IN THE SUPREME COURT OF IOWA

MATTHEW KRAUS,	)	**Supreme Court Number: 23-2069**
PETITIONER,	)	**CDDM008294**
AND CONCERNING	)	
MOLLY KRAUS,	)	
RESPONDENT.	)	

APPEAL FROM THE DISTRICT COURT FOR DELAWARE COUNTY
THE HONORABLE THOMAS BITTER

APPELLANT'S AMENDED BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Ruling entered by the District Court should be reversed or this case remanded with instructions because:

I. **THE COURT ERRED IN DISMISSING THE MODIFICATION ACTION AS A SANCTION PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.413**

II. **THE COURT ERRED IN ORDERING MATT TO PAY MOLLY'S REQUEST FOR ATTORNEY FEES**

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court and not routed to the Iowa Court of Appeals pursuant to the criteria of Iowa R. App. P. 6.1101(3)(a) (2015) as a case which involves questions not previously decided – can I.R.Civ.P. 1.413 be used to dismiss a family law Modification action pursuant to a Motion for Sanctions?

Nature of the Case

Matt filed Petition to Modify child custody and visitation. D0147 (01/12/23). Matt appeals the District Court Order Granting Motion for Sanctions and dismissing the child custody Modification Petition, dated October 3, 2023 and orders on 1.904(2) dated November 1, 2023 and Order for Judgment denying 1.904(2). DO.0160 Mtn. Sanctions (8/24/23). DO.0189 Order Dismissing (10/23/23), DO.0192 Mtn. 1904(2) (10/23/23), DO.0196 Order for Judgment (denying 1.904(2) and Ordering Attorney Fees) (12/1/23). Matt timely filed a Notice of Appeal on December 18, 2023. DO.0197 Notice of Appeal (12/18/23).

STATEMENT OF FACTS

Matt is 30 years old and is the father of two boys, 12 years old and 9 years old, who attend Western Dubuque schools. D0201, Tr. at 2:24-25, 3:6-11. Matt and Molly were divorced in 2022. D0201, Tr. at 3:3-7. Matt

and Molly entered into a custody agreement and consented-to-decree, whereby Matt has visitation and Molly has primary care. D0201, Tr. at 5:7-25. Shortly after the Decree (November) was entered Matt mentioned to Molly that he wanted to change the Decree (December) and then filed for a modification in January 2023. DO.143 Petition to Modify (01/12/23). D0201, Tr. at 6:15-17, 7:25 to 8:12. Molly did not know Matt's precise reasons for wanting a change until after counsel exchanged emails January 18, 2023, Matt's attorney answering Molly's attorney's request for a statement of the reasons to modify, following filing of the Petition. DO.143 Petition to Modify (01/12/23). D0201, Tr. at 9:20 to 10:16. DO.0185, Exh.2-S (Admitted only as to Offer of Proof) Matt was requesting a change but Molly testified that she had not been advised by him that he was concerned about a gun threat at school until the attorney email exchange in January of 2023. D0201, Tr. at 12:7-14.

Molly was not contacted by the school or teachers about any threat and maintained that Matt had not raised this with her in any way. D0201, Tr. at 13:15-18. Molly agrees that Matt did bring up his concerns after the filing on January 18, 2023. D0201, Tr. at 24:8-19. D0165, Exh.MM. DO.0185, Exh.2-S. Molly denied that there had been a substantial and material change in circumstances. D0201, Tr. at 23:16-21. At the time of the hearing on the

Motion for Sanctions mediation had not yet occurred but was scheduled. D0201, Tr. at 26:17-27.

In part Matt filed to modify because his prior attorney had "misrepresented how much" he makes. D0201, Tr. at 36:19 to 37:2. Matt was requesting a trial to modify care, visitation, child support and medical support. D0201, Tr. at 4:1-15. At the hearing on Motion for Sanctions Matt testified that the statement made to him by both his sons concerned him regarding safety. D0201, Tr. at 44:16 to 45:12. Matt's counsel offered 2-S, which was admitted only under an Offer of Proof, the Court ruling that the exhibit did not comply with the order for offer prior to hearing and that such was not a rebuttal exhibit. D0201, Tr. at 49:15 to 51:16. This exhibit was the email exchange between counsel after filing to show that the request for 'what the change in circumstances was' was immediately responded to and what the reasons given were. D0201, Tr. at 49:15 to 51:16. Following testimony the attorneys and the Court conducted an involved exchange on the record as to the request to dismiss as a sanction. D0201, Tr. at 62:2 to 87:19. Following trial the Trial Court judge afforded the attorneys the opportunity to submit a "Brief of Authorities" to the Court – said emails are attached to Matt's November 1, 2023 Motion for 1.904(2). DO.0192 Motion 1.904(2) and Attachment (11/1/23).

