

IN THE COURT OF APPEALS OF IOWA

No. 2-1114 / 11-2094
Filed September 18, 2013

**D.D., A.D., and DAVID C.
ROSTON,**
Plaintiffs-Appellants,

vs.

**DAVENPORT COMMUNITY
SCHOOL DISTRICT and
JULIO ALMANZA, Superintendent,**
Defendants-Appellees.

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

D.D., A.D., and attorney David C. Roston appeal the district court's denial of their motion for additional attorney's fees in an open records case, and the Davenport Community School District cross-appeals the prior award of attorney fees and denial of their motion for sanctions. **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

David C. Roston, Coralville, for appellants D.D. and A.D., and appellant pro se.

Mikkie Rae Schiltz of Lane & Waterman, L.L.P., Davenport, for appellees.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

D.D., A.D., and attorney David C. Roston (“Plaintiffs”) appeal the district court’s denial of their motion for additional attorney’s fees in an open records case. Defendants, Davenport Community School District and Julio Almanza, Superintendent, cross-appeal a prior award of attorney’s fees as well as the district court’s refusal to impose sanctions against Roston. Because we find Roston should have been awarded additional attorney fees, we reverse and remand and deny the defendants’ cross-appeal.

I. Background Facts and Proceedings

Plaintiffs filed a petition pursuant to Iowa Open Records Act,¹ Iowa Code chapter 22 (2009), on October 14, 2010. In the petition the plaintiffs claim to have sent a letter to the Davenport Community School District requesting certain documents and asking the court to order the defendants to comply with the request. The defendants did not initially file an answer. The plaintiffs filed a motion for summary judgment on December 13, 2010, requesting the court find the defendants in default, issue an injunction requiring compliance with the open records request, award attorney fees, and require the payment of court costs. The defendants’ answer was subsequently filed. A flurry of motions resulted, including a motion to strike, a resistance, and a reply to the resistance.

On March 18, 2011, the district court ruled on the motