IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 24-0548

THE LAW OFFICE OF SHAWN SHEARER, P.C., SHAWN SHEARER & THEODORE F. SPORER

Plaintiffs,

vs.

IOWA DISTRICT COURT FOR FREMONT COUNTY

Defendant.

CERTIORARI
THE IOWA DISTRICT COURT FOR FREMONT COUNTY
HONORABLE ERIC NELSON – JUDGE
FOURTH JUDICIAL DISTRICT
CASE NO. EQCV025651

RELATED TO:
IOWA SUPREME COURT CASE NO. 23-1101

PLAINTIFFS' BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Unlawful Imposition of Sanctions under Iowa R. Civ. P. 1.413(1)

Did the district court act unlawfully and/or abuse its discretion by imposing a Rule 1.413(1) sanction against the Plaintiffs in this certiorari action (counsel for the petitioners in *Jennings et al. v. Fremont County, Iowa et al.* (Fremont County Case No. EQCV025651) ("*Jennings*")?

2. Unreasonableness of Sanction

If a Rule 1.413(1) sanction is justified, is the district court's imposition of a $30,000 sanction unreasonable and in excess of that needed to deter for losing a motion to dismiss when the dismissal order was (i) based upon a legal decision from a federal district court entered (a) after the *Jennings* petition was filed and (b) only four months before the dismissal order; and (ii) the federal district court decision was on appeal to the Eighth Circuit; and (iii) the *Jennings* dismissal order is, and remains, on appeal with the Iowa Court of Appeal?

ROUTING STATEMENT

This case involves lawyer discipline and should be retained by the Supreme Court under Iowa R. Civ. P. 6.1102(e).

NATURE OF THE CASE

Description of Case

Plaintiffs (co-counsel for the petitioners in the underlying *Jennings* case) challenge the lawfulness and excessiveness of the Rule 1.413(1) sanction of $30,000 imposed by the Fremont County District Court in *Jennings*.

This case focuses on the requirements of Rule 1.413(1) as applied to Plaintiff's actions between January 31, 2023 and May 15, 2023 – 104-days. These acts must be viewed in the light of subsequent developments involving a federal judge leaving the bench, a state court judge retiring without taking senior status, the Eighth Circuit vacating the decision relied upon as basis for the sanction and no evidentiary hearing ever being held.

What is reasonable diligence under the circumstances when the law is fluctuating and there are overlapping federal and state court proceedings in related, but not the same, cases?

What is a "good faith" argument against existing law?

Must counsel dismiss a state court case and risk malpractice for allowing a limitations period to expire based upon a federal district court being appealed?

Is loss of a motion to dismiss alone sufficient for sanctions under Rule

1.413(1), or is something more required?

Is a $30,000 sanction under the facts and circumstances consistent with this Court's precedent or an abuse of discretion by the district court?

May a party seeking sanctions sit on their rights for more than five-months and await the district court judge's retirement (without taking senior status) and the appointment of the new judge before filing a motion for sanctions?

Are state court sanctions justified when the federal district court case upon which the dismissal of the state court case was dismissed is subsequently vacated by the Eighth Circuit after the sanctions order is entered?

What are the implications for the entire system of justice of imposing sanctions on counsel for losing a single motion? Will this sanction chill advocacy and deprive citizens of their rights to speak and petition their government?

The time frame involved is compressed. Complicating matters now are subsequent events modifying substantially the landscape that existed at the time decisions were being made by counsel and the district court – particularly, the Eighth Circuit vacating the Southern District of Iowa court's decision upon which the dismissal and sanction in *Jennings* were based.

Plaintiffs, *Jennings* Counsel, complied with their Rule 1.413(1)

obligations. The district court erred as a matter of law and abused its discretion in levying any sanction.

Proceedings Below

This is an original certiorari action filed by Plaintiffs, counsel for the plaintiff's in *Jennings* ("*Jennings* Counsel" or "Plaintiffs"), with this Court.[1] The proceedings in the *Jennings* litigation were the following.

The original petition in *Jennings* was filed by *Jennings* Counsel. (D0001 Pet. (01/25/23)) An amended petition was filed before any answer was filed. (D0008 Am.Pet. (02/08/23))

Shenandoah Hills Wind Project, LLC ("*SHW*") intervened unresisted (D0007 Pet.Inter. (02/08/23) & D0016 Order (03/10/23)).

The parties briefed the *Jennings* petitioner's motion for a temporary injunction and SHW's motion for dismissal for failure to state a claim. Both motions were heard at oral argument on May 15, 2023.

On June 13, 2023, SHW's motion to dismiss the Amended Petition pursuant to Rule 1.421(1)(f) (D0052 Mot. (03/30/23)) and the named defendants motion for judgment on the pleadings (D0054 Mot. (04/04/23))[2]

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[1] Unless otherwise indicated, all docket references are to *Jennings* (Fremont Cnty. No. EQCV025651)

[2] The named defendants (Fremont County and members of its board of supervisors and employees) had answered the Amended Petition (D0013 Ans.

were granted by the district court (Judge Steensland). (D0070 Ruling 06/13/23))

On July 3, 2023, Judge Steensland was mandatorily retired and did not take senior status

On July 7, 2023, the *Jennings* petitioners (represented by Plaintiffs) filed a timely notice of appeal. (D0071 Notice (07/07/23)) The *Jennings* appeal remains pending before the Iowa Court of Appeals and is undecided. (IA SCT No. 23-1101)

On July 10, 2023, Judge Nelson, recently appointed to the bench, was assigned the *Jennings* case. (D0074 Order (07/10/23))

On July 17, 2023, the last possible day to do so (30-days after the dismissal ruling), SHW filed a motion for sanctions alleging the filing and maintaining the *Jennings* Amended Petition violated Rule 1.413(1) based upon the federal district court's decision in *Hunter et al. v. Page County et al.* 653 F.Supp.3d 600 (S.D. Iowa 2023) ("*Hunter*") entered January 31, 2023.

The parties briefed SHW's Sanction Motion.

- D0075 Motion (07/13/23);
- D0078 Resistance (07/24/23);
- D0083 Reply (08/08/23);
- D0084 Supp.Resist. (08/24/23).

(03/03/23)) and their motion on the pleadings filed 04/04/23 was, effectively, a joinder to the intervenor's motion to dismiss.

On September 14, 2023, a telephonic hearing was held on the liability portion of the sanctions motion. (transcript at D0088 (10/20/23))

On November 7, 2023, Judge Nelson granted the sanctions motion and directed the parties to brief the remedy (i.e. the appropriate sanction to be entered). (D0089 Order (11/07/23)). The parties filed their briefing as ordered.

- D0090 SHW.Brf. (11/28/23);
- D0091 Cnty.Joins.SHW (11/30/23);
- D0093 & D0094 Pltf.Brf. (12/19/23).

On January 16, 2024, a hearing before Judge Nelson on the appropriate sanction remedy was held. (transcript at D0107 & D0108 (07/18/24)). The parties then engaged in supplemental briefing related to whether an affidavit without time sheets is sufficient proof.

- D0097 SHW.Supp.Brf (01/29/24);
- D0098 Pltf.Objection (02/05/24);
- D0099 SHW.Reply (02/15/24).

On March 7, 2024, the district court (Judge Nelson) entered an aggregate sanction against *Jennings* Counsel in the amount of $30,000. (D0100 Order (03/07/24))

On April 2, 2024, *Jennings* Counsel commenced this case by filing a Petition for Writ of Certiorari. (Dkt. Cert.Pet. (04/02/24)).[3] The intervenor,

[3] Plaintiffs incorporate their Petition for Writ of Certiorari herein.

SHW, resisted (Dkt. Cert.Resist (04/18/24)) and the County defendants joined that resistance. (Dkt. Cert.JoinResist (04/19/24)) This Court granted the Petition for Certiorari. (Dkt. Order (07/12/24)).

STATEMENT OF THE FACTS

The Underlying Case (*Jennings*) arose out of Shenandoah Hills Wind Project, LLC's ("*SHW*") proposal to develop a commercial wind energy project spanning across the border between Iowa's Fremont and Page counties (the "*Proposed Project*").

The boards of supervisors of Fremont and Page approved SHW's conceptual plan for the Proposed Project on July 13 and August 2, 2022, respectively.

At differing times between July 2022 and December 2022, groups of concerned citizens in both counties contacted the Plaintiffs in this certiorari action for representation. (Plaintiffs are referred to as "*Counsel*").[4] Two cases arose out of these representations.

[4] Plaintiffs Shawn Shearer and The Shearer Law Office, P.C. and Plaintiff Theodore Sporer served as co-counsel in both the *Hunter* and *Jennings* cases. At no time have Mr. Shearer or Mr. Sporer been associated as a law firm or practiced together as a law firm.

A. Page County – *Hunter et al. v. Page County et al.*

1. *Hunter* State Court Proceedings

Counsel was first engaged by a group of Page County citizens. A petition challenging Page County's process and approval of the Proposed Project was filed in the Iowa District Court for Page County on September 19, 2022 with Plaintiffs acting as counsel - *Hunter et al. v. Page County et al.* (Page Co. No. EQCV105918).

2. *Hunter* Removed and Federal District Court Proceedings

The named *Hunter* defendants (Page County and its supervisors and an employee) removed the case to the Southern District of Iowa. *Hunter at al. v. Page County et al.* (S.D. Iowa No. 1:22-cv-17) ("*Hunter*").

The federal court granted SHW's intervention and SHW filed a motion to dismiss *Hunter* for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

On January 31, 2023, after briefing and oral argument, the federal district court (Judge Pratt) granted SHW's motion to dismiss *Hunter*. See *Hunter v. Page Cnty.*, 653 F.Supp.3d 600 (S.D. Iowa 2023).

On February 3, 2023, the Page County Zoning Administrator revoked Page County's approval of the Proposed Project on the basis that there had been material changes in information.

On February 27, 2023, Counsel, on behalf of the *Hunter* petitioners,

appealed the *Hunter* dismissal to the Eighth Circuit. The case was briefed and oral arguments held before the Eighth Circuit on October 19, 2023. [5]

3. Eighth Circuit *Hunter* Decision – District Court Decision Vacated

On May 17, 2024, the Eighth Circuit vacated all of the *Hunter* district court decision, with one exception, and remanded the case with instructions to "dismiss without prejudice plaintiffs' all non-Open Meetings claims as moot" *Hunter v. Page Cnty.*, 102 F.4th 853, 875 (8th Cir. 2024).[6]

With respect to the *Hunter* Open Meetings Act claim, the Eighth Circuit acknowledged the difference between the Iowa pleading standards and the federal pleading standards and acknowledged the *Hunter* Open Meetings Act claim may have survived the state pleading standard before removal. *Hunter* 102 F.4th at 874-875:

> ***Plaintiffs' complaint might have survived Iowa's more permissive pleading standard when plaintiffs brought this case in Iowa court.*** Iowa R. Civ. P. 1.421(1)(f); *see Nahas v. Polk Cnty.*, 991 N.W.2d 770, 776-77 (Iowa 2023) ("[W]e have explicitly declined to replace our notice pleading system with the heightened pleading standards that federal courts

[5] The *Hunter* plaintiffs' briefing on appeal is available through the Eighth Circuit Pacer.gov portal (Eighth Cir. Case No. 23-1405).

[6] The Eighth Circuit cited to *U.S. Bancorp Mortg. Co. v. Bonner Mall*, 513 U.S. 18 (1994) that found remanding a moot case for dismissal because "the ends of justice exact that the judgment below should not be permitted to stand when without any fault of the [petitioner] there is no power to review it on the merits." (quoting *United States v. Hamburg-Amerikanische*, 239 U.S. 466, 477-478 (1916)).

> use.") However, we agree with the district court that, *once this case was removed, the complaint was insufficient to satisfy the more demanding standards of Rule 12(b)(6).*

The *Hunter* case, in the end, after the Eighth Circuit decision, provides no guidance and cannot be the basis for sanctions in *Jennings*.

- The federal district court's decision in *Hunter* on the non-Open Meetings Act claims was vacated and this vacatur destroys the precedential value of the federal district court's *Hunter* opinion as to those claims. *Ridley v. McCall*, 496 F.2d 213, 214 (5th Cir. 1974);
- The dismissal of the *Hunter* Open Meetings Act claim was affirmed, but the Eighth Circuit acknowledged that the *Hunter* petition may have survived Iowa's notice pleading standards.

In effect, after the Eighth Circuit decision on May 14, 2024, the *Hunter* district court decision is of no effect or matter.

B. Fremont County – *Jennings et al. v. Fremont County et al.*

Counsel was engaged by a group of concerned citizens in Fremont County in January 2023.

The facts in Fremont County differed from those in Page County – of import was that Fremont County had entered decommissioning and road use agreements (the "*Agreements*") with SHW on December 28, 2022 (D0008 Am.Pet.Ex.E&F (02/08/23)). Page had not entered decommissioning or road

use agreements.

1. *Jennings* – Original Petition

On January 25, 2023 (less than 30-days after Agreement approval), Counsel filed the *Jennings* original petition against Fremont County and its supervisors and zoning administrator. (D0001 Pet. (01/25/23)) ("*Original Petition*").

The *Jennings* claims were similar, but not identical, to those in *Hunter*. The facts and claims alleged in Fremont (*Jennings*) differed from those in Page (*Hunter*) including:

(i) Fremont's entry of the Agreements less than 30-days prior and claims challenging approval of those Agreements (no such claim was available in *Hunter*);

(ii) Unique factual allegations as to the specific board members in Fremont County (who are different people, under different circumstances, who took different actions than those in Page County) to support the *Jennings* claims for:

(a) Violation of the Iowa Open Meetings Act, Iowa Code Chapter 21 ("*IOMA*"); and

(b) Supervisor conflicts of interest, Iowa Code §331.302(14);

(iii) Fremont's failure to read the same ordinance three times as

required by Iowa Code §331.302(6) (Page County had complied with this requirement and no such claim was raised in *Hunter*); and

(iv) A substantially different challenge to the constitutionality of a "general repealer"[7] provision in an ordinance:

- The *Hunter* petition alleged that a "general repealer" provision itself was void for vagueness;
- The *Jennings* petition alleged that a "general repealer" provision creates vagueness in all *other* ordinances previously adopted by the county because the public is unaware of what *other* ordinances or provisions thereof are modified, amended or repealed by the "general repealer" provision of a newly adopted ordinance.

The *Hunter* district court decision did not, and could not, provide any guidance as to these unique claims and facts in *Jennings*.

[7] A "general repealer" provision is used to mean a provision such as Section 13 of the Fremont County Wind Ordinance that provides: "All ordinances or parts of ordinances in conflict herewith are hereby repealed." (D0008 Am.Pet.Ex.C p.13 (02/08/23))

2. *Jennings* Amended Petition – Reaction to *Hunter* Decision

On January 31, 2023, the federal district court entered its order dismissing *Hunter* (6 days after the *Jennings* Original Petition had been filed).

On February 6, 2023, counsel for SHW sent *Jennings* Counsel a letter threatening sanctions under Rule 1.413(1) if *Jennings* was not voluntarily dismissed. (D0075 Mot.Ex.A. (07/13/23)).

On February 8, 2023, in reaction to the *Hunter* decision and SHW's demand letter, and with no answer yet filed in *Jennings*, *Jennings* Counsel prepared and filed an Amended Petition (D0008 Am.Pet. (02/08/23)) ("*Amended Petition*"). See blackline comparison of the Original and Amended Petitions at D0093 Brf.Ex.B (12/19/23).

At no time between filing the *Jennings* Amended Petition and the filing of the sanctions motion did SHW's counsel ever indicate in writing to *Jennings* Counsel that the amendments made had failed to satisfy the demands in SHW's February 6, 2023 letter.

The Amended Petition removed claims possibly impacted by the *Hunter* court's analysis of the writ of certiorari limitations period if applied to Fremont County's adoption of its Wind Ordinance and approval of SHW's conceptual Proposed Project.

The *Jennings* Amended Petition retained those challenges to the Wind

Ordinance and Proposed Project approval where such claims were based upon independent statutory grounds: (i) failure to comply with Iowa Code §331.302(6) (three readings) and (ii) the decisive vote being cast by a conflicted supervisor in violation of Iowa Code §331.302(14).[8] See *City of Johnston v. Christenson*, 718 N.W.2d 290, 296 (Iowa 2006) (certiorari not exclusive where the legislature provides other statutory relief or where declaratory judgment is sought testing the constitutionality of the ordinance).

The Amended Petition also retained the *Jennings* plaintiffs' IOMA claims regarding Fremont's adoption of its Wind Ordinance, approval of the conceptual Proposed Project application, and approval and entry of the Agreements. Because IOMA, Iowa Code §21.6(3)(c), provides a look-back of 6-months for invalidating actions taken in closed-meetings, the Amended Petition only sought invalidation of Fremont's approval and entry of the Agreements. However, while the IOMA invalidation remedy was not available for Wind Ordinance adoption or approval of SHW's conceptual Proposed Project, IOMA provides other statutory remedies (penalties, fines, injunctions) for acts more than 6-months prior and the Amended Petition

[8] The *Jennings* Original Petition (D0001) contained 23 claims and the Amended Petition (D0008) contained 21 claims. The two claims eliminated were in direct reaction to the federal district court's *Hunter* decision (now vacated).

sought those remedies statutory remedies. See Iowa Code §21.6(3)(a),(b),(e).

On March 3, 2023, the named Fremont County defendants answered the Amended Petition. (D0013 Ans. (03/03/23)). A week later, SHW's intervention was granted. (D0007 Mot. (02/08/23); D0016 Order (03/10/23)).

3. *Jennings* – TRO Litigation

On March 21, 2023, the *Jennings* plaintiffs sought a restraining order on an emergency basis ("*TRO*") because Fremont was threatening to imminently grant SHW permits to clear trees and brush in the public right-of-way ("*ROW Permits*") in alleged preparation for construction of turbines.

- D0017-28 Mot. (03/21/23)
- D0031 Mot.Emerg.Hearing (03/22/23)
- D0034 SHW.TRO.Resist (03/23/23)
- D0036 County.Joinder (03/23/23))
- D0037-45 TRO.Reply (03/27/23).

On March 27, 2023, Judge Steensland set April 5, 2023 for hearing on the TRO (D0046 Order (03/27/23)). Within hours after that Order was issued, the Fremont board of supervisors ("*BOS*") changed its proposed meeting agenda and added approval of the SHW ROW Permits to its noticed agenda for the BOS meeting scheduled for March 29, 2023 (a week before the scheduled April 5th TRO hearing).

Jennings Counsel immediately filed for an emergency hearing to stay the BOS action on the ROW Permits (D0047-49 Mot. (03/27/23)).

The district court issued an Order that the BOS "shall take no permanent action on matters pending before this Court until the hearing scheduled for April 5, 2023 is held." (D0051 Order (03/28/23)) ("*March 28th Order*").

Two days later, March 30, 2023, SHW filed a Motion to Dismiss (discussed in detail below).

On April 3, 2023, Judge Steensland ordered that the SHW Motion to Dismiss and the TRO hearing (scheduled for April 5th) would be consolidated and heard together on May 15, 2023 (D0053 Order (04/03/23)) stating:

> There is currently pending a telephonic hearing on the temporary injunction issue set for April 5, 2023. Because the issues significantly overlap with the Motion to Dismiss that hearing will be continued to also be heard in person at the May 15, 2023 hearing. *All previous Orders, including the Order of March 28, 2023, remain in full force and effect.*
>
> The parties are advised that I am subject to mandatory retirement and my last day is July 2, 2023. Therefore, a packed calendar is even more packed so that I can timely and fairly deal with matters pending before me. Motions to Continue the May 15, 2023 hearing will not be well received.