Molly testified that she had paid a "few thousand in attorney fees" but did not know the number. D0201, Tr. at 27:7-22. Following hearing and ruling the Court ordered Matt to pay $7226.65 in attorney fees plus interest of 7.33%. DO.196. Order for Judgment at 1 (12/01/23).

ARGUMENT I

THE COURT ERRED IN DISMISSING THE MODIFICATION ACTION AS A SANCTION PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.413

Standard of Review:

The standard of review of district court's decision on whether to impose sanctions is typically for an abuse of discretion. *Mathias v. Glandon,* 448 N.W.2d 443, 445 (Iowa 1989). Citing *Barnhill v. Iowa Dist. Court for Polk County,* 765 N.W.2d 267, 271 (Iowa 2009). "Although our review is for an abuse of discretion, we will correct erroneous application of the law. *Weigel v. Weigel,* 467 N.W.2d 277, 280 (Iowa 1991). The district court's findings of fact, however, are binding on us if supported by substantial evidence. *Zimmermann v. Iowa Dist. Ct.,* 480 N.W.2d 70, 74 (Iowa 1992)." *Barnhill* at 271. "We give deference to the district court, who 'is in the best position to evaluate counsel's actions and motivations" when deciding if counsel has breached the "fine line ... between zealous advocacy and frivolous claims." *In Re Marriage of Cickavage*, 978 N.W.2d 806, at 7

(Table), (Iowa Ct.App. 2022) (*Cickavage I of III)* at 7, quoting *Barnhill* at 279. If this were an equity question (Family Law) then the standard would be *de novo* but the Case Law does not directly address this question of reviewing a 1.413 Attorney Sanction motion in a Motion to Dismiss a family law matter (modification).

Preservation of Error:

Matt filed a Resistance to the Motion for Sanctions, resisted the motion at the hearing, emailed (as requested by the Court) a Brief of Authorities, and filed a 1.904(2) motion following the Order re: Motion for Sanctions (hereafter "Order Dismissing") . DO.0162 Resistance Mtn.Sanctions (08/28/23), DO.0192 Motion 1.904(2) and Attachment (11/1/23), DO.0189 Order Dismissing (10-23-23).

Applicable Law:

Our Iowa Case Law suggests that the question of the application of Iowa Rule of Civil Procedure 1.413 in Family Law is a rarely appealed issue, but 1.413 to dismiss a Modification of Child Custody appears to be a case of first impression (Note: the Rule specifically relates to the signing by an attorney). The Rules of Evidence are enforced differently in Juvenile Court, District Court in Family, and then most strictly applied in at-law cases in district associate and district Court – same rules used to different

extents based on the area of law. Similarly the Hearsay rule is enforceable in the determination of Child Custody issues but otherwise *in equity* in family law the Rules of Evidence are relaxed. The rule of thumb is that objections are used in Family Law (*in equity*) but much outside of hearsay will come in subject to the objection and the evidence (exhibit or testimony) will be 'given the appropriate weight by the Court.' (admitted but then given weight the court deems appropriate).

The Motion for Sanctions here under Iowa Rule of Civil Procedure 1.413 is treated more as a Motion for Summary Judgment as the requested relief by Respondent is dismissal on the merits of the Petition. DO.0143 Petition (01/12/23). The case law here in Iowa involving review of a 1.413 award or denial (a review for abuse of discretion) is comprised of contract and product liability cases, with a few exceptions. *Barnhill* is a roofing lawsuit where counsel was sanctioned by the Court in the amount of $25,000 and the Supreme Court review the 1.413 question centers on counsel alleging warranty claims and tort claims / theories against the defendants concluding therein that, in criticizing counsel's citation regarding the basis of the claim that "[n]o reasonably competent attorney would conclude […] that a breach of warranty can be based on a tort theory." *Barnhill* at 274.

The attorney used a theory in the petition that the Court found was not something a competent attorney would rely on. *Barnhill* does not stand for dismissal of family law modification petitions. In fact *Barnhill* identifies the use of 1.413 to "discourage meritless suits" but that the Rule "is not meant to stifle the creativity of attorneys or deter attorneys from challenging or attempting to expand existing precedent." *Id.* at 276, 279. As to the attorney (Barnhill) in *Barnhill*, the Court further found that the district court therein was "frustrated with Barnhill's trial tactics and lack of candor and forthrightness, both of which led to the extension of the proceedings and increased legal expenses incurred by [the defendants]." *Id.* At 278.

