IN THE COURT OF APPEALS OF IOWA

No. 0-712 / 10-0270
Filed October 20, 2010

GEORGE P. LYSENKO and
REBECCA LYSENKO,
Plaintiffs-Appellants,

vs.

CARROLL JENSEN and
JOYCE JENSEN,
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

The plaintiffs appeal from a district court order finding the defendants not in contempt. **AFFIRMED.**

Timothy J. Luce of Anfinson & Luce, P.L.C., Waterloo, for appellant.

Jay P. Roberts of Roberts, Stevens & Prendergast, P.L.C., Waterloo, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

George and Rebecca Lysenko appeal from the district court's order dismissing their contempt action against their neighbors, Carroll and Joyce Jensen. The Lysenkos assert (1) the district court should have found the Jensens in contempt for failing to comply with a permanent injunction entered after a remand from our court, (2) the district court disregarded our mandate and wrongfully modified the permanent injunction, and (3) the district court should have awarded attorney fees. We find the district court's determination that the Jensens did not willfully disobey a court order supported by substantial evidence. Also, we conclude the district court's rulings to date have not resulted in a modification of our previous decision or the permanent injunction. Finally, we uphold the district court's denial of attorney fees. For these reasons, we affirm.

I. Background Facts and Proceedings.

The Lysenkos and the Jensens are neighboring property owners. In 2005, the Jensens completed significant landscaping on their property, bringing in thirteen to sixteen truckloads of dirt and constructing a raised berm along the boundary between their property and that of the Lysenkos.

The Lysenkos began having water issues on their property, including pooling of water in their backyard. In 2006, they filed a petition requesting that the Jensens be enjoined from obstructing the natural water flow between the two properties. After trial, the district court found the raised elevation and the berm on the Jensens' property had resulted in additional water in the Lysenkos' backyard, but concluded there was not such a significant alteration that the

extraordinary remedy of injunctive relief should be granted. Therefore, it denied the Lysenkos' petition.

On appeal, we reversed the district court's judgment. *See Lysenko v. Jensen*, No. 07-1282, 2008 WL 2746323 (Iowa Ct. App. July 16, 2008). We found that:

> the record does not contain any testimony indicating that if the Jensens were required to regrade and remove the berm, their property would be harmed in any manner. Returning the back yard to the intended grade and allowing proper water drainage is the only effective remedy available to the Lysenkos.

We remanded for entry of an order granting the injunctive relief requested.

In the meantime, while the appeal was pending, the Jensens had installed a solid white fence on top of the berm.

On October 16, 2008, the district court entered a permanent injunction on remand. It directed the Jensens to cease and desist any activities on their property that would stop or divert the natural water flow and ordered the Jensens to "immediately regrade their property, remove the subject berm, and take such additional remedial action as is necessary to stop the blockage of the free flow of the natural waterway."

Approximately three weeks later, on November 6, 2008, the Lysenkos filed an application for contempt, asserting the Jensens had not complied with the permanent injunction. A hearing was held February 10, 2009. Joyce Jensen testified that she was seventy-eight years of age, her husband was eighty-one years of age and had Alzheimer's, and she was his full-time caretaker. She said she intended to comply with the court orders, but was unsure of what to do. She said that after the contempt action was filed she had contacted four contractors,

who told her she would have to wait until the following spring to complete any work. She also claimed the contractors were unsure of the precise work that needed to be done to ensure compliance with the court order. It was undisputed that no work had yet been done on the Jensens' property.

On February 12, 2009, the district court ruled that the defendants were "not at this time" in contempt. The district court explained that under the circumstances, the Jensens "should be afforded additional opportunity to comply with Judge Zager's order." However, the court continued:

> [A]ction must be taken immediately so that the drainage issue is resolved no later than May 1, 2009. At a minimum, by May 1, 2009, defendants shall have removed the low berm running approximately 120 feet along the property line between the parties property, and shall excavated sufficient soil toward the rear of their property adjacent to plaintiffs' property so as to allow drainage from plaintiffs' property to flow across the back yard of defendants' property. Defendants shall contact a landscape contractor within seven days of this date to make arrangements for said work to be completed, and shall ensure its completion by May 1, 2009.

The court did not dismiss the contempt proceeding at that time, but said it would do so on June 1 if neither had filed a request for a further hearing.