This April 3rd Order extended the March 28th Order prohibiting BOS action at least through May 15, 2023. The only possible legal basis for extending the March 28th Order's restraint to May 15th without a hearing was that Judge Steensland believed the TRO standards (particularly likelihood of success on the merits) had been satisfied to justifying such *ex parte* action

without a hearing.

After the May 15, 2023 hearing, the district court took all issues under advisement and did not vacate the March 28th Order. It was not until the Order dismissing the case was entered on June 13, 2023 that the restraint in the March 28th Order was lifted – the March 28th Order of restraint was effective for 77 days (03/28/23 to 06/13/23). The restraint imposed from March 28th to June 13th by the district court is referred to herein as the "*de facto TRO*."

4. *Jennings* – Motion to Dismiss & Partial Judgment on Pleadings

On April 4, 2023, in the midst of the emergency TRO briefing, SHW filed a Motion to Dismiss the entire *Jennings* Amended Petition under Rule 1.421(1)(f) (D0052 Mot. (04/04/23)) relying heavily on the federal district court decision of January 31, 2023 in *Hunter*. The named County defendants, filed a minimalist Motion for Judgment on the Pleadings, effectively joining SHW's Motion to Dismiss. (D0054 Mot. (04/04/23)).

The *Jennings* plaintiffs filed a Motion for Partial Judgment on the pleadings as to Amended Petition Claim 1 seeking a declaratory judgment that (i) the Fremont Wind Ordinance did not amend the Fremont Zoning Ordinance (Iowa Code §§ 331.302(4) and 335.24), and (ii) the Zoning Ordinance use and height limitations remained in effect. (D0056 Mot. (04/05/23)).

The parties completed briefing on the pending motions.[9] A trial scheduling conference was held.[10] A hearing on all pending motions was held on May 15, 2023.

5. *Jennings* – Dismissal Order – Judge Retirement & Appointment – Appeal

The following events occurred over 30-days:

June 13, 2023	Judge Steensland enters the order dismissing *Jennings* relying upon *Hunter*. (D0070 Order (06/13/23).
June 16, 2023	Judge Nelson is appointed as district judge.[11]
July 3, 2023	Judge Steensland retires without taking senior status.
July 5, 2023	Fremont County's counsel in *Jennings*, Mr. Livingston, is appointed to the Iowa Attorney Disciplinary Board.[12]
July 7, 2023	Notice of Appeal is filed in *Jennings* (D0071 Not.Ap. (07/07/23))[13]

[9] SHW Motion Briefing – D0054 Mot. (04/04/23); D0064 Resist. (05/05/23); D0067 Reply (05/14/23). *Jennings* Partial Judgment Briefing – D0056 Mot. (04/05/23); D0063 Resist. (05/05//23); D0065 Cnty.Join. (05/10/23); D0066 Reply (05/12/23)

[10] See Trial setting order D0060 (04/26/23).

[11] See https://governor.iowa.gov/press-release/2023-06-16/gov-reynolds-appoints-michael-carpenter-eric-nelson-and-patrick-smith

[12] The order appointing Mr. Livingston is available on SHW counsel's website (last accessed 11/18/24) at:

https://www.fredlaw.com/assets/htmldocuments/2023/07/2023%20-%20Amended%20Appointment%20Order%20Underwood.pdf

[13] The substantive merits on appeal in *Jennings* are not addressed herein, but have been fully briefed and oral arguments were held November 7, 2024. See Docket Sup.Ct. No. 23-1101.

July 10, 2023 Judge Nelson is assigned to *Jennings* (D0074 Order (07/10/23))

July 13, 2023 SHW files the Motion for Sanctions in *Jennings*. (D0075 Mot. (07/13/23)[14]

Meanwhile in the Eighth Circuit (*Hunter*), Counsel filed the *Hunter* appellants' brief on April 25, 2023, Page County and SHW filed appellee briefs on June 16 and June 20, 2023, and on July 12, 2023, the *Hunter* plaintiffs' filed their reply. See Docket 8th Cir. Case. No. 23-1405.

SHW's *Jennings* Motion for Sanctions was filed July 13, 2023, the day after the *Hunter* appeal briefing was completed.

The intertwining of events between *Hunter* and *Jennings* must inform the Court as it evaluates *Jennings* Counsel's actions in the moment during these fluid events.

6. *Jennings* – Sanctions Motion Hearings – *Hunter* Reliance

SHW's counsel stated during the hearing on sanction liability that SHW is only seeking sanctions for papers filed after the *Hunter* case was dismissed. (D0088 Sept.14.23.Trans. 11:16-19 (10/20/23)) because *Jennings* Counsel "continues to bring these arguments ***we already briefed in Hunter***." (*Id*. at

[14] The Motion for Sanctions was filed three-days after Judge Nelson's assignment and on the last possible day to do so – 30-days after the dismissal order.

22:25-23:3)

SHW's counsel also stated that the only question was whether *Jennings* Counsel "failed to reasonably investigate." (*Id*. at 12:12-15)

SHW admitted it bears the burden to present a preponderance of evidence upon which a failure to reasonably investigate could be based. (*Id*.) After acknowledging the burden, SHW's counsel stated (*Id*. at 27:9-13):

> They [*Jennings* Counsel] fail to assert that any investigation occurred after the *Hunter* decision . . . all of this motion is concerning filings they made *after* the *Hunter* decision.

7. *Jennings* – Sanctions Liability Order – *Hunter* Dependent

Judge Nelson found a violation of Rule 1.413(1) stating:

> The Petitioners should have known, based upon the *Hunter* ruling, that their claims were not meritorious and that proceeding with this action [*Jennings*] was frivolous.

D0089 Order pg. 5 (11/07/23).

Hunter has since been vacated by the Eighth Circuit. The question now presented is whether the claims in *Jennings* actually were "frivolous" based upon the federal district court *Hunter* decision, then on appeal, that was subsequently vacated and of no precedential value. The merits of *Hunter* were not decided. *Hunter* cannot be the basis of a frivolity.

ARGUMENT

I. PRESERVATION OF ISSUES

All of the issues raised herein were raised and preserved in the *Jennings* Sanctions Resistance (D0078 Resist (07/24/23)), Supplement to Sanctions Resistance (D0084 Resist.Supp. (08/24/23)), Brief in Resistance to Monetary Sanctions (D0093 & D0094 Brf. (12/19/23)), Objection and Resistance to SHW's Brief and Accompanying Affidavit (D0098 Obj. (02/05/24)), and Petition for Writ of Certiorari in this case (04/02/24).

II. STANDARD OF REVIEW & LEGAL STANDARDS

A. Certiorari & Sanction Standards of Review

Sanctions are challenged by writ of certiorari. *Davis v. Iowa Dist. Court*, 943 N.W.2d 58, 61 (Iowa 2020). "[O]ur review is for errors of law." *Crowell v. State Pub. Def.*, 845 N.W.2d 676, 687 (Iowa 2014). Certiorari lies where a lower court has "exceeded its jurisdiction or otherwise acted illegally." *Id.* A lower court acts illegally when its "findings lack substantial evidentiary support, or when the court has not properly applied the law." *Davis*, 943 N.W.2d at 61.

The Court also reviews sanctions for abuse of discretion. *First Am. Bank v. Fobian Farms, Inc.*, 906 N.W.2d 736, 744 (Iowa 2018). "A district court abuses its discretion when it 'exercises its discretion on grounds or for

reasons clearly untenable or to an extent clearly unreasonable." *Id.* However, "if an erroneous application of the law occurs during the exercise of that discretion, we will correct it." *Weigel v. Weigel*, 467 N.W.2d 277 (Iowa 1991).

B. Rule 1.413(1) Standards

"The imposition of sanctions is an extraordinary remedy to be exercised with caution and restraint." *In re Keegan Mgmt. Co., Secs. Litig.*, 78 F.3d 431, 436–37 (9th Cir. 1996). "Judges … should impose sanctions on lawyers for their mode of advocacy *only in the most egregious situations*, lest lawyers be deterred from vigorous representation of their clients." *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001)(emphasis added).

For legal arguments to be sanctionable, "[t]he legal argument must have *absolutely no chance of success* under existing precedent. *Morris v. Wachovia Securities, Inc.*, 448 F.3d 268, 277 (4th Cir. 2006)." *Hawkins v. Citicorp Credit Services, Inc.*, 665 F.Supp. 2d 518, 527 (D. Md. 2009).

"The Rule seeks to strike a balance between the need to curtail abuse of the legal system and the need to encourage creativity and vitality in the law." *Doering v. Un. Cty. Bd. of Chosen Freeholders*, 857 F.2d 191, 197 n.6 (3d Cir. 1988)(citing *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987)).

C. Good Faith Filings after Inquiry are NOT Sanctionable Offenses

"[Fed. R. Civ. P. 11] is not breached if after reasonable legal research and adequate factual investigation, a party and counsel in good faith decide to challenge existing law. Responsible, albeit adventuresome, lawyers must not be sanctioned in those circumstances." *Gaiardo*, 835 F.2d at 483.[15]

D. Evaluation of Counsel's Actions - "Reasonable Under the Circumstances" and "Without Hindsight"

"In considering whether a [Rule 1.413(1)] violation occurred, the court must ask whether counsel acted with reasonableness under the circumstances." *Brooks Web Ser. v. Criterion 508 SOL,* 780 N.W.2d 248 *(Iowa Ct. App. 2010)* (quoting *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 272 (Iowa 2009) and *Weigel* 467 N.W.2d at 281).

The Court is "mindful that our civil procedure system does not expect parties to have their entire case established at the time the petition is filed." *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 466 (Iowa 1993). The Court must view the attorney's judgment "as of the time the paper in question was filed, not with hindsight."[16] *Id.;* see also, *Weigel*, 467 N.W.2d at 280.

