrine:

- *Remington v. MacHamer*, 192 Iowa 1098, 186 N.W. 32 (Iowa 1922)("Having invited the error, if any there was, defendant may not now take advantage of it.")
- *Hackman v. Beckwith*, 245 Iowa 791, 800, 64 N.W.2d 275, 281, (1954); *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632,

46 A.L.R.3d 636 (Iowa 1969) ("[I]t is elementary a litigant cannot complain of error which he has invited or to which he has assented.")

- *Knudsen v. Merle Hay Plaza, Inc*., 160 N.W.2d 279, 285 (Iowa 1968) (“Defendant cannot have the benefit of self-created error....”)
- *State v. Washington*, 257 N.W.2d 890, 893 (Iowa 1977), cert. denied, 435 U.S. 1008, 98 S.Ct. 1881, 56 L.Ed.2d 390 (1978) (party to a criminal proceeding may not complain of error where he himself has acquiesced in, committed, or invited the error)
- *Jasper v. State*, 477 N.W.2d 852 (Iowa 1991) ("Applicant cannot deliberately act so as to invite error and then object because the court has accepted the invitation.”);
- *State v. Jensen*, No. 7-466/06-0879 (Iowa App. 10/12/2007) (Iowa App. 2007) ("In general, a defendant may not complain of a self-inflicted wound")
- *Horsfield Constr., Inc. v. City of Dyersville*, 823 N.W.2d 418 (Iowa App. 2012) (“It is elementary a litigant cannot complain of error which he has invited **or to which he has**

assented.")(quoting *Knudsen v. Merle Hay Plaza, Inc*., 160 N.W.2d 279, 285 (Iowa 1968))

Nevertheless, in spite of this century-long history of the application of judicial estoppel and the doctrine of invited error, the trial court's ruling creates a process whereby parties can consent to their own dismissal, try the case to verdict, and, only after losing, raise an alleged error to which they fully participated and assented—to invalidate the entire proceeding and provide that party a do-over. The incentivizing of this assent-and-object approach is precisely what the doctrine of invited error was designed to prevent.

III. CONCLUSION

For the reasons stated above, as well as for the reasons stated in Appellant's Initial Brief, this Court should reverse the decision of the district court and direct it to enter a judgment in accordance with the jury's verdicts on both the invalidity of the Decedent's 2018 will and the award of tortious interference damages against Sheryl Collins, and to proceed accordingly.