

**IN THE COURT OF APPEALS OF IOWA**

No. 8-823 / 07-2014  
Filed November 13, 2008

**GRETCHEN THOMPSON,**  
Plaintiff-Appellant,

**vs.**

**DR. GARY VANHOFWEGEN and  
VANHOFWEGEN FAMILY DENTISTRY,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Clay County, John P. Duffy, Judge.

Plaintiff appeals from the dismissal of her dental malpractice claim.

**AFFIRMED.**

Patricia J. Matassarini, Canyon Lake, Texas, and Phil C. Redenbaugh of  
The Law Office of Phil C. Redenbaugh, P.C., Storm Lake, for appellant.

Ned A. Stockdale of Fitzgibbons Law Firm, Estherville, for appellees.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

**MAHAN, J.**

Gretchen Thompson appeals from the Iowa Rule of Civil Procedure 1.944 dismissal of her dental malpractice claim. She contends the district court erred in refusing to reinstate the case following dismissal. She also contends the district judge should have recused himself. We affirm.

**I. Background Facts and Proceedings.**

This claim was filed on April 16, 2003, alleging professional malpractice stemming from dental treatment received by Thompson. Thompson is allergic to latex and alleged she was improperly exposed to latex during her dental treatment provided by defendants.

The first try-or-dismiss notice was sent out by the clerk of court on July 22, 2004, with a dismissal date of January 1, 2005. The notice provided, “[p]ost December 31 trial or trial-setting conference dates will not serve to avoid dismissal.”

Trial was set in this matter for October 5, 2004. Defendants’ motion for a continuance and to be relieved from the requirements of rule 1.944(2) was granted on September 16, 2004. The order granting these motions provided: “this case shall not be subject to dismissal pursuant to [rule 1.944] if tried on or before January 1, 2006.” The case was again set for trial on August 30, 2005.

Many filings followed, including: defendants’ application for assignment to a single judge in December 2004, noting that two judges had recused themselves from further proceedings and that numerous issues remained to be determined before the case was ready for trial; District Court Judge David A. Lester’s February 5, 2005 denial of defendants’ motion for summary judgment,

finding genuine issues of material fact existed as to whether the defendants had breached the standard of dental care and as to the source of latex that caused the allergic reaction Thompson claims she suffered; defendants' motion for partial summary judgment filed January 28, 2005; the designation of District Court Judge John P. Duffy to rule on all matters in this case, filed February 10, 2005; and a notation that a hearing on defendants' partial summary judgment motion was held on April 4, 2005.

On August 15, 2005, Thompson, due to personal circumstances, moved to continue the trial date. On September 16, 2006, the court entered a written ruling continuing the trial to January 10, 2006. The trial date was later continued until January 11, 2006, by the district court.

In December 2005 the district court denied defendants' motion for partial summary judgment. Thereafter the parties filed several motions to determine the admissibility of evidence, and the district court ordered Thompson to recast her petition, finding the amended petition "prolix, confusing and constitutes multiple claims."

Following hearings on outstanding motions, which were held on January 3 and January 5, 2006, the district court entered several orders on January 11, 2006. The court ruled on Thompson's oral application to reinstate the case pursuant to rule 1.944(6). The district court concluded:

The dismissal of this case was the result of oversight and other reasonable cause, because the case was specifically set for trial on January 10, 2006, without an extension of the prior Rule 1.944 dismissal order. The court finds the case should be reinstated.

IT IS FURTHER ORDERED that the case shall be tried on or before January 1, 2007. If not so tried, the case shall be dismissed without further notice to the parties.

In ruling on defendants' motions in limine, the court determined, in part, that: Thompson's treating physician could not offer opinions as to the causation of her injury because the physician had not been disclosed as an expert in accordance with Iowa Rule of Civil Procedure 1.508; Thompson was not allowed to introduce evidence of parts of conversations with Dr. Brandy Lancaster, D.D.S., which would have gone to the source of latex exposure, because those statements had previously been determined to be inadmissible because they were materially false, misleading, and unreliable; Thompson could not offer any opinions of Dr. Amy Addington, Thompson's sister, because she had not been designated or listed as an expert witness; and Thompson could not offer anticipated medical opinions of her mother, Janet Watts, R.N., because she too had not been disclosed under rule 1.508.

Also on January 11, 2006, a hearing was held on Thompson's motion to continue the trial in light of the court's evidentiary rulings and other personal reasons. The court ordered "trial of the case, set for this date, is continued to a date to be determined by the Court Administrator's office."

Dissatisfied with the court's rulings, Thompson filed an application for interlocutory appeal. Interlocutory review was denied by the supreme court on June 14, 2006. Procedendo issued on June 21, 2006.

Following the issuance of procedendo, a trial scheduling conference was held (after two continuances) on October 3, 2006. Trial was set for November 6, 2007.

On January 3, 2007, the clerk of court sent out a dismissal notice under rule 1.944(2). On January 12, 2007, Thompson filed her application for reinstatement, alleging “inadvertence and/or oversight” and contending the clerk failed to issue requisite notice. Thompson’s application acknowledges that the district court’s January 11, 2006 ruling set a January 1, 2007 dismissal date. The application to reinstate was resisted.<sup>1</sup>

A hearing was held on the application for reinstatement on May 14, 2007. The transcript from that hearing includes the court’s statement that it would “try to get a ruling out within the next week.”