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[15] Rule 1.413 is based upon federal Rule 11 and "we look to federal [R]ule 11 for guidance." *First Am. Bank v. Fobian Farms, Inc.*, 906 N.W.2d 736, 745 (Iowa 2018)

[16] However, hindsight may be informative to evaluate counsels' risk/reward decisions in the moment, such as here where counsel maintained the *Jennings*

E. Circumstances under which *Jennings* Counsel Acted

The circumstances under which *Jennings* Counsel's conduct must be examined includes:

(i) The 30-day certiorari limitation period and the reasonableness of investigation to be imposed on counsel subject to such a short deadline while representing citizens who are not directly parties to a municipal decision;

(ii) The interwoven timelines of *Hunter* and *Jennings;*

(iii) *Hunter* in federal court and *Jennings* in state court;

(iv) *Hunter* on appeal to the Eighth Circuit while *Jennings* was in the midst of motion to dismiss briefing is state district court;

(v) The short period of time between the federal district court decision in *Hunter* (01/31/23) and the hearing on the *Jennings* motion to dismiss (05/15/23) – 104 days with federal jurisdictional questions being raised in *Hunter* on appeal*;*

(vi) The Eighth Circuit's subsequent vacatur of *Hunter*; and

(vii) From the time of filing the petition in *Hunter* in state court (09/19/22) to the state district court's dismissal of *Jennings* (06/13/23) is less

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case, and appealed the *Hunter* case at the same time. This conduct was reasonable and required hindsight reveals the *Hunter* decision was vacated by the Eighth Circuit.

than 9-months, during which *Hunter* was removed, motions to remand filed, and *Hunter* appealed before a substantive hearing in *Jennings* was held.

During this 9-month period, Plaintiffs were counsel in both *Hunter* and *Jennings*, facing federal issues of jurisdiction and removal and motions to remand in *Hunter*, subject to differing pleading and dismissal standards in state vs. federal court, and collecting and pleading unique facts to each case.

Jennings Counsel and SHW's counsel agree there is no precedent (federal or state) interpreting or applying Iowa Code §331.302(4) (amendment specificity) & § 335.24 (resolving conflicts between ordinances). There also is no precedent interpreting Iowa Code §331.302(6) (three readings unless waived by a majority vote) and whether the "substantial compliance" standard applies to §331.302(6) when a specific statutory provision (majority to vote to waive the requirement) is available.

Despite all of the litigation in *Hunter* and *Jennings*, there are still no substantive decisions from any district or appeals court (federal or state) on these statutory questions that are the heart of the Amended Petition in *Jennings* and the petition in *Hunter*.

F. Rule 1.413(1) Does Not Require Counsel to Act Negligently, Waive Client Rights, or Assume Malpractice Liability.

SHW's February 6, 2023 letter demanded *Jennings* Counsel voluntarily dismiss *Jennings* because of the *Hunter* decision.

If *Jennings* Counsel had done as SHW demanded, only to have the *Hunter* decision vacated, the 30-day certiorari time to challenge the Fremont Agreements would have expired and the case could not have been refiled. A voluntary dismissal on demand would have been negligent and the J*ennings* plaintiffs would have cause for a malpractice claim for allowing a limitations period to expire.

Rather than dismiss, *Jennings* Counsel's chose to amend the *Jennings* Petition, appeal the *Hunter* case, brief and argue the *Jennings* Motions to Dismiss, and appeal the *Jennings* dismissal. This course was the only reasonably prudent option. But for maintaining *Jennings*, when the Eighth Circuit vacated *Hunter* and dismissed the state claims *without prejudice*, there would have been no opportunity for the *Jennings* plaintiffs to seek redress or seek a declaration of the law from the Court. Maintaining *Jennings* while *Hunter* was on appeal was the only reasonable choice under the circumstances. A decision to dismiss *Jennings* as demanded by SHW would have waived the *Jennings* petitioners' rights and would have been a negligent course of conduct.

G. Burden of Proof on SHW – Lack of Preponderance of Evidence, Lack of Substantial Evidence, and Lack Any Evidence

The procedures for determining sanctions "must comport with due process." ABA Standards Guidelines, Judicial Panel on Multidistrict Litigation 121 F.R.D. 101 (J.P.M.L. 1988). A district court errors if its decision is not upon substantial evidentiary support.

Sanctions under Rule 1.413 may only be awarded when the violation is established "by a preponderance of the evidence." *Iowa Supreme Court Attorney Disciplinary Bd. v. Rhinehart*, 953 N.W.2d 156 (Iowa 2021).

SHW's counsel admits the only issue on the sanction liability question is whether *Jennings* Counsel conducted reasonable inquiry *after* the *Hunter* district court decision was entered. What evidence is there of record as to what inquiry, or alleged lack thereof, was or was not conducted by *Jennings* Counsel? -- None.

To the contrary, the record shows specific diligence as to changes in the law – the prompt filing the Amended Petition (removing two claims in reaction to *Hunter*). The records shows continuing diligence as to factual developments – the *Jennings* TRO briefing in which counsel provided the court affidavits of clients as to real-time factual events – i.e. advising the court of changes made to board agenda items within hours of them occurring (see D0047-48 Mot.&Aff. (03/27/23)). The record also contains *Jennings*

Counsel's personal statements as to the diligence conducted throughout the case. See D0088 Sept.14.23.Trans. 34:22-38:8 (10/20/23).

Jennings Counsel also refers the Court to the filings of record in both *Hunter* and *Jennings*, including in the appeals of both to the Eighth Circuit and Iowa Court of Appeals. A review of all these writings and oral arguments does not reveal a lack of diligence or investigation as to the facts or the law. These writings all reveal *Jennings* Counsel amended the petition in response to *Hunter*, asserted consistent legal positions in both cases at both district courts and appeals courts, argued in good faith that *Hunter* was decided improperly, and argued in good faith the material factual differences in facts and claims to distinguish each from the other.[17] This is not a lack of diligence as to the law or facts.

[17] This is in contrast to SHW's Counsel, Fredrickson, taking simultaneous contrary positions on behalf of Invenergy subsidiaries before the state courts of Iowa. Compare D0063 Resist. Pgs. 6-7 in which Invenergy asserts non-zoning ordinances may limit zoning ordinances unless contrary to state law Invenergy's post-trial briefing in *Worthwhile Wind LLC v. Worth County* (CVCV012819) in which Fredrickson argues the complete opposite asserting a stand-alone home rule ordinance under Iowa Code ch. 331 cannot restrict rights under a zoning ordinance and fails to provide the court the contrary authority cited in this case. Fredrickson's briefing in *Worthwhile* overlapped with its briefing in *Jennings*. The omission was knowing and intentional and a violation of IRPC 32:3.3 (a)(2)(candor to the court, disclosure of contrary authority). The law of "vested rights" in Iowa is now muddled and contradictory due to this failure.

III. *JENNINGS* COUNSEL COMPLIED WITH RULE 1.413(1) - NO SANCTION SHOULD BE IMPOSED –- THE DISTRICT COURT ACTED UNLAWFULLY AND ABUSED ITS DISCRETION

"A sanction is imposed with the hope a litigant or lawyer will "`stop, think and investigate more carefully before serving and filing papers.'" *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). In evaluating the totality of the circumstances, objectively viewing *Jennings* Counsel's conduct over the four months *Jennings* was pending, the question is when did *Jennings* Counsel fail to stop, think and investigate more carefully? What conduct requires "deterrence" by sanctions?

The district *court* found that "based upon the *Hunter* ruling," *Jennings* Counsel should have known the *Jennings* claims "were not meritorious and that proceeding with this action [*Jennings*] was frivolous." (D0089 Order pg. 5 (11/07/23)). This was legal error and abuse of discretion.

- The *Jennings and Hunter* facts were different.
- The claims were different.
- The Amended Petition was filed to adjust to *Hunter*.
- The *Hunter* case was appealed.
- The *Hunter* case was vacated.
- The federal district court's decision was not binding or controlling.
- Dismissal of *Jennings* immediately after *Hunter* would have been

malpractice by allowing a limitations period to expire.

Jennings Counsel proceeded professionally, responsibly and consistently by appealing *Hunter*, resisting dismissal of *Jennings*, and then appealing *Jennings*. Any other course of conduct would have been unprofessional, negligent and contrary to *Jennings* Counsel's obligations of zealous representation of their clients.

A. *Jennings* Counsel Complied with Rule 1.413(1)

SHW's counsel stated at the sanctions hearing that the sanctions sought are only related to *Jennings* Counsel's actions and filings *after* the federal district court's decision in *Hunter* was issued.

Rule 1.413(1) does not require the hasty action of voluntary dismissal of a state court case based upon a recent federal district court decision interpreting state law when such dismissal would substantially damage the legal rights of the *Jennings* plaintiffs.

Rule 1.413(1) does not require *Jennings* Counsel to malpractice or violate ethical obligations to the client by taking action that would allow a statute of limitations period to expire. See *Committee on Professional Ethics v. Stienstra*, 395 N.W.2d 638, 640 (Iowa 1986); *Committee on Professional Ethics v. Jackson*, 391 N.W.2d 699, 701 (Iowa 1986). The damage to the *Jennings* clients from voluntarily dismissing *Jennings*, while *Hunter* was on

appeal to the Eighth Circuit, would be irreversible when the *Hunter* decision on the state law claims subsequently was vacated by the Eighth Circuit.

Counsel's actions in response to the *Hunter* district court decision were consistent with the obligations of diligence under Rule 1.413(1). Counsel filed the *Jennings* Amended Petition. Counsel appealed the *Hunter* decision to the Eighth Circuit. Counsel researched and determined that the *Hunter* decision as to state law questions never previously interpreted by Iowa court was not binding upon the state court. (See D0078 Resist. at 19-20 (07/24/23)).