On May 4, 2009, the Lysenkos filed another application for contempt, again asserting that the Jensens had not complied with the permanent injunction and also requesting an award of attorney fees. On July 22, 2009, the Jensens filed their own application for contempt and for an order of dismissal. In their application, the Jensens described the Lysenkos as "urban terrorists," alleged their landscaper had abandoned the project out of fear of being sued by the Lysenkos, and claimed the Lysenkos had "prevented their own remedy by their actions." A hearing on both parties' motions was held on August 6, 2009.

On August 14, 2009, the district court issued a brief order that did not directly address the pending contempt applications, but noted the Jensens' landscape architect had quit, and directed the Jensens to immediately retain a substitute to complete the project. The court further ordered that project plans be submitted to the Lysenkos' attorney no later than September 1, 2009, and that the Jensens have the landscaping work completed no later than October 15, 2009. The order also set a further review hearing for September 18, 2009.

On September 29, 2009, the Jensens again filed an application for contempt. They alleged the Lysenkos had ordered off their property an engineering company retained by the Jensens. The Jensens claimed to have notified the Lysenkos in advance that this engineer would be taking measurements on the Lysenko property. Again, the Jensens asserted that the Lysenkos' injuries were "self-inflicted." The Jensens sought a contempt finding, financial compensation, and attorney fees from the Lysenkos.

A hearing on the pending contempt applications was held November 12, 2009. The district court put on the record that it had had a conversation with the attorneys and found there had been no progress since the last hearing. The district court specifically directed the Jensens to remove the raised area along the last eight sections of the white fence between the Lysenkos' and Jensens' properties, in addition to ensuring that the property was graded downward between the properties. The following day, November 13, 2009, the district court issued a written order that stated,

> [The Jensens] have not had any landscape work performed in an effort to remedy the drainage situation. [The Jensens] have hired contractors to prepare plans which would allow for the free

> flow of water from the Lysenko property to the Jensen property. On one occasion, [the Lysenkos] required that the landscape architect leave [their] property. The architect was thus unable to prepare a plan for the Jensens. Unfortunately, because of a miscommunication, the Lysenkos were not notified in advance that the landscape architect would be coming upon their property to measure and plan a remedy for this problem.
>
> The court had previously afforded [the Jensens] additional time to formulate a landscape plan in order to hopefully avoid the necessity of disturbing some of their landscape improvements. However, at this time, the court will simply require that any property line barriers be removed so as to allow the free flow of water.
>
> It is ordered that [the Jensens] shall take immediate action to scrape material along the last eight sections of the fence line so that defendants' property level is slightly lower than plaintiffs' property level over the last eight sections of fence line. In addition, [the Jensens] shall re-grade their property in the area of the rear property line so as to allow the free flow of water from the fence line area across the back of [the Jensens'] property.

The court dismissed the Jensens' application for contempt, but expressly "reserved" ruling on the Lysenkos' contempt application "until a determination can be made as to whether defendants have complied with the provisions of this Order."

Later in November 2009, the Jensens had a person with experience in landscaping perform work on their property. Subsequently, both the Lysenkos and the Jensens made further filings with the court, in which they disagreed over whether the Jensens had complied with the November 13, 2009 order. An evidentiary hearing was held on January 11, 2010.

During that hearing three individuals testified—the landscaper, an individual who had taken measurements of the landscaper's work for the Jensens, and Mr. Lysenko. There was no dispute that the landscaper had removed a substantial amount of dirt from the Jensens' side of the property up to the solid white fence that the Jensens had installed on their side of the property.

The dispute centered on the status of the berm where the white fence had actually been resting on it. Lysenko claimed the berm remained underneath the fence, obstructing the free flow of water. Jensens' witnesses disagreed and testified that earth had been removed from below the fence, reducing the berm and establishing a steady drop in elevation between the Lysenkos' property and the Jensens'. The photographic evidence confirmed the Jensens had removed substantial amounts of dirt from their side of the white fence, but did not indicate whether dirt had been removed below the fence itself.