In *Rowedder v. Anderson* the Iowa Supreme Court in a 2012 opinion affirmed sanctions under 1.413 as "partial reimbursement of the legal fees they incurred in defending against unfounded claims brought against them." *Rowedder v. Anderson*, 814 N.W.2d 585, 592 (Iowa 2012). *Rowedder* was an action against purchasers of real property, not a Family Law case, and was a case that three years after the filing of the petition was filed proceeded to a jury trial. *Iowa Supreme Court Attorney Disciplinary Board v. Janssen* is an October 14, 2022 Supreme Court opinion concerning discipline against a lawyer who was sanctioned by the district court under 1.413 for filing "motions to disqualify counsel and to

quash [a] subpoena [and] [t]hey were neither warranted in fact nor law and the court questions whether they were filed in good faith." *Iowa Supreme Court Attorney Disciplinary Board v. Janssen*, 981 N.W.2d 1 (Iowa 2022). Further the Court found that "attorney tactics delayed the proceedings and wrongly increased [opponents'] attorney fees" *Janssen* at 3.

In *Cickavage* the Iowa Court of Appels found that the party therein seeking sanctions "has not shown that [opponent's counsel] acted in a way no reasonable attorney would – rather he points out disputed facts that are par for the course in any trial." *In Re Marriage of Cickavage*, 978 N.W.2d 806, at 7 (Table), (Iowa Ct.App. 2022) (*Cickavage I of III)*, quoting *Barnhill* at 279.

In *Matter of Estate of Bisignano* the Supreme Court considers a suit by an estate against Exile Brewing and specifically a 1.413 claim finding that "the primary purpose of sanctions under rule 1.413 is to deter frivolous suits" which I argue means that the rule is not meant to declare a winner by acting as an order granting summary judgment. *Matter of Estate of Bisignano*, 991 N.W.2d 135, 142 (Iowa 2023). Citing *First Am. Bank v. Fobian Farms, Inc.*, 906 N.W.2d 736, 745 (Iowa 2018). "*In re Guardianship of Radda*, for instance, we determined that even though a party presented questions of first impression that lacked merit, the arguments

weren't frivolous within the meaning of rule 1.413(1)." *Bisignano* at 142, quoting *In re Guardianship of Radda*, 955 N.W.2d at 215 (Iowa 2021).

In re Marriage of Whiteside, 743 N.W.2d 871 (table) (Iowa Ct.App. 2007) the Court, in a family law case, rejected the justification offered of 1.413 as a basis for attorney fees in a contempt action to award prevailing nonmovant. The Court of appeals rejected the theory for lack of a trial court basis in the findings that the award was pursuant to 1.413. *Brooks Web Services, Inc. v. Criterion 508 Solutions, Inc.*, 780 N.W.2d 248 (Table), (Iowa Ct.App. 2010) interpreted *Barnhill* (2009) wherein the Court reversed a district court sanction under 1.413. "Sanctions under rule 1.413 are not to be imposed with the benefit of hindsight." *Id.* at 6, citing *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 466 (Iowa 1993) (quote omitted). "In the case before us, we see no evidence that [the attorney] ignored facts or law in devising the petition, persisted in pursuing the alternative theories simply out of stubbornness, or was less than forthright with the court. We find the court abused its discretion in imposing sanctions against [the attorney]." *Id.* At 7.

Dutton, Daniels, Hines, Kalkhoff, Cook and Swanson, P.L.C. v. Iowa District Court for Blackhawk County, 986 N.W.2d 390 (Table), (Iowa Ct.App. 2022) addressed the timeliness of a 1.413 motion for sanctions as to the petition in a case involved a purchase agreement for real property.

Where the defendants filed a motion for sanctions 16 months after the petition the Court found that "the June 2021 motion was untimely as to any violations in the petitioner" where petition was filed in January of 2020. *Id*. At 6.

Argument:

The Trial Court has allowed for the creation of a pre-trial challenge to the sufficiency of evidence in a Modification action of a Dissolution of Marriage Decree. The Trial Court has allowed a sanction against a party where the Rule is designed to be a check on the discretion of counsel. Rule 1.413 allows the Court a wide range of punishment against counsel but the interpretation of the Rule in this case is not seen in the Case Law nor is it found elsewhere. The great ill in this case is that this is an end-around to avoid the protections of a Motion for Summary Judgment. Matt was held to prove his case at a Sanctions hearing even before a trial date was set, and the Court found that a threat of bringing a gun to school was at that pretrial point not enough to allow the Modification to proceed. The Court did not allow Matt the benefit of a party deserving his day in Court.