There can be no greater exposition of counsel's good faith argument for the modification or reversal of existing law than for *Jennings* Counsel to be simultaneously:

(i) Appealing the *Hunter* decision to the Eighth Circuit arguing that *Hunter* was wrongly decided; and

(ii) Arguing in *Jennings* that *Hunter* was wrongly decided.

Given the compressed timeline of events, no sanction can be justified using the federal district court *Hunter* decision as binding and absolutely controlling precedent when *Hunter* was on appeal to the Eighth Circuit and that appeal was being prosecuted by the same Counsel advocating consistent positions in both cases.

Jennings Counsel's decisions in the moments between January 31,

2023 (*Hunter* decision) and May 15, 2023 (*Jennings* substantive motion hearing) is vindicated by the Eighth Circuit's *Hunter* decision. The Eighth Circuit upheld dismissal of the *Hunter* IOMA claims, but clearly stated that the IOMA claims may have passed muster under the Iowa notice pleadings standards, but not the federal standards. Therefore, *Hunter* was of no guidance as to the IOMA pleadings in state court in *Jennings*. The Eighth Circuit's *Hunter* vacatur of the federal district court's state non-IOMA claims left the statutory interpretation questions raised in *Hunter* and in *Jennings* unanswered and those questions now subject of the pending *Jennings* appeal.

A premature voluntary dismissal of *Jennings* in February 2023 would forfeited all remedies for the *Jennings* plaintiffs to have their claims regarding Iowa Code §§331.302(4) & 335.24 (both of first impression) heard.

Jennings Counsel would have substantially errored ethically and in breach their civil duties to the *Jennings* plaintiffs by succumbing to the demands of SHW to dismiss *Jennings* based upon the *Hunter* district court decision. *Jennings* Counsel's decision to proceed through the state court process in *Jennings* while *Hunter* was moving through the federal appeal process was the ***only*** professional, ethical and responsible decision that could be made under the circumstances. This conduct is not sanctionable under Rule 1.413(1). The district court's sanction was unlawful and an abuse of

discretion.

B. Untimeliness of Sanctions Motion – Prejudice from Delay

Hunter was decided January 31, 2023. SHW's counsel stated sanctions were sought only for conduct after that decision. However, SHW's counsel did not file a motion for sanctions until July 13, 2023 – a six-month plus delay.

SHW sent its demand for withdrawal of *Jennings* on February 6, 2023. (D0075 Brf.Ex.A (07/13/23)). The Amended Petition was filed February 8, 2023. ***SHW never sent another demand to Jennings Counsel indicating the amendments were insufficient.***

From filing of the Amended Petition (02/08/23) through the filing of the sanction motion (07/13/23) *Jennings* Counsel had no reason to believe SHW's concerns had not been addressed, and SHW took no action to state otherwise. *Jennings* Counsel had no warning that SHW considered the Amended Petition an insufficient response.

It was only after (i) Judge Steensland retired (07/03/23), (ii) Fremont County's outside counsel in *Jennings* was appointed to the Iowa Attorney Disciplinary Board (07/05/23), and (iii) newly appointed Judge Nelson was assigned to *Jennings* (07/10/23), that SHW filed the Motion for Sanctions on the very last day available to do so – July 13, 2023. SHW intentionally forwent filing a motion for sanctions from January 31 to July 13, 2023.

SHW's delay was opportunistic and the filing designed to harass in violation of Rule 1.413(1). If SHW's counsel truly believed *Hunter* required *Jennings* Counsel to immediately voluntarily dismiss *Jennings*, the sanctions motion should have been filed immediately after their demand letter of February 6, 2023; instead, SHW waited 155 days (02/06-07/13) to file.

The Court has stated that counsel should request sanctions as early as possible. *Darrah v. Des Moines Gen. Hosp.,* 436 N.W.2d 53, 55 (Iowa 1989). This Court requires "filing motions for sanctions … to be made "expeditiously without undue delay" and certainly before "expiration of the time for appeal from final judgment." *Brooks Web Ser. v. Criterion 508* SOL, 780 N.W.2d 248 (Iowa Ct. App. 2010)(quoting *Hearity v. Bd. Supervisors*, 437 N.W.2d 807, 909 (Iowa 1989)).

In *Franzen v. Deere and Co.*, 409 N.W.2d 672, 675 (Iowa 1987) this Court stated (emphasis added):

> We note that the advisory committee note concerning federal rule 11 states:
>
> > ***A party seeking sanctions should give notice to the court*** and the offending party ***promptly upon discovering a basis for doing so.*** The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. 97

F.R.D. at 200-01.

> *We do urge couns*el, or the court on its own motion, *to* ***request sanctions at the earliest time rule 80(a) violations occur***. The determination whether a party, or the party's lawyer, or both, have violated the rule is inextricably entwined with the determination of issues in the underlying action. *Certainly* ***the optimum time for considering and deciding whether to impose sanctions is a time soon after violations have occurred*** *and not late*r than the entry of final judgment in the district court. ***Whenever practicable the judge who decides the merits*** *of the underlying lawsuit* ***should also decide*** *whether to impose rule 80(a)* ***sanctions. Simultaneous determination of the merits of the underlying action and the merits of alleged rule 80(a) violations would permit all such related issues to be resolved in a single appeal.*** *See Duane Smelser Roofing Co. v. Armm Consultants, Inc.,* 609 F. Supp. 823, 824 (E.D.Mich. 1985).

Not one of the Court's *Franzen* urgings was satisfied by SHW.

- Lack of Prompt Notice to Counsel and Court. SHW did not provide prompt notice to Counsel that the Amended Petition filed February 8, 2023 failed to meet the demands of SHW's February 6, 2023 sanction warning letter. *Jennings* Counsel had every reason to believe the amendments had satisfied SHW. Instead of providing prompt notice that SHW's believed the amendments were insufficient, SHW let five months elapse before filing the sanction motion on July 13, 2023.

- Intentional Separation of Merits and Sanctions Appeals The sanctions motion was filed the last day possible – 30 days after the dismissal order. The *Jennings* plaintiffs' Notice of Appeal had been filed weeks before the sanction

motion was filed. Because of the delay, the appeal of the *Jennings* merits is now separated from the appeal of the sanctions. The appeal of the *Jennings* merits has been fully briefed and oral arguments on the merits held a month prior to filing of this brief.

- Knowingly Allowing Change in Judges. The preference is the same judge should hear the merits and the sanctions motion. In his April 3, 2023 Order setting May 15, 2023 for hearing on *Jennings'* TRO Motion and SHW's Motion to Dismiss, Judge Steensland advised the parties of his mandatory retirement on July 3, 2023. (D0053 Order (04/03/23)). At the time of that April 3rd Order:
    - 52-days had passed since the SHW sanction demand letter;
    - 50-days had passed since the filing of the Amended Petition;
    - The parties were mid-briefing of *Jennings'* TRO Motion and SHW's Motion to Dismiss (the only briefs filed by *Jennings* Counsel post-*Hunter* – i.e. the only filings for which SHW sought Rule 1.413(1) sanctions); and
    - SHW knew that there were:
        - 42-days until the hearing on the TRO and Motion to Dismiss; and
        - 91-days until Judge Steensland's retirement.

If SHW believed *Jennings* Counsel's continued advocacy was a violation of

Rule 1.413(1), there was more than sufficient time for SHW to then file the sanction motion and the parties complete briefing to be heard before Judge Steensland's retirement and possibly time to complete briefing and hear the sanction motion at the same time as the substantive motions on May 15th.

Evidence & Prejudice

SHW's delay was knowing and intentional. SHW waited 157-days after the filing of the Amended Petition to file the sanctions motion (02/08/23 to 07/13/23). This delay was longer than the 127-days the case was active before Judge Steensland (02/08/23-06/13/23).

After filing of the Amended Petition, SHW waited for 125 days (02/08/23-06/13/23) until they knew Judge Steenland's decision dismissing the case. This delay yields the inference of SHW's uncertainty on the substantive arguments before Judge Steensland and therefore lack of frivolity by *Jennings* Counsel's advocacy. If SHW truly believed the filings were frivolous SHW would have filed the sanctions motion earlier and not waited until after a ruling in SHW's favor

Even after SHW was successful in obtaining the Order of Dismissal (06/13/23), SHW waited another month to file the motion for sanctions (07/13/23). During that time, Judge Nelson was appointed to the bench (06/16/23), Judge Steensland retired (07/03/23) and Judge Nelson was

assigned to the *Jennings* case (07/10/23).

Based upon these facts, the Court must glean that SHW did not file the sanctions motion between February 8, 2023 and July 13, 2023 because:

(i) SHW knew Judge Steensland would not award sanctions because *Jennings* Counsel's arguments were not frivolous or violations of Rule 1.413(1); and

(ii) SHW did not want to file the sanctions motion until SHW knew the identity of the new judge assigned to the *Jennings* case.

SHW waited 157-days to file the motion, and then only did so after being assured the district court had ordered dismissal, Judge Steensland had retired and not taking senior status, and the identity of the new judge assigned determined. SHW then filed the motion at the 11th hour of the last day possible. SHW knew *Jennings* Counsel had not violated Rule 1.413(1).

The urgings of *Franzen* are well principled. While the motion for sanctions was technically timely, the delay was prejudicial to *Jennings* Counsel and the system. The Court can observe the record of SHW's behavior and infer motives and candor from the events in its de novo review of the record. Equity allows a remedy for delay in exercising ones rights.

C. Merely Losing a Motion to Dismiss is not Sanctionable

Courts resoundingly agree that substantially more than loss of a motion to dismiss is necessary before sanctions are even considered.

> The granting of a motion to dismiss, however, does not obligate a court to impose sanctions. *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 830 (9th Cir. 1986). The Court of Appeals has emphasized that Rule 11 targets "abuse" — the Rule must not be used as an automatic penalty against an attorney or a party advocating the losing side of a dispute." *Gaiardo v. Ethyl Corp.,* 835 F.2d 479, 482 (3d Cir. 1987).