On January 13, 2010, the district court issued an order, which stated,

> Based upon the credible evidence presented at the hearing, the court concludes that the defendants have complied with the court's Order, and defendants are not in contempt of court. Specifically, the defendants have re-graded their property so as to allow the free flow of water from the fence line area across the back of the defendants' property. The re-grading was completed within the time frame directed.
>
> While the plaintiffs contend that the re-grading will not allow the free flow of water across the property line area once the snow melts and rains arrive in the spring, the court relies heavily upon the credible testimony of Joseph Fox [the landscaper] and Evan Holtman [the measurer] in determining that the defendants' property is now five to seven inches lower than the plaintiffs' property in the area in question.

Therefore, the district court order dismissed the parties' applications for contempt. The Lysenkos appeal. They argue (1) the district court should have found the Jensens in contempt, (2) the district court erred in "diluting" the appellate decision of this court and the permanent injunction entered on remand, and (3) the district court should have awarded attorney fees.

II. Standard of Review.

When the district court refuses to find a party in contempt or dismisses an application for contempt, a direct appeal by the aggrieved party is permitted. *City of Masonville v. Schmitt*, 477 N.W.2d 874, 876 (Iowa Ct. App. 1991). Our review is such cases is not de novo, but on assigned errors only. *Id.* A refusal to find contempt should be upheld if supported by substantial evidence. *In re Marriage of Hankenson*, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993). Because "proof beyond a reasonable doubt must be established for a finding of contempt, substantial evidence to support such a finding is such evidence as could convince a rational trier of fact that the alleged contemnor is guilty of contempt beyond a reasonable doubt." *Reis v. Iowa Dist. Court*, 787 N.W.2d 61, 66 (Iowa 2010).

III. Denial of Contempt.

The Lysenkos first argue the Jensens should have been found in contempt of court. They contend that the October 16, 2008 permanent injunction ordered the Jensens to immediately perform specific work to remedy the drainage problem and the Jensens did not perform that work in a timely fashion.

Iowa Code section 665.2 sets forth actions constituting contempt, including "[i]llegal resistance to any order." Iowa Code § 665.2(3) (2009); *Reis*, 787 N.W.2d at 68.

> Resistance to or violation of an order cannot be considered contempt of court unless it is willful. To support a finding of willful disobedience, the court must find "conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not."

> In Iowa, all actions for contempt are quasi-criminal, even when they arise from civil cases. Therefore, contempt must be established by proof beyond a reasonable doubt.

Reis, 787 N.W.2d at 68; *see also City of Dubuque v. Iowa Dist. Court*, 725 N.W.2d 449, 452 (Iowa 2006).

Consistent with our decision, the permanent injunction ordered the Jensens to "immediately regrade their property, remove the subject berm, and take such additional remedial action as is necessary to stop the blockage of the free flow of the natural waterway." After giving the Jensens just three weeks, the Lysenkos filed for contempt. Ms. Jensen's testimony at the ensuing hearing demonstrated that she was impeded by her own and her husband's health issues, but had contacted several contractors who advised that the necessary work would have to done in the spring. The February 2009 order required the work be completed by May 1, 2009. We do not take issue with the court's finding that the defendants were "not at this time [February 2009] in contempt of court."

The work was not done by May 1, or for that matter by early November. Additional contempt hearings took place in August 2009 and November 2009. The district court, following these hearings, did not make contempt findings, but instead reserved the matter for later determination, noting that a landscape architect retained by the Jensens had quit and that an engineer had been ordered by the Lysenkos off of their property. We accept the district court's implicit findings that at these stages, the Jensens were not in "willful disobedience" of the permanent injunction. *See Reis*, 787 N.W.2d at 68. The record does indicate that at least to some extent, the Lysenkos' behavior caused or aggravated the delays.

Finally, we uphold the district court's decision not to hold the Jensens in contempt following the January 2010 hearing. Substantial evidence supports the finding that the Jensens had done as instructed in November 2009, by re-grading their property to make it lower than the Lysenkos' so as to allow the free flow of water.

We realize that the proceedings on remand have taken considerable time, longer than we anticipated. Nonetheless, even assuming (without deciding) that each of the court's decisions from February 2009 to January 2010 are subject to our review, on the ground that the district court never actually refused to find the Jensens in contempt until January 2010 but simply continued the proceeding, we affirm the district court. Substantial evidence supports the court's conclusions that the Jensens were not in "willful disobedience" of a court order.