In September 2007 Thompson filed several motions: a motion to disqualify defense counsel; a motion for continuance of the November 2007 trial date; and a motion seeking assignment to a new judge or recusal of the currently assigned judge. Thompson noted that there was yet to be a ruling on her application for reinstatement and she asserted prejudice and bias, listing the delay in rulings and a number of other adverse rulings, including those excluding evidence.

On October 13, 2007, the district court ruled on Thompson’s application to reinstate. The court first concluded that no notice by the clerk was required before dismissal in this instance, citing *Wilimek v. Danker*, 671 N.W.2d 25 (Iowa 2003). The court next determined Thompson’s application to reinstate was timely under rule 1.944, but that she had failed to establish the dismissal was the result of oversight, mistake, or other reasonable cause. The court noted very

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<sup>1</sup> Defendants filed a third motion for summary judgment on April 19, 2007, asserting Thompson had no admissible evidence on central issues of her claim.

little activity in the case following the continuance, which had been granted on January 11, 2006: there had been a ruling on defendants' motion for sanctions and plaintiff's motion to reconsider that ruling imposing sanctions. The court also noted that following the denial of interlocutory appeal and subsequent civil trial setting order, Thompson had failed to file a timely motion to continue the case under rule 1.944(2). The court concluded:

Based on the number of times trial of this case has been continued and the Plaintiff's request for a continuance of the trial set for November 6, 2007, it becomes clear that the Plaintiff has failed to pursue the completion of this case in a timely manner.

The court also denied Thompson's motion to recuse, finding the matters alleged did not constitute grounds for recusal. The court ruled, "The case stands dismissed."

Thompson now appeals.

## **II. Analysis.**

In *Wilimek v. Danker*, 671 N.W.2d at 27, the court held:

if a continuance is granted on certain terms and those terms are not met, a case subject to rule 1.944 will be dismissed by operation of law whether or not a subsequent try-or-dismiss notice has been sent by the clerk.

We agree with the district court that its rulings of January 11, 2006, gave clear notice to the parties that the case would be subject to dismissal without further notice on January 1, 2007, if not tried by that date. Consequently, the case was dismissed by operation of law on January 1, 2007.

Thompson argues, however, that she has established "oversight, mistake, or other reasonable cause" and, therefore, reinstatement is mandatory under rule 1.944. We disagree. Iowa Rule of Civil Procedure 1.944(6) provides:

The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefor, shall be filed within six months from the date of dismissal.

The district court concluded Thompson failed to establish that dismissal was a result of oversight, mistake, or other reasonable cause, but Thompson offers:

lead counsel is admitted Pro Hac Vice in Iowa and is licensed in Kansas and Texas. No such dismissal provisions are present in either state. After reviewing the law relating to Rule 1.944, after the dismissal, she now has a better concept of the Rule 1.944 principal [sic]. The failure to obtain an order continuing the case prior to December 31, 2006 was the result of inadvertence and mistake—mistaken assumptions concerning the two Orders entered on January 11, 2006.

We find several flaws in this offer. First, to assert that lead counsel became familiar with rule 1.944 only after this dismissal is contrary to counsel's averment made in her application for admission pro hac vice. The application for admission pro hac vice requires an "averment as to the out-of-state lawyer's familiarity with the rules of professional conduct, . . . the applicable local rules, and the procedures of the court . . . before which the out-of-state lawyer seeks to practice." Iowa Ct. R. 31.14(5)(m).

Secondly, this was not the first rule 1.944 dismissal of the case and application for reinstatement. We do not find "oversight, mistake, or other reasonable cause" where the same mistake is repeated.

Finally, it is precisely for the reason that out-of-state counsel may not be as familiar with our rules that we require an in-state lawyer to appear and remain "responsible to the client and responsible for the conduct of the proceeding." Iowa Ct. R. 31.14(3). Thompson does not allege that local counsel was

unfamiliar with rule 1.944 dismissal or the methods by which dismissal could be avoided. Under these circumstances, we conclude the district court properly found plaintiff had not established that dismissal was “the result of oversight, mistake, or other reasonable cause.” Although review of the denial of mandatory reinstatement is for errors of law, we conclude reinstatement under rule 1.944(6) was not mandatory. *O’Brien v. Mullapudi*, 405 N.W.2d 815, 817 (Iowa 1987); *Ray v. Merle Hay Mall, Inc.*, 621 N.W.2d 696, 699 (Iowa Ct. App. 2000).

The district court could have reinstated the case at its discretion under rule 1.944(6). We have thoroughly reviewed the record and find no abuse of the court’s discretion in refusing to reinstate this case.

We also find the district court did not err in refusing to recuse. We do note that we do not condone lengthy delays in ruling on pending matters; yet, we recognize the extensive workload of our district courts. Nothing in the record suggests the delays herein were due to improper prejudice or bias against the plaintiff or that the rulings of the court were the result of prejudice or bias. We affirm.

**AFFIRMED.**