Ferreri v. Fox, Rothchild, O'Brien, 690 F.Supp. 400 (E.D. Pa. 1988).

> The standard for testing conduct under Rule 11 is reasonableness under the circumstances. *Gaiardo* at 482; *Eavenson, Auchmuty Greenwald v. Holtzman,* 775 F.2d 535, 540 (3d Cir. 1985). As we advised in *Gaiardo,* ***"[L]itigants misuse the Rule when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment. . . Substantially more is required.***" 835 F.2d at 483. ***Rule 11 is intended only for exceptional circumstances. . .***

Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir. 1988)(emphasis added).

> Rule 11 "should not be invoked against an attorney who fails to dismiss a case after the opposing attorney submits evidence that a statute of limitations or res judicata bars the suit." *Gaiardo* at 484.

Id.

"[T]he mere failure of a complaint to withstand a motion for summary judgment or a motion to dismiss should not be thought to establish a rule

violation." *Simmerman v. Corino*, 27 F.3d 58 (3d Cir. 1994). Mere failure to survive a motion to dismiss does not support sanctions. *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002).

The only "sin" identified by SHW's counsel is that *Jennings* Counsel failed to immediately voluntary dismiss *Jennings* upon issuance of the federal district court's decision in *Hunter* but instead filed the Amended Petition (eliminating claims based on *Hunter*), briefed the TRO Motion and resisted SHW's Motion to Dismiss.

Substantially more is required for there to be sanctionable conduct under these circumstances. *Jennings* Counsel had good cause for amending the petition and continuing forward, especially given the signal sent by the *de facto* temporary restraint entered by Judge Steensland.

Hunter was not controlling. The federal and state pleading standards differed. Claims were made in *Jennings* that were not and could not have been made in *Hunter*. Material factual differences existed in Page County compared to Fremont County. Still today, even after the litigation to date in *Hunter* and *Jennings*, there remain provisions of Iowa statutory law adopted in 1950 (§335.24) that have never been interpreted by the Iowa courts. That

interpretation a critical component of both *Hunter* and *Jennings*.[18] In addition, the *Hunter* district court decision has been vacated and the *Jennings* case remains on appeal with no decision issued by the Iowa Court of Appeals.

This is not one of those "exceptional circumstances" justifying a sanction. In fact, *Jennings* Counsel traversed this moving legal and factual landscape with thought and intent, not only for the arguments asserted, but also in the pursuit of consistent legal rulings from both federal and state courts simultaneously in different cases. Looking at the context of events over the 150-days *Jennings* was pending in the district court, there is no basis for a sanction merely for losing a motion to dismiss that remains on appeal and its foundation, *Hunter*, now vacated.

D. Sanctions Unjustifiably Infringe on Client Constitutional Rights and Chill Zealous Advocacy

The individual plaintiffs in *Jennings* have the right to petition for redress of grievances against their municipal government under the United States and Iowa constitutions. (See D0093 Brf. Pgs.6-9 (12/19/23)) Any sanction levied must be carefully scrutinized so as to preserve free exercise of this fundamental right and to avoid any the chilling effect on the exercise thereof (especially where the named defendant is a governmental entity and

[18] A request for the first interpretation of a statute 75-years on the books is not "frivolous."

the allegations of mis-, mal- or non-feasance of government officials).

> Except in the most extreme circumstances citizens cannot be punished for exercising this right [to petition] 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institution.'

McDonald v. Smith, 472 U.S. 479, 486 (1985)(quoting *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937)).

- "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty of the rights of the people to peaceably assemble and to petition for redress of grievances." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

- "[T]he right to petition the Government *requires stringent protection*." *McDonald* 472 U.S. at 486.

- The right to petition "is implicit in '[t]he very idea of government, republican in form.'" *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542 (1876)).

- The right to petition "is among the most precious of liberties guaranteed by the Bill of Rights." *Mine Workers v. Illinois Bar Assn.,* 389 U.S. 217, 222 (1967).

- The right to petition has "a sanctity and a sanction not permitting dubious intrusion." *Harrison v. Springdale Water Sewer Com'sn*, 780 F.2d

1422, 1427 (8th Cir. 1986)(quoting *Thomas v. Collins*, 323 U.S. 516 (1945)).

"Petitions to the government assume an added dimension when they seek to advance political social, or other ideas of interest to the community as a whole." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 395 (2011).

> Petitions to the courts and similar bodies can likewise address matters of great public import. In the context of the civil rights movement, litigation provided a means for "the distinctive contribution of a minority group to the ideas and beliefs of our society." *NAACP v. Button,* 371 U.S. 415, 431, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Individuals may also "engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *In re Primus,* 436 U.S. 412 (1978). *Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.*

Guarnieri, 564 U.S. at 397 (2011)(emphasis added).

These concepts have been applied in land use and zoning contexts similar to the challenges specifically in *Jennings* regarding 600+ foot commercial wind energy turbines proposed for construction within 1,500 feet of *Jennings* petitioners' homes.

> The First Amendment also guarantees the right "to petition the Government for a redress of grievances." The plaintiffs exercised this right by attending and speaking out at Zoning Adjustment Board hearings and *by challenging in the courts the board's decision to grant a use permit* for the Bel Air project. See, e.g., Christian Gospel Church, Inc. v. City County of San

> Francisco, 896 F.2d 1221, 1226 (9th Cir. 1990) (neighbors who opposed zoning permit application by church "by circulating a petition, testifying before the Planning Commission and writing letters to the editor" were "fully protected by the first amendment"); Evers v. County of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984) (activity of property owners who urged county officials not to close what they believed was public road "falls within the first amendment's protection of the right to petition the government for redress of grievances") (citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)). ***Regardless of what we might think of their objectives, the plaintiffs "were doing what citizens should be encouraged to do, taking an active role in the decisions of government***." Christian Gospel Church, 896 F.2d at 1226.

White v. Lee, 227 F.3d 1214, 1227 (9th Cir. 2000)(emphasis added).

The Supreme Court has directed extreme caution in face of chilling the exercise of the right to petition.

> As with the freedoms of speech and press, exercise of the right to petition "may well include vehement, caustic and sometime unpleasantly sharp attacks on government and public officials," and the occasionally "erroneous statement is inevitable." *New York Times Co. v. Sullivan*, *supra*, at 270-271. The First Amendment requires that ***we extend substantial "breathing space" to such expression*** because a rule imposing liability whenever a statement was accidentally or negligently incorrect *would* ***intolerably chill*** *"would be critics of official conduct ... from voicing their criticism.*"

M*cDonald*, 472 U.S. at 487.

This Court has acknowledged these weighty concerns in levying sanctions: "Indeed, we have cautioned that fee shifting awards can *chill vigorous advocacy.*" *Fobian Farms*, 906 N.W.2d at 751.

The litigation in *Jennings* over 123 days is not an "extreme circumstance" for which a sanction is justified. Any sanction levied merely for a losing a motion to dismiss (without substantial prior history of the same counsel making repeated filings over years all ending in the same result) will have a substantial chilling effect on all litigation.

This sanction of the size in this case assures that meritorious litigation will not be filed, heard, or justice received. Iowa counsel will be unwilling to bring cases on behalf of Iowa citizens when faced with substantial personal financial risk if a motion to dismiss is lost.

"The First Amendment requires the courts to provide substantial "breathing space" to expression by petition because a rule imposing liability whenever a statement was accidentally or negligently incorrect "*would intolerably chill would be critics of official conduct ... from voicing their concerns*." *McDonald* 472 U.S. at 487.

Brown v. Board of Education, and its predecessors and successors, would never have occurred if a single loss of a motion to dismiss was sanctioned. *Dobbs v. Jackson Women's Health Organization* (overturning *Roe v. Wade*) arrived at the Supreme Court only after dismissal on summary judgment by the district court and affirmation of that dismissal by the appeals court. This Court itself has revaluated its own decisions. See e.g. *Burnett v.*

Smith, 990 N.W.2d 289 (Iowa 2023)(overturning *Goddfrey*).

The Iowa district courts are bound to follow this Court's precedent. Plaintiffs seeking modifications, refinement, or in the extreme case reversal, of this Court's precedent must, almost with certainty, lose a dispositive motion at the district court level. Absent counsel willing to absorb inevitable lower court losses, this Court's ability to progress in refinement of the law will be undermined, weakened, and possibly eliminated. Plaintiff's counsel challenging the edges of the law and the reasoning of the courts is an essential aspect of the system. Absent egregious circumstances, not present here, the district court's sanction in this case undermines this Court's purpose and effectiveness within this system of governance.

Jennings Counsel's alleged "sin" was failing to voluntarily dismiss *Jennings* after a federal district court decision (*Hunter*) interpreting Iowa law was entered. This is contrary to this Court's clear statement that "a federal district court decision is not binding authority on our court." *Conklin v. State*, 863 N.W.2d 301, n.4 (Iowa Ct. App. 2015)(citing *State v. Short,* 851 N.W.2d 474, 481 (Iowa 2012)).

The district court's sanction forces Iowa counsel in state court to defer to newborn, only days-old federal district court interpretations of state law even when the federal district court decision is subject of appeal to the Eighth

Circuit, not only on the substance of the claims, but also on questions of federal jurisdiction to make the decision at all. This sanction standard undermines the sovereignty of this Court to interpret the laws of Iowa when the state courts levy sanctions based on federal district court decisions.

SHW's motion and the district court's $30,000 sanction personally against *Jennings* Counsel for losing a motion dismiss based upon a federal district court decision on appeal (now vacated) is outrageous and indefensible.

The chilling effect on advocacy and resulting trampling of citizens' rights to speech and petition through counsel of their choice caused by this sanction is constitutionally intolerable and an affront to the authority of this Court and the State's sovereign authority.