The bounds of Motion for Summary Judgment are contained in Iowa Rule of Civil Procedure 1.981, which is as follows:

> Rule 1.981 On what claims. Summary judgment may be had under the following conditions and circumstances: 1.981(1) For claimant. A party seeking to recover

upon a claim, counterclaim, cross-petition or cross-claim or to obtain a declaratory judgment may, at any time after the appearance day or after the filing of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in that party's favor upon all or any part thereof. 1.981(2) For defending party. A party against whom a claim, counterclaim, cross-petition or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof. 1.981(3) Motion and proceedings thereon. The motion shall be filed not less than 60 days prior to the date the case is set for trial, unless otherwise ordered by the court. Any party resisting the motion shall file a resistance within 15 days, unless otherwise ordered by the court, from the time when a copy of the motion has been served. The resistance shall include a statement of disputed facts, if any, and a memorandum of authorities supporting the resistance. If affidavits supporting the resistance are filed, they must be filed with the resistance. Notwithstanding the provisions of rules 1.431 and 1.435, the time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the court. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. 1.981(4) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly. 1.981(5) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith. The court may permit affidavits to be supplemented or opposed July 2023 depositions, answers to interrogatories, further affidavits, or oral testimony. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered. 1.981(6) When

> affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party for reasons stated cannot present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. 1.981(7) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused that party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. 1.981(8) Supporting statement and memorandum. Upon any motion for summary judgment pursuant to this rule, there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried, including specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file and affidavits which support such contentions and a memorandum of authorities. [Report 1943; amendment 1967; amendment 1975; amendment 1980; July 15, 1991, effective January 2, 1992; October 31, 1997, effective January 24, 1998; November 9, 2001, effective February 15, 2002; Court Order September 14, 2017, temporarily effective September 14, 2017, permanently effective November 14, 2017]

The Court in *Rykhoek* the Court reversed a Trial Court grant of a Motion for Summary Judgment in a Modification action as to visitation and child care provisions post-decree. *In re Marriage of Rykhoek* 525 N.W.2d 1 (Ct.App. Iowa 1994). In relevant part the *Rykhoek* Court summarized the legal standard of review of summary judgment orders as follows:

> We review the district court's ruling granting summary judgment for errors at law. Iowa R.App. P. 4. Summary judgment is proper only when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Iowa R.Civ.P. 237I; *Brown v. Monticello State Bank,* 360 N.W.2d 81, 83–84 (Iowa 1984). On review we determine whether a genuine issue of fact exists and whether the law was applied correctly. *Id.* At 84.

"When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party." *Eggiman v. Self-Insured Services Co.*, 718 N.W.2d 754, 763 (Iowa 2006) (citing *Daboll v. Hoden*, 222 N.W.2d 727, 733 (Iowa 1974) ("If reasonable minds could draw different inferences and reach different conclusions from the facts, even though undisputed, the issue must be reserved for trial.").

On the other hand, the Motion for Sanctions Rule states in relevant part the following:

> **1.413(1)** Pleadings need not be verified unless special statutes so require and, where a pleading is verified, it is not necessary that subsequent pleadings be verified unless special statutes so require. 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 an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. 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, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party shall impose a similar obligation on such party. This rule does not apply to disclosures, discovery requests, responses, objections, and motions under rules 1.500 through 1.517, which are governed by rule 1.503(6).
> **1.413(2)** If a party commencing an action has in the preceding five-year period unsuccessfully prosecuted three or more actions, the court may, if it deems the actions to have been frivolous, stay the proceedings until that party furnishes an undertaking secured by cash or approved sureties to pay all costs resulting to opposing parties to the action including a reasonable attorney fee.

> **1.413(3)** Any motion asserting facts as the basis of the order it seeks, and any pleading seeking interlocutory relief, shall contain or be accompanied by an affidavit of the person or persons knowing the facts requisite to such relief. A similar affidavit shall be appended to all petitions which special statutes require to be verified.
> **1.413(4)** Any pleading, motion, affidavit, or other document required to be verified under Iowa law may, alternatively, be certified pursuant to Iowa Code section 622.1, using substantially the following form:
> "I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct.

In examining the differences between Sanctions and MSJ the striking conclusion is that Sanctions require something akin to bad faith or violating a reason to know by the lawyer in filing a petition. A MSJ instead is aimed at the facts of the case – are the facts too weak or unsupported to get to a trial? The Court in the case at-bar made a MSJ finding with a MSJ conclusion (dismissal) but by a different name – Sanctions. This cannot be what the legislature or the Supreme Court intends in Modification cases. It has long been the tradition of allowing our citizens access to the Court and if being made aware of the pitfalls and problems of a Modification action especially one filed a few months after the original, stipulated-Decree, then that should be their right. This case involves a litigant stating that their children threatened to take a gun to school, a statement made to that parent, and that is a strong reason to request review of the trial court, a modification. Whether it can be established and litigant meet the heavy burden of changing custody remains to be seen, but he has a right to do that at trial.

The Court here in the Order Dismissing wrote in relevant part the following about the Modification that was filed:

> In his petition for modification, Matthew didn't allege anything specific that had changed. He didn't say that either party had moved. He didn't say that either party worked a different job or different hours. He didn't say that Molly had been arrested or had assaulted the children or had been using drugs or was suffering from physical or mental health issues. He didn't say that Molly was now involved with a new boyfriend who was inappropriate for the children to be around. He didn't say that either of the children were somehow suffering. In fact, Matthew didn't allege anything specific that had changed since the entry of the decree.

