IN THE COURT OF APPEALS OF IOWA

No. 3-873 / 13-0357
Filed October 23, 2013

Upon the Petition of
JOHN A. SCHWERING,
Petitioner-Appellant,

And Concerning
WILLETTA COLEMAN,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

A father who voluntarily dismissed his application to establish custody and visitation under Iowa Code chapter 600B (2011) appeals the award of attorney fees to the child's mother. **REVERSED.**

Judy Johnson of Borseth Law Office, Altoona, for appellant.

Kari Kruml of Kruml Law Firm P.C., Johnston, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

This case involves the interpretation of the term "prevailing party" in Iowa Code section 600B.26 (2011) when a petitioner dismisses an action under Iowa Rule of Civil Procedure 1.943. John Schwering challenges the district court's award of attorney fees to respondent Willetta Coleman following his voluntary dismissal of a petition to establish custody and visitation. Because we find the district court read the term "prevailing party" too broadly, we reverse.

I. Background Facts and Proceedings

Schwering and Coleman have never been married, but together have a child who was born in March 2007. The court determined paternity and child support in October 2007. On February 28, 2012, Schwering filed an application to establish custody and visitation concerning the child. Schwering is a member of the United States military. At the time of his petition, he was on active duty stationed in Italy. He sought joint legal custody and visitation, but not physical care of the child. The court issued a form "Family Law Case Requirements Order" on February 28, 2012, which set a pretrial date of June 8, 2012, and a mediation deadline of August 28, 2012. Coleman filed an answer[1] to Schwering's application on March 16, 2012.

When Schwering learned he would be deployed to Afghanistan in June of 2012, he directed his counsel to dismiss his application as he would be in a warzone for several months.

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[1] Coleman captioned the document as an answer, but later asserted it contained a counterclaim.

Coleman's attorney acknowledged receiving a copy of the dismissal on June 4, 2012, though it may not have been filed with the court until June 15, 2012.[2] On June 8, 2012, the court held a pretrial conference on the petition. Coleman's attorney attended the pretrial conference, but Schwering's counsel was not present. In an order entered on June 8, the court gave Schwering forty-five days to provide certain documents or face sanctions. Schwering filed a response on June 12, 2012, asking the court to cancel any directives in the pretrial order, given the fact he dismissed his petition. On June 28, 2012, Coleman also filed a response to the dismissal, asking for attorney fees. Coleman's attorney submitted an attorney fee affidavit to the court as part of a hearing on August 6.

On August 22, 2012, the district court decided Coleman was the "prevailing party" and entitled to attorney fees under Iowa Code section 600B.26. The court also ruled the fee affidavit did not give sufficient detail and gave Coleman seven days to submit a supplemental affidavit.

On August 24, 2012, Schwering filed a motion to reconsider and amend under Iowa Rule of Civil Procedure 1.904(2). Coleman filed her supplemental affidavit on August 29, 2012. Schwering responded on September 5, 2012, arguing the fees were not reasonable. On February 18, 2013, the court issued an order awarding attorney fees and denying Schwering's motion to reconsider.

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[2] The dismissal in the court file had a certificate of service dated June 1, 2012. The document also bears a file stamp of June 1, 2012. But that stamp is crossed out and initialed. A second file stamp is dated June 15, 2012. It is not clear from the record why the clerk's office crossed out the first file stamp.

The court awarded Coleman $3145 in fees. Schwering now appeals. Coleman did not file an appellee's brief.

II. Standard of Review

When the appropriateness of the district court's decision turns on the correctness of its interpretation of the language of a relevant statute, we review for correction of errors at law. *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 680 (Iowa 2013). Under Iowa law, statutes that provide for attorney fees are not to be strictly construed. *River Bend Farms, Inc. v. M & P Missouri River Levee Dist*., 324 N.W.2d 460, 461 (Iowa 1982).

