IN THE COURT OF APPEALS OF IOWA

No. 0-934 / 09-1670
Filed April 27, 2011

CITY OF RIVERDALE, IOWA,
Plaintiff-Appellant,

vs.

DR. ALLEN DIERCKS, MARIE RANDOL, and TAMMIE PICTON,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Appeal from an award of attorney fees. **REVERSED.**

Michael Motto of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellant.

Michael Meloy of Koos & Meloy, Bettendorf, for appellees.

Heard by Sackett, C.J., Potterfield, J., and Mahan, S.J.* Tabor, J. takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, C.J.

Defendants requested to view certain audio and/or video tapes generated by the City of Riverdale [City], Iowa's security system. The City, advised by the installers of the system and one of its attorneys, filed a declaratory judgment action asking the district court to determine that the requested items were confidential and naming Allen Diercks, Marie Randol, and Tammie Picton, who had requested the recordings, as defendants. The defendants then filed a counterclaim asked the court to find that the tapes were not confidential and were subject to public examination, and requesting attorney fees. The district court found the tapes were not confidential and the City does not challenge this finding on appeal. It only challenges the district court decision awarding defendants attorney fees of $64,732.50 and expert witness fees of $150. The City advances that, because it did not violate Iowa Code chapter 22 (2007) and the district court made no finding it operated in bad faith, an award of attorney fees was not warranted. We agree and reverse the award.

SCOPE OF REVIEW. Review of a declaratory judgment action is dependent on how the case was tried. *See Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 178 (Iowa 2010). "To determine the proper standard of review, we consider the 'pleadings, relief sought, and nature of the case [to] determine whether a declaratory judgment action is legal or equitable.'" *Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006) (quoting *Nelson v. Agro Globe Eng'g, Inc.*, 578 N.W.2d 659, 661 (Iowa 1998)). The primary relief sought in this case was injunctive. A "litmus test" that has been applied is whether evidentiary

objections were ruled on by the trial court. *Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20, 24 (Iowa 1982); *accord Passehl*, 712 N.W.2d at 414. If so, the action is one at law. *Passehl*, 712 N.W.2d at 414 n. 6; *Stanley v. Fitzgerald*, 580 N.W.2d 742, 744 (Iowa 1998). The court routinely ruled on objections. Another indication that the action is a legal one is the parties' filing of motions normally made in legal actions. *See Citizens Sav. Bank*, 315 N.W.2d at 24. The docket record is replete with motions. We conclude this action was tried as a law action. Consequently, our review is for correction of errors at law. Iowa R. App. P. 6.907.

BACKGROUND AND PROCEEDINGS. In 2007 the City was considering installing a security system, including video cameras and some audio recording capabilities, in city hall. The City passed resolution 2007-13[1] concerning the confidentiality of certain records pursuant to Iowa Code section 22.7(50). The

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[1] The resolution provides, in relevant part:

> [T]he following class of records are deemed confidential pursuant to Iowa Code Section 22.7 with regard to information supplied by the vendor who installs the new security system for the Riverdale City Hall: records which contain information regarding the procedures, instructions, *video and sound recordings from operation of the security system*, test reports, maintenance invoices, and other information regarding the installation, operation or maintenance of the system, and records which contain information related to security procedures or emergency preparedness which are developed or maintained by the City of Riverdale for the protection of its employees, visitors, and property, which include, but are not limited to, information directly related to vulnerability assessments; information contained in records relating to security measures such as security and response plans, security codes and combinations, passwords, restricted area passes, keys, and security or response procedures; emergency response protocols; and information contained in records that if disclosed significantly increase the vulnerability of critical physical systems or infrastructures of a government body to attack.

(Emphasis added.)

security system was installed in February of 2008. On March 20, 2008, the City received a written opinion from the city attorney. The opinion related in part to the video and audio security system at city hall. It provided, in relevant part, "it is likely Riverdale will receive an open records request to review the recordings. The recordings, if preserved in some format, are a public record and thus must be produced if requested." The written opinion did not address whether the recordings were confidential.

The defendants have made many public records requests of the City over the years. In April of 2008 Diercks, accompanied by Picton, went to the clerk's office to pick up records from a prior request and to request additional records. The district court described what occurred. The district court found that while the parties waited for the records and filled out a request for more the Mayor asked Diercks if he would consider mediation to address the frequent open-meeting requests. Diercks indicated he was not interested and the conversation between the Mayor and Diercks became confrontational. Diercks made a request for a copy of the video of this encounter between the Mayor, Diercks, and Picton.