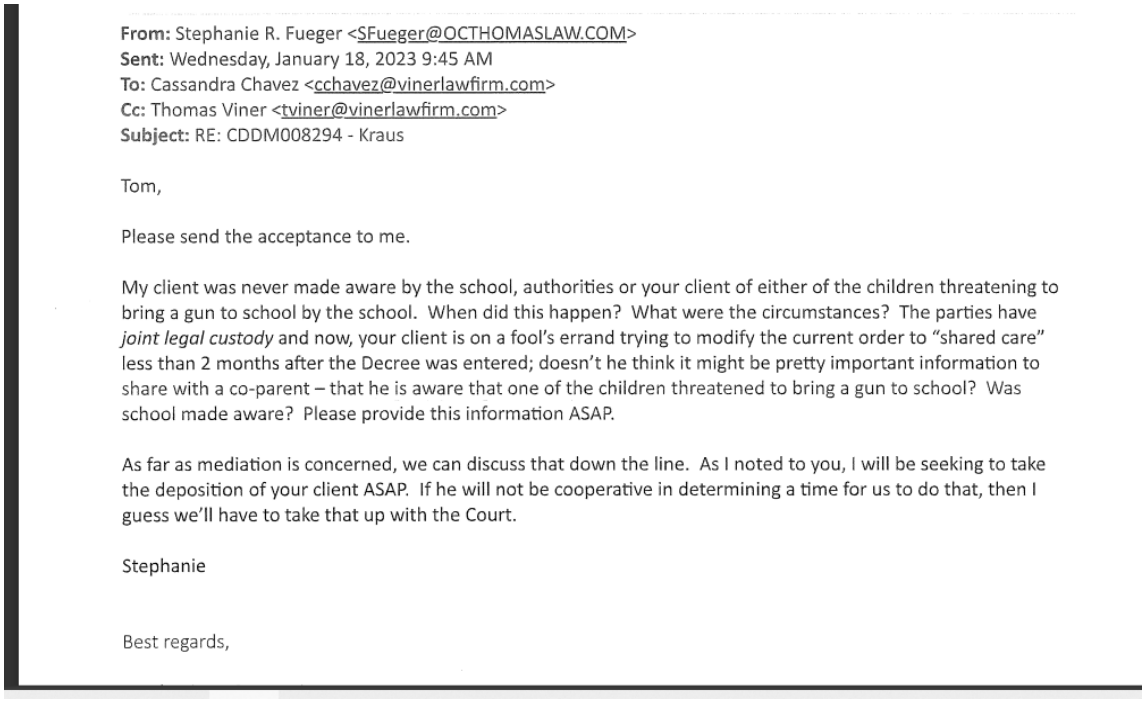
DO.0189 Order Dismissing at 3 (10/23/23). The Court went on to write:

> It would be difficult to imagine a stronger case for the imposition of sanctions pursuant to R.C.P. 1.413. Only if Matthew had filed his petition even faster than 51 days post-decree would it be more egregious. Matthew argues that this matter should proceed to a modification trial, and the court can award attorney fees if Matthew is unsuccessful at trial. However, that argument is flawed for several reasons. First, Molly still has to spend time meeting with her lawyer to prepare for trial and attending trial. Presumably, she'd have to take time off work for those things. Second, even if Molly gets a judgment for attorney fees, she still has to collect. Third, the court doesn't just allow a meritless claim to proceed to trial under the thinking that a remedy can be later applied.

DO.0189 Order Dismissing at 3 (10/23/23). Neither of these paragraphs address, as discussed in *Brooks Web Services, Inc.* "evidence that [the attorney] ignored facts or law in devising the petition, persisted in pursuing the alternative theories simply out of stubbornness, or was less than forthright with the court. " *Brooks Web Services, Inc. v. Criterion 508 Solutions, Inc.*, 780 N.W.2d 248 (Table) at 6, (Iowa Ct.App. 2010). The weight of the evidence cannot be the sole analysis of the Court under our Case Law in I.R.Civ.P. 1.413 Motion for Sanctions. The rule is designed to hold accountable – which is to say 'punish' – attorneys who file in bad faith

– not for attorneys who file with file what may be difficult cases but the allegation is go grave that despite a small passage of time since the Decree it so essential to safety that a filing is made – this is the difference between a Motion for Summary Judgment and a 1.413 Motion for Sanctions. Further, the Trial Court here placed too much weight on ability to collect attorney's fees by Molly as a reason to grant the motion instead of allowing the Modification to proceed (quoted above). DO.0189 Order Dismissing (0/23/24) at 4.