The district court's decision, if upheld, is the beginning of the slippery slope, and this slope is steep and fast, into elimination of zealous advocacy and challenges to existing legal thinking and the law – zealous advocates and challenges to legal thinking are the hallmark and cornerstone of our adversarial system.

The sanction imposed by the district court must be completely vacated.

IV. THE SANCTION IS EXCESSIVE, PUNITIVE, BEYOND THAT NECESSARY TO DETER AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE

The district court abused its discretion, acted illegally, and acted without substantial evidence when imposing a $30,000 sanction on *Jennings* Counsel. The purpose of Rule 1.413(1) is to *deter abuse*. If any sanction at all is justified, under the totality of the circumstances, $30,000 is excessive.

This Court has acknowledged that "the stigma attached to the mere imposition of sanctions" is a significant deterrent to a lawyer and that deterrence – not compensation – the primary goal of sanctions. *Rowedder v. Anderson,* 814 N.W.2d 585, 591 (Iowa 2012). "*Rowedder* is instructive making clear the *minimum* amount to deter is more significant in determining the proper sanction than the victims' attorney fees." *Fobian Farms*, 906 N.W.2d at 747.

A. The Sanction Exceeds that necessary to Deter and in Inconsistent with Precedent

> A court should not use a sanction to drive an attorney out of the practice of law. *Kunstler*, 914 F.2d at 524.… The amount of sanction is appropriate only "`when it is the ***minimum that will serve to adequately deter the undesirable behavior.***'" *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) (quoting *Eastway Constr. Corp. v. City of New York*, 637 F.Supp. 558, 565 (E.D.N.Y. 1986) (emphasis added))

Barnhill, 765 N.W.2d at 281-82.

A sanction of $30,000 in a case lasting a mere 135 days is unprecedented in this state and in any other jurisdiction (with the exception of cases in which dozens to nearly 100 cases filed by the same counsel are repeatedly dismissed for the same reason). See D0093 Brf.Ex.K (12/19/23).[19]

1. SHW's Work was Performed in *Hunter* not *Jennings*

SHW's counsel admits that its briefing on the *Jennings* issues was completed in *Hunter*, not in *Jennings*, (D0088 Sept.14.23.Trans. 22:25-23:3 (10/20/23). The same legal issues (all state law) were being simultaneously argued by the same counsel in different cases in both federal and state court at the same time. SHW only sought sanctions for its state court work after the federal district court's decision was entered in *Hunter*. A sanction in *Jennings* when the work was admittedly completed in *Hunter* a few months prior is not grounds for a $30,000 sanction in *Jennings*.

2. Sanction is Excessive and Disproportionate - Compare *Barnhill*

The sanction in *Barnhill*, 65 N.W.2d 267 (Iowa 2009) was $25,000 (reduced from a total of $150,000 of claimed fees) compared to the $30,000 award by the district court in this case.

[19] See discussion of *Keister v. PPL Corp.* (M.D.Pa. 2016) at D093 Ex. K pg. 5-6 & D093 Ex. M (multiple public reprimands across several different cases over three years of litigation *before* monetary sanctions are imposed).

The *Barnhill* related litigation extended over 11-years before the sanction was affirmed by this Court.

The *Barnhill* litigation included a removal to federal court, a judgment, that judgment vacated post-trial, a subsequent class-action filed in state court, discovery, summary judgment motions, counsel citing cases for propositions for which they did not stand, appeals of claims never alleged, and multiple appeals of the same case with the substantive portion of the litigation lasting more than *eight years*.

- Compare: *Jennings* involved a petition, a motion for a TRO and a Motion to Dismiss. *Jennings* was before the district court 135 *days*.

The *Barnhill* district court found that "the pleadings and other documents filed by Barnhill in this case have in general such a confusing, convoluted, self-contradictory and elusively vague, ambiguous, indirect and constantly shifting quality as to compel the conclusion that the case was made up as it went along. It is as though Barnhill said whatever needed to be said at each step to just get past the moment, whether there was a legitimate basis for saying it or not." *Barnhill 765* N.W.2d at 271-72 (Iowa 2009).

- Compare: No such allegations are alleged in *Jennings*. *Jennings* Counsel was consistent in their arguments simultaneously being

made in the *Hunter* appeal and the *Jennings* case. Barnhill repeatedly lost and continued by filing more and more cases even after conclusive decisions. In *Jennings*, all events were occurring simultaneously and were only raised in two cases. Different jurisdiction were required, not by *Jennings* Counsel's choice, but because SHW chose to develop a project across county lines necessitating two jurisdictions.

In *Barnhill* the time sheets submitted as evidence to support the sanction was "over sixteen, single-spaced pages with about 400 entries and the court file for the case (of over four years) was at least twenty-two volumes." *Id.* at 277.

- Compare: In *Jennings*, no time sheets have been submitted as evidence by SHW. Not a single SHW time entry is on the record of this appeal.

In *Barnhill* "there were six sanctionable counts asserted … five petitions, more than a dozen individually named plaintiffs, eight motions for summary judgment against nine individually-named plaintiffs, a class certification appeal, limited remand procedures, and a summary judgment appeal." *Id.* at 277-78. "[T]he district court was also 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 expense." *Id.* at 578.

- Compare: In *Jennings* there were no trials, there were two substantive motions contested (TRO and Dismiss), no discovery and therefore no summary judgment filings, no trials, and no allegations of lack of candor or forthrightness. None of the *Barnhill* abuses are present in *Jennings*: one petition, not numerous petitions; four-months, not four-years; a single motion to dismiss, no discovery, multiple summary judgment motions, and trial; and no claims of lack of candor.

The conduct of Barnhill was well out-of-line, a violation of the rules of professional ethics and repeated over eight-years after being warned by loss after loss and a sanction justified.

Jennings and *Hunter* lasted at the district courts for nine-months. Comparing the totality of circumstances, a $30,000 sanction in *Jennings* exceeds that levied on Barnhill and cannot be justified as reasonable or the *minimum* amount to deter, if any sanction is justified at all.

3. Sanction is Excessive and Disproportionate - Compare *Fobian Farms*

Fobian Farms, 906 N.W.2d 736 (Iowa 2018), involved a known scrivener's error in a mortgage document used to fraudulently gain control of real property. *Id.* at 739. The district court found Fobian Farm's counsel's

testimony not credible after discovery leading to a three day trial. *Id.* at741. "Fobian Farms bullied the surveyors [who had corrected the scrivener's error] with litigation until they recanted their affidavit…" *Id.* at 743. In *Fobian Farms*, this Court, applying the *Rowedder* and *Barnhill* factors[20] reduced the sanction from nearly $150,000 to $30,000. *Id.* at 753. None of the *Fobian Farms* facts are present in *Jennings*.

- Compare: In *Jennings,* there are no allegations of fraud, no counsel ever testified (a due process violation discussed below), *Jennings* Counsel did not bullying third-parties through law suits, no discovery occurred, and there was no trial.

The conduct in *Fobian Farms* was egregious and sanctions justified. However, the *Jennings* district court leveled the same sanction against *Jennings* Counsel as that in *Fobian Farms*. *Jennings* counsel, over less than five-months, acted with diligence and consistently while advocating the same positions in both state and federal court, with the *Hunter* decision, the basis of the dismissal of *Jennings* and the sanction at issue, since vacated by the

[20] "We reiterate the factors for which the district court is to make specific findings to determine the appropriate sanction under rule 1.413: "(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the [sanctioned party's] ability to pay; and (4) factors related to the severity of the...violation." *Rowedder* , 814 N.W.2d at 90 (quoting *Barnhill*, 765 N.W.2d at 277)." *Fobian Farms*, 906 N.W.2d at 746

Eighth Circuit and the *Jennings* case remaining on appeal.

Fobian Farms and *Jennings* are not comparable in any respect. Yet, the district court decided the sanction should be the same? The district court erred at law and abused discretion, regardless of the standard of review to be applied.

4. Sanction is Excessive and Disproportionate - Compare *Rowedder*

The sanction in *Rowedder*, 814 N.W.2d 585 (Iowa 2012), was $1,000. *Rowedder* involved allegations of real estate fraud, discovery disputes, suing improper parties, discovery, a motion for summary judgment and litigation lasting more than two years. Counsel was sanctioned for suing the improper parties. *Id.* at 587-88.

- Compare: The district court sanctioned *Jennings* Counsel $30,000 for failing to voluntarily dismiss *Jennings* immediately upon the issuance of the now vacated federal district court decision in *Hunter*.

The *Jennings* sanction well exceeds that needed to deter if $1,000 was sufficient for the conduct in *Rowedder*.

5. Sanction is Excessive and Disproportionate – Compare *Rhinehart*

In *Rhinehart v. Iowa. Dist. Court for Carroll Cnty. (In re Teresa Kasparbaur Revocable Living Tr.)* 949 N.W.2d 660 (Iowa Ct. App. 2020), a

sanction of $5,000 was upheld[21] where counsel's abuses included argumentation in multiple cases (including a trial, multiple appeals, motions with the appellate court, interlocutory appeals, requests for discretionary review). Rhinehart was sanctioned for "continuously relitigat[ing] an unfavorable ruling in every available vehicle." *Id.*

- Compare: None of these factors are present in *Jennings*. *Jennings* lasted months not years, there was no trial, no summary judgment motions, no discovery, no appeals, and no multiple cases. Litigation in different courts was necessitated by SHW's project spanning across county lines (not because of actions of *Jennings* Counsel). The *Hunter* dismissal was vacated and the *Jennings* dismissal remains on appeal.

In comparison to the $5,000 sanction in *Rhinehart*, the $30,000 sanction in *Jennings* is excessive and an abuse of discretion.