The City made a copy of the video and audio recording and gave it to its attorney for Diercks to pick up. Before the recordings were obtained by Diercks, the Mayor sought advice from the city attorney's law firm, asking that the security company that installed the system be contacted to determine whether releasing the recordings might compromise the security system or release proprietary information, and also seeking an opinion from the firm whether providing Diercks with the recordings would compromise the security system. Based on the

response from the security company and the oral opinion from the law firm, the City filed a declaratory judgment action under Iowa Code chapter 22, asking the district court to affirm its belief that certain audio and video tapes generated by the system were confidential and asking that the court prohibit defendants and other members of the public from inspecting the tapes. *See* Iowa Code §§ 22.8(4)(c), 22.10(4). The defendants counterclaimed, alleging among other claims, the City's bad faith in refusing to produce the recordings.

After a hearing the district court found in an October 9, 2009 ruling that the tapes were not confidential and the portion of the City's resolution declaring them confidential was null and void. The court also found defendants were entitled to reasonable attorney fees in an amount to be determined. On October 4, 2009, the City filed a notice of appeal from this ruling.

On October 27, 2009, defendants filed their application for attorney fees and costs. On November 19, 2009, the City resisted the defendants' request, arguing attorney fees were not allowed because the district court made no finding the City "acted in bad faith" nor did defendants file a request for such a finding and the case now was on appeal. The City also objected to certain deposition fees being taxed as costs.

A hearing on the fees and costs was held on November 18, 2009. On November 30, 2009, the court entered a ruling. The court noted the City's argument there was an absence of a finding of "bad faith" in its October 9, 2009 ruling. The district court also addressed the defendants' argument that the court,

in sustaining their counterclaim, made a finding of bad faith that was implicit in the ruling saying:

> The court finds that it did sustain the defendants' counterclaim. The *court however did not make a specific finding of bad faith.* In fact, the court did note in its order that the Petition was filed at the direction of the attorney representing the City. The confusion arises by the fact that although the counterclaim did not allege bad faith and sought the relief of an injunction; it was argued in briefs and tried as a "bad faith" case and the defendants did seek "any other relief the court deemed appropriate."

(Emphasis supplied.)

The district court made the following statement without citing authority:

> The court finds that this is one of those cases where based on the specific facts attorney fees for prosecuting the counterclaim should be assessed due to the violation of the act. However, the fees are assessed to the governmental entity and not the Mayor. The City argues this finding does not articulate how the City violated the act or what legal authority justified an award of attorney fees under the facts here. *The violation was predicated upon the failure to turn over audio portions of tape.*

(Emphasis supplied.)

The district court then omitted from its consideration some charges and found the defendants' attorney had 369.90 hours at the rate of $175 an hour for a total of $64,732.50 and ordered judgment against the city in that amount together with a expert's fee of $150.

On December 29, 2009, the district court, in response to what it found to be a motion that was not resisted, amended its November 30, 2009 ruling to reflect that "both the affirmative defenses and the counterclaim alleged bad faith by Mayor Grindle and the City of Riverdale." The court ordered the November 30, 2009 order to be amended accordingly.

On January 4, 2010, the city filed a motion to amend the court's December 29 ruling, noting a resistance had been filed and asking the court "to consider the response and resistance in connection with its ruling." On January 5 the court amended its December 29 ruling to indicate a resistance was on file and the matter was contested. The court did not make any substantive amendments to its ruling. On January 21, the City filed a notice of appeal from the November 30 ruling on fees and costs and from the December 29 ruling on defendants' motion to amend or enlarge.

ATTORNEY FEE AWARD. The City on appeal contends the district court erred in awarding attorney fees to the defendants and the fees awarded were excessive.

The City contends it brought the action in compliance with Iowa Code chapter 22 in good faith and should be not be responsible for attorney fees for defendants. The Iowa Supreme Court has said that when a custodian of public documents brings a declaratory action in good faith to determine whether documents are subject to disclosure, it should not face the sanction of having to pay attorney fees. *Des Moines Indep. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co.*, 487 N.W.2d 666, 671 (Iowa 1992). Furthermore, Iowa Code section 22.8(4) provides that:

> 4. Good-faith reasonable delay in a lawful custodian in permitting the examination and copying of a government record is not a violation of this chapter if the purpose of the delay is any of the following:
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> . . . .
>
> c. To determine whether the government record in question is a public record, or a confidential record.

The district court made no finding of bad faith on the part of the City, finding only that it failed to turn over the records. Absent a finding of bad faith on the part of the City and violation of chapter 22, it should not have been ordered to pay the attorney fees for the defendants. *See* Iowa Code § 22.10(3) (requiring a finding the lawful custodian violated chapter 22 before awarding attorney fees under 22.10(3)(c)). We reverse the district court's order awarding the fees. Costs on appeal are taxed to defendants.

REVERSED.