The Court did not address Exhibit 2-S (Offer of Proof) as an explanation by Matt promptly upon being asked by counsel what the basis for filing was. DO.0185 Exh.2-S (Admitted as Offer of Proof).



From: Stephanie R. Fueger <SFueger@OCTHOMASLAW.COM>
Sent: Wednesday, January 18, 2023 9:45 AM
To: Cassandra Chavez <cchavez@vinerlawfirm.com>
Cc: Thomas Viner <tviner@vinerlawfirm.com>
Subject: RE: CDDM008294 - Kraus

Tom,

Please send the acceptance to me.

My client was never made aware by the school, authorities or your client of either of the children threatening to bring a gun to school by the school. When did this happen? What were the circumstances? The parties have *joint legal custody* and now, your client is on a fool's errand trying to modify the current order to "shared care" less than 2 months after the Decree was entered; doesn't he think it might be pretty important information to share with a co-parent – that he is aware that one of the children threatened to bring a gun to school? Was school made aware? Please provide this information ASAP.

As far as mediation is concerned, we can discuss that down the line. As I noted to you, I will be seeking to take the deposition of your client ASAP. If he will not be cooperative in determining a time for us to do that, then I guess we'll have to take that up with the Court.

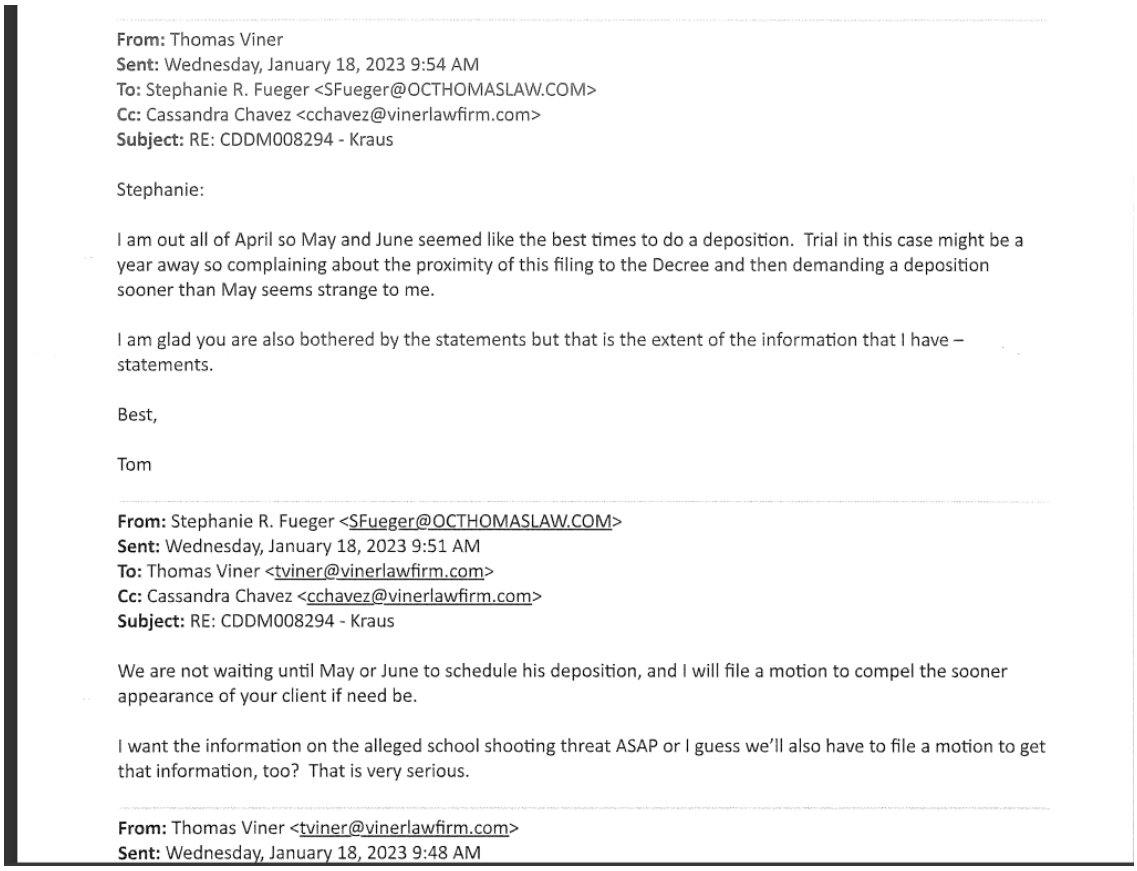
Stephanie

Best regards,

DO.0185 Exh.2-S (Admitted as Offer of Proof) at 2. It is notable that a. the date of the email above is January 18, 2023 (six days after the Modification was filed) and b. the immediate response was to do depositions (which occurred in May 2023, and c. that the Motion for Sanctions was not filed for seven months after this email above and three months after the deposition. The delay in time suggests further that the objection was to the weight of the evidence and a desire to dismiss the action and avoid having to defend at trial, not whether there was a bad faith filing.