6. *Jennings* Sanction is Excessive, Inconsistent with Precedent, and Significantly Greater than the Amount Necessary to Deter

The totality of circumstance, the level of egregiousness, repetitive conduct, and the years of prior warnings provided to counsel justifying sanctions in each of the above Iowa precedent and in other jurisdictions cited

[21] The district court in *Rhinehart* had reduced the requested sanction from more than $95,000 to $5,000 as the amount necessary to deter.

by SHW (see D0093 Brf.Ex.K (12/19/23)) are non-existence in *Jennings*. The district court's sanction of $30,000 in *Jennings* is unlawful and an abuse of discretion.

B. Lack of Substantial Evidence to Support Sanction Amount

1. No Reliable, Testable Evidence was Presented by SHW

The only evidence submitted by SHW as the basis for fees incurred was an affidavit of SHW's counsel (D0097 Ex.A.Aff. (01/29/24)). This affidavit did not include invoices or a statement of time. Rather, SHW's counsel admitted that "a single matter number in Fredrickson's billing system" was used for general legal advice on the entire Proposed Project, which included both *Hunter* and *Jennings*, as well as the firm's general advice regarding the Proposed Project. The affidavit was counsel's "estimate" of fees, all within that Proposed Project billing number allegedly related to *Jennings*. (*Id*. at ¶¶ 2, 3, 8-13). The affidavit claims a "conservative" estimate of $100,000 in fees (pulled out of this project-wide billing) incurred in *Jennings* over a 135 day period.

There are significant questions to ask under oath as to this affidavit. At oral argument, SHW's counsel stated the basis for the sanction was that *Jennings* Counsel "continues to bring these arguments ***we already briefed in Hunter***." (D0088 Sept.14.23.Trans. 11:16-19 (10/20/23). But sanctions were

only sought for fees incurred in *Jennings after* the *Hunter* decision. If the work was done and briefed in *Hunter* how is it possible for the conservative estimate of fees in *Jennings* over 135 days to be $100,000+ as set forth in the affidavit?

The district court did not take evidence, require testimony, or require submission of time sheets or calculations of the "estimate" pulled by the affiant Dublinske using an undisclosed formula. *Jennings'* Counsel was not provided any opportunity to examine Mr. Dublinske, and Mr. Dublinske was not present at either of the sanctions hearings.

The district court erred as a matter of law and abused its discretion. There is NO evidence, let alone "substantial evidence" to justify a $30,000 award.

2. *Jennings* Counsel was Denied Due Process

Due process applies to sanctions imposed upon counsel.[22] Factors to consider regarding due process in imposing sanctions and establishing the amount thereof include:

> (i) the circumstances in general; (2) the type and severity of the sanction under consideration and (3) the judge's participation in the proceedings, the judges knowledge of the facts, and whether there is a need for further inquiry …

[22] The procedures for determining sanctions "must comport with due process." ABA Standards Guidelines, Judicial Panel on Multidistrict Litigation 121 F.R.D. 101 (J.P.M.L. 1988); *Tom Growney Equip., Inc. v. Shelley Irr. Dev., Inc.*, 834 F.2d 833 (9th Cir. 1987).

> In many situations the judges participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary… On the other hand, when a court is asked to resolve an issue of credibility or determine whether a good faith argument can be made for the legal position taken the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater.

Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987).

In *Kunstler*, the U.S. Fourth Circuit vacated a sanction where fee statements were submitted (less egregious than this case where SHW has submitted no fee statements into evidence) and found:

> [A] monetary sanction should never be based solely on the amount of attorney's fees claimed by the injured party… Where a court determines a large monetary sanction should issue; and the amount is heavily influenced by an injured party's fee statements, ***the court should permit the sanctioned party to examine and contest the injured party's fee statements*** as an aid to the court's own independent analysis of the reasonableness of the claimed fees.

In re Kunstler 914 F.2d 505, 522 (4th Cir. 1990).

> Appellants were given no opportunity to contest the fees statements submitted, and the amount of the sanction was largely the result of those statements. Under the facts of this case and particularly the amount of the sanctions, due process requires the appellants to have some opportunity to contest the amount the sanction imposed. ***We therefore vacate the sanction imposed.***

Id.

The facts in the *Jennings* sanctions are worse and the sanction in this case must be vacated.

- Judge Nelson was not the judge presiding over the substantive decisions and had no personal knowledge of the events.
- No time sheets were submitted as evidence by SHW.
- The SHW counsel affiant never testified.
- *Jennings* Counsel had no opportunity to challenge specific evidence of time or expenditures or the allocation of fees and estimates alleged.
- SHW counsel's affidavit making estimates of allocations between *Jennings, Hunter* and general legal advice contradicts SHW's oral argument that the research and writing was completed in *Hunter*, not *Jennings*.
- SHW's counsel's statements that (i) SHW was not seeking sanctions for conduct prior to the *Hunter* decision and (ii)t the work was completed in *Hunter*, are contradictory requiring examination under oath.

3. Conclusion - Lack of Substantial Evidence and Lack of Process

There is minimal, if any evidence, certainly no "substantial evidence," upon which to base the $30,000 sanction. The district court therefore erred for lack of substantial evidence and for lack of providing *Jennings* Counsel the ability to review the time sheets and method of estimation described in the only evidence, the SHW affidavit.

C. If not Vacated the Sanction Should be Substantially Reduced

"[O]ur system of litigation is an adversary one, and … presenting the facts and law as favorably as possible in favor of one's client is the nub of the lawyer's task" and sanctions should be imposed "only in the most egregious situations, lest lawyers be deterred from vigorous representation of their clients." *United Nat. Ins. Co. v. RD Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001).

Jennings is not an egregious circumstance. Far from it. Nevertheless, damage to the careers and reputation of *Jennings* Counsel occurred without proper process.

Even if this sanction is vacated now, by signing below, Plaintiff Shearer affirmatively states that this sanction process in *Jennings* and this single blemish on his career, henceforth will cause hesitance in vigorous representation of clients to avoid the possibility of a repeat of this situation.

This is exactly the chilling of vigorous representation against which courts have repeatedly warned.

Vacating the district court's order will never undo the damage its mere imposition has foisted upon *Jennings* Counsel. Audits of trust accounts *sua sponte* have occurred. The sanction's existence is now used against *Jennings* Counsel in other matters. Plaintiff Sporer has retired from the practice of law. Plaintiff Shearer, prior to this case, over 30 years of practice, has never been disciplined or sanctioned in any state where licensed or admitted *pro hac vice*.

The Court's acknowledgement that "[s]tigma will accompany every judicial finding sanctioning an attorney, and any court-ordered sanction [is] anathema to most Iowa lawyers", *Rowedder*, 814 N.W.2d at 594, is correct. Much damage has already been done to the careers and reputation of *Jennings* Counsel.

If the sanction is not vacated in its entirety for lack of basis for finding a violation of Rule 1.413(1) occurred, this Court has the authority to modify the sanction and determine the amount. *Breitbach v. Christenson*, 541 N.W.2d 840, 846 (Iowa 1995). The amount should be the minimum to deter the abuse to be addressed. Monetary sanctions are unnecessary to deter. A public reprimand, with no monetary sanction, is deterrence (more than necessary), not only to *Jennings* Counsel, but to all plaintiffs' counsel in the State.

CONCLUSIONS

1. The district court's sanction based upon failure to voluntarily dismiss state law claims based upon a federal *district court* decision cedes the Iowa Supreme Court's exclusive and sovereign right to interpret state law (subject only to the United States Constitution and the decisions of the United States Supreme Court) to the federal district courts. This sanction, if upheld, usurps this Court's sole authority.

2. Plaintiff's complied with all requirements of Rule 1.413(1) – diligence as to facts and law and good faith argumentation challenging existing law and seeking interpretation of heretofore uninterrupted statutory provision of Iowa law.

3. The chilling of advocacy from upholding this sanction will set-off a wave of sanctions chilling the most basic of litigation – petition and motion to dismiss. Risk of a loss and sanction will dissuade even the bravest of counsel from advocating for those least able to pay. This sanction tears at the fundamental right to seek redress from government.

4. Even if a sanction can be justified, $30,000 is disproportionate to cases decided prior and in excess of the amount needed to deter. The damage done from the district court's decision, even if vacated now, is excessive.

5. *Hunter*, the basis of the sanction, was vacated and *Jennings* remains on

appeal. The sanction was premature then and it is now.

RELIEF REQUESTED

For the foregoing reasons and those contained in the record of this case (particularly *Jennings* Counsels' briefing on the sanctions issues at the district court (See D0078 Brf. (07//24/23) & D0093 Brf. (12/19/23)) there is no basis for sanctions under rule 1.413(1). The district court erred as a matter of law and abused its discretion and the sanction order should be vacated entirely.

Alternatively, if a sanction must be imposed, Rule 1.413 does not require monetary sanctions. This Court may develop its own non-monetary sanctions, but should be mindful of the stigma and burden already imposed. Any sanction must be mindful of the fundamental rights of our citizen's to speak and petition their government without punishment.

REQUEST FOR ORAL ARGUMENT

Pursuant to Iowa R. App. P. 6.908(1) Plaintiffs request to be heard in oral argument.

Dated: December 5, 2024

Respectfully submitted,

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Orders and Rulings Attached

Attachment 1: Order dated March 7, 2024 (D0100) entered by Judge Nelson re: Sanction Amount (Remedy)

Attachment 2: Ruling on Motion for Sanctions (Liability) dated November 7, 2023 (D0089) entered by Judge Nelso

Attachment 3: Ruling on Motion to Dismiss dated June 13, 2023 (D0070) entered by Judge Steensland

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

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(i) because this brief contains 12,903 words excluding those parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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 using Microsoft Word 2010 in Times New Roman 14 point font as specified in Iowa R. App. P. 6.903(1)(e)(1).

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ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the actual cost of reproducing the necessary copies of the preceding brief and request for oral argument was $0.00.

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CERTIFICATE OF FILING and SERVICE

I, the undersigned, hereby certify that I filed and served the foregoing Plaintiffs' Brief and Request for Oral Argument through the Iowa Judicial Branch Appellate EDMS on December 5, 2024.

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