III. Analysis

In a proceeding to determine custody or visitation under chapter 600B, the district court "may award the prevailing party reasonable attorney fees." Iowa Code § 600B.26. The district court decided Coleman was entitled to attorney fees because she became the prevailing party when Schwering voluntarily dismissed his petition. The court relied on *In re Marriage of Roerig*, 503 N.W.2d 620, 622-23 (Iowa Ct. App. 1993), when interpreting the term "prevailing party."

In *Roerig*, our court decided a divorced father was entitled to attorney fees as the "prevailing party" under Iowa Code section 598.36 when his ex-wife sought to voluntarily dismiss her modification petition on the first day of trial, acknowledging she would not be entitled to an increase in child support. 503 N.W.2d at 622. Our court noted the parties in that case had engaged in significant discovery and trial preparation. *Id*. We cited cases from other jurisdictions where courts awarded attorney fees under a prevailing-party statute

when the plaintiff's voluntary dismissal terminated a case in the defendant's favor.

But in *Roerig* we also discussed cases where a plaintiff's voluntary dismissal did not render a defendant a prevailing party for purposes of a statute awarding fees. *Id.* at 623 (citing *Gray v. Kay,* 120 Cal. Rptr. 915, 917 (1975); *Associated Convalescent Enters. v. Carl Marks & Co.,* 108 Cal. Rptr. 782, 785 (1973)). In those cases, courts recognized a difference between the ministerial act of dismissal by a clerk and a final judgment or decree issued by a judge. *Id*.

In this case, Schwering voluntarily dismissed his petition because he was being deployed to Afghanistan. Unlike *Roerig*, Schwering did not wait until trial to seek dismissal. Schwering served the dismissal on Coleman several days before the scheduled pretrial conference. No trial date had been set yet.

Iowa Rule of Civil Procedure 1.943 governs voluntary dismissals. That rule states:

> A party may, without order of court, dismiss that party's own petition, . . . at any time up until ten days before the trial is scheduled to begin. Thereafter a party may dismiss an action . . . only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against that party on the merits, unless otherwise ordered by the court, in the interests of justice.

Iowa R. Civ. P. 1.943.

Under Rule 1.943, Schwering did not require an order of the court to dismiss his petition. The phrase "without order of court" indicates the party may dismiss the action at will and the court lacks discretion to prevent such dismissal. *Lawson v. Kurtzhals*, 792 N.W.2d 251, 256 (Iowa 2010) (internal citations omitted). The district court notes in its attorney-fee order that Coleman did not contest the voluntary dismissal. Schwering's voluntary dismissal was without prejudice to refiling the action when he returned from the warzone. *See* Iowa. R. Civ. P. 1.943.

We agree with Schwering that *Roerig* is not controlling here. The definition of "prevailing party" in *Roerig* does not apply where the matter is voluntarily dismissed without court order. *See Roerig*, 503 N.W.2d at 623 (reversing trial court's denial of attorney fees based on the particular facts of case); *cf. Schark v. Gorski*, 421 N.W.2d 527, 528-29 (Iowa 1988) (interpreting what is now Iowa Rule of Civil Procedure 1.716 to prohibit assessment of deposition costs to the "losing party" where plaintiff voluntarily dismissed action after extensive discovery). Where a party voluntarily dismisses a petition before any trial date is scheduled, and by rule dismissal does not require a court order, the other party has not prevailed in the action. The action has simply gone away, subject to being refilled. *See Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037-38 (8th Cir. 2001) ("[A] voluntary dismissal without prejudice means that neither party can be said to have prevailed.").

In applying *Roerig* to the instant facts, the district court construed the term "prevailing party" too broadly. Because we find Coleman is not a prevailing party

under the statute, we reverse the district court's decision awarding her attorney fees.

Schwering also asks us to award him attorney fees resulting from the appeal, but offers no statutory authority to support his request. We decline to award appellate attorney fees to Schwering.

REVERSED.