If Rule 1.413 is meant to protect parties from the bad actions of other attorneys one gauge may be the conduct and approach to defending the case by the nonmovant attorney (the one requesting sanctions), which in this instance was to immediately demand deposition dates and then threaten a motion to compel – the day after the Petition was filed, even prior to Service

of Respondent.



From: Thomas Viner
Sent: Wednesday, January 18, 2023 9:54 AM
To: Stephanie R. Fueger <SFueger@OCTHOMASLAW.COM>
Cc: Cassandra Chavez <cchavez@vinerlawfirm.com>
Subject: RE: CDDM008294 - Kraus

Stephanie:

I am out all of April so May and June seemed like the best times to do a deposition. Trial in this case might be a year away so complaining about the proximity of this filing to the Decree and then demanding a deposition sooner than May seems strange to me.

I am glad you are also bothered by the statements but that is the extent of the information that I have – statements.

Best,

Tom

From: Stephanie R. Fueger <SFueger@OCTHOMASLAW.COM>
Sent: Wednesday, January 18, 2023 9:51 AM
To: Thomas Viner <tviner@vinerlawfirm.com>
Cc: Cassandra Chavez <cchavez@vinerlawfirm.com>
Subject: RE: CDDM008294 - Kraus

We are not waiting until May or June to schedule his deposition, and I will file a motion to compel the sooner appearance of your client if need be.

I want the information on the alleged school shooting threat ASAP or I guess we'll also have to file a motion to get that information, too? That is very serious.

From: Thomas Viner <tviner@vinerlawfirm.com>
Sent: Wednesday, January 18, 2023 9:48 AM

DO.0185 Exh.2-S (Admitted as Offer of Proof) at 1. Not to say that depositions and motions to compel aren't allowed for, but the immediate demand and threat, though it could be in reaction to a perceived bad faith filing, is more likely a reaction to not wanting to defend an action – which doesn't make it bad faith. Matt's approach through the filing was to bring to Molly's attention and the Court's – to raise the issue and ask that placement be reviewed. Matt's attorney believed in the merits of the concern and filed accordingly, requesting mediation, responding to opposing attorney's

questions about the claim, and working with opposing counsel to setup the requested deposition. *Dutton* addressed timeliness in the filing of a 1.413 Motion for Sanctions to say that delays in filing are an indication of the merits of the complaint of a bad faith filing. D*utton, Daniels, Hines, Kalkhoff, Cook and Swanson, P.L.C. v. Iowa District Court for Blackhawk County*, 986 N.W.2d 390 (Table) at 6, (Iowa Ct.App. 2022).

In assessing the Motion for Sanctions on October 3, 2023, the Court required that Matt defend the merits of the claim, not the attorney defending the validity of the filing. The Iowa Supreme Court in *Slaughter* summarized a Motion for Summary Judgment in the following way:

> Summary judgment is not a dress rehearsal or practice run; 'it is the put up or shut up moment in a lawsuit, when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of events."

Slaughter v. Des Moines University College of Osteopathic Medicine, 925 N.W.2d 793, 808 (Iowa 2019) (citing *Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997)) (citing *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). The Sanctions hearing, particularly the on-the-record discussion conducted by the Court with counsel was a "put up or shut up moment" even though it was not an MSJ hearing. D0201, Tr. at 70:17 to 73:22 (The Court asking counsel for Matt what the evidence in support of modification is).

ARGUMENT II

THE COURT ERRED IN ORDERING MATT TO PAY MOLLY'S REQUEST FOR ATTORNEY FEES

Standard of Review:

The review standard for Attorney Fees is for an abuse of discretion. *Kocinski v. Christiansen*, 972 N.W.2d 220 WL 5106051(Table) (Iowa Ct.App. 2021). (Citing *NevadaCare*, 783 N.W.2d 459, 469 (Iowa 2010). Reversal shall be on "on grounds that are clearly unreasonable or untenable." *Id.* Iowa Code section 600B.26 allows courts to grant an award of attorney fees to the prevailing party in a custody dispute. Trial attorney's fees should be based on "the respective abilities of the parties to pay" and "must be fair and reasonable." *Kocinski* at 7. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994).

Preservation of Error:

Matt resisted the Motion for Sanctions when filed, resisted the request for sanctions and attorney fees at the hearing, and filed a 1.904(2). DO.0160 Mtn.Sanctions (08-24-23), DO.0162 Resistance Mtn.Sanctions (08-28-23), DO192 Mtn.1.904(2) (11/01/23).