IV. Alleged Modification of Order.

The Lysenkos next argue that the district court in November 2009 effectively modified our July 2008 decision and its own October 2008 order, by allowing the Jensens to keep the white fence they installed during the appeal and avoid removing the entire berm. As the district court explained in November 2009, "The white fence doesn't need to be removed as long as there's an area for water to flow beneath the white fence. That doesn't concern me." The Lysenkos' counsel objected that this solution would not solve the drainage issues, and the court said it was confident that it would but added that "[y]ou can let me know if it doesn't." When the next hearing occurred, in January, no evidence was presented as to how water was actually draining, presumably because of the time of year.

A district court on remand has no power or jurisdiction to do anything except to proceed in accordance with the mandate. *Kuhlmann v. Persinger*, 154 N.W.2d 860, 864 (Iowa 1967). Our decision, to which we believe the district court's October 16, 2008 permanent injunction order was faithful, required the Jensens to remove the berm and any other obstacles to the previous free flow of water. What the district court ordered in November 2009 was arguably less than that, i.e., regrading of the property in the area of the rear property line, on the theory that this would solve the drainage issue. We agree that if this action was sufficient to restore the status quo ante (pre-2005) regarding the flow of water, then it does not amount to a modification of our previous decision. After all, the critical problem was the water issue, not the existence of the berm. At this point, though, we cannot say the water issue has been solved. Thus, while we uphold the district court's finding of no contempt, we believe this does not foreclose further proceedings, if necessary, to achieve full compliance with our July 2008 decision and the October 2008 permanent injunction. While the Jensens are understandably anxious not to remove the white fence, the fact remains that they elected to install that fence while the Lysenkos' previous appeal was pending. We mean no criticism of the district court. The behavior of the parties made the proceedings on remand prolonged and difficult. The district court acted appropriately here in its efforts to fashion a workable resolution.

V. Attorney Fees.

The Lysenkos also assert that the district court should have awarded them attorney fees because they had to file two separate contempt actions and fairness dictates they be awarded attorney fees. "The right to recover attorney

fees as costs does not exist at common law." *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010) (citing *Thorn v. Kelley*, 257 Iowa 719, 726, 134 N.W.2d 545, 548 (1965)). As a general rule, a district court may only award attorney fees when clearly authorized by statute or contract. *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 66 (Iowa 2003); *Wilson v. Fenton*, 312 N.W.2d 524, 529 (Iowa 1981), *overruled on other grounds by Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742 (Iowa 1993). The supreme court has held that attorney fees may not be awarded in an Iowa Code chapter 665 contempt action even when there is a finding of contempt. *See Reis*, 787 N.W.2d at 72 (stating that attorney fees cannot be awarded in a contempt action); *Wilson*, 312 N.W.2d at 529 (indicating that the penalty for contempt is limited by the provisions of Iowa Code section 665.4 and 665.5, and those provisions do not permit taxing the prevailing party's costs, including attorney fees, to the contemnee). The Lysenkos cite to no authority authorizing the award of attorney fees in a contempt action when there has been no finding of contempt.[1] Additionally, the district court did not address the issue of attorney fees in its final order, and the Lysenkos did not request the district court do so in their rule 1.904(2) motion. As a result, the issue of attorney fees is not preserved for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2006) ("When a district court fails to rule on an issue

[1] In their brief, the Lysenkos argue that the district court has discretion to award attorney fees and cite to *Gibb v. Hansen*, 286 N.W.2d 180 (Iowa 1979), and *Farrell v. Iowa Dist. Ct.*, 747 N.W.2d 789 (Iowa Ct. App. 2008). The *Gibb* case did not involve attorney fees. 286 N.W.2d at 180. *Farrell* was a contempt action for failure to pay child support, a proceeding in which Iowa Code section 598.24 specifically authorizes the award of attorney fees. 747 N.W.2d at 792. *Farrell* is not applicable to the present case. In *Wilson*, the supreme court indicated that specific statutory authority must exist to award attorney fees in a contempt action, and cited section 598.24 as such an example. 312 N.W.2d at 529.

properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal."). Accordingly, we reject the Lysenkos' appeal on this issue.

VI. Conclusion.

For the foregoing reasons, we affirm the district court.

AFFIRMED.