Applicable Law*:*

Dissolution proceedings are equitable actions and are subject to *de novo* review. *In re Marriage of Kurtt,* 561 N.W.2d 385, 387

(Iowa App. 1997). "We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented." *In re Marriage of Steenhoek,* 305 N.W.2d 448,452 (Iowa 1981).

Argument:

Matt requests an order remanding with instructions or order reversing dismissal and instructions for setting trial setting hearing and orders vacating the Attorney fee award. The award amount itself is triple what molly testified she had paid. D0201, Tr. at 27:7-22. The Court did not apply proper weight to the incomes of the parties – Matt does not have a disparately greater income than Molly. Further Matt has a limited ability to pay – Matt makes $49,000 annually. DO183. Exh.SS. D0201, Tr. at 54:25 to 55:10.

CONCLUSION

This case is an opportunity for the Court to assess if dismissal is an available remedy in family law Modification cases, where non movant to the modification believes that the statutory requirement of "substantial and material change in circumstances" has not been met. Otherwise stated, when must that standard be met? Traditionally the movant has the opportunity to present at trial evidence in support of the Petition, some of which may not exist or have been developed fully at the time of the Petition or at the time

(here, 9 months later) a hearing on a motion for Sanctions pursuant to Iowa Rule of Civil Procedure 1.413. How is this not a Motion for Summary Judgment? This is a request to dismiss a petitioner's case, but unlike a MSJ here the petitioner, Matt, did not seem to receive the benefit of "in a light most favorable" but instead was forced to try to explain to the Court what evidence *would be offered* – all of which ignores the fact that Matt filed because his sons threatened gun violence at school. There must be more deference to a parent bringing to the Court's attention such a horrendous threat. If a Motion for Sanctions is about the acts of the lawyer then the proposition in this case is to say to practitioners "if a client's child is so unhappy and discontent with a parent or a school or anything you need to wait for more time to pass or for something more to happen." If the facts here are not enough to advance a request to change custody and visitation and to assess whether a Guardian *ad Litem* may be need, as was done here (See 2-S) it should be done through a Motion for Summary Judgement and not a Motion for Sanctions. DO.0185 Exh.2-S.

Molly's attorney resisted the offer of communications the day of the request for information about why Matt filed, and that was provided. Exh.S-2. If not as direct evidence then as rebuttal, which the Court rejected and allowed only as a Show of Proof. The prejudice in not allowing that

showing is in question because the core issue isn't showing the issue or answering the question, but limiting Matt at a Sanctions hearing is unduly prejudicial. In fact the hearing became a modification trial for all intents and purposes in that the Court a made a finding that he could not meet his burden. The problem of course is that was not the trial date. It is also not up to the Trial Court to decide if at the evidentiary hearing (which had not yet been set) would be then-able to meet his burden. All of this ignores the right of the movant (Matt) to have his day in Court. The liability of parties bringing a Modification action is that the prevailing party very typically is awarded attorney fees – a sharp contrast to original actions. Instead here Matt was denied a trial after filing, depositions, and a Sanctions hearing and then was still ordered to pay over $7000 in attorney fees to Molly. Not only does Matt deserve his day in Court but also it is dangerous to allow the Trial Court to change the rules, to now create a shortcut to Motions for Summary Judgment by a different name.

REQUEST FOR ORAL ARGUMENT

Oral argument would assist this Court in its analysis of the issues presented on appeal. Appellant requests oral argument.

CERTIFICATE OF COST

I hereby certify that the cost of printing the foregoing Appellant's Brief was

the sum of _____$1.00_____.

Respectfully submitted,

_____/s/ Thomas J. Viner _____
Thomas J. Viner #AT0008104

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

1. This brief complies with the type-volume limitation of Iowa R.App. 6.903(1)(g)(1) or (2) because this brief contains 5914 words excluding the parts of the brief exempted by Iowa R.App.P. 6.903(g)(1).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirement of Iowa. R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO (Version 2402 Build 16.0.17328.20124) 32-bit in 14-point Times New Roman font.

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ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING AND SERVICE

I, Thomas J. Viner, hereby certify that I have filed this Brief by filing same with the Iowa EDMS filing system June 4, 2024 .

_____/s/ Thomas J. Viner _____
Thomas J. Viner AT0008104
ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING AND SERVICE

I, Thomas J. Viner, hereby certify that I have filed this Appellant's Brief by filing it via EDMS on this the 4th day of June 2024, upon the following persons and upon the Clerk of the Iowa Supreme Court by EDMS filing

Matt Kraus, Appellant – Served via Email.

Stephanie Fueger, attorney for Petitioner – Served via EDMS.

Honorable Judge Thomas Bitter – Served via Email.

/s/ Thomas J. Viner
Thomas J. Viner, Attorney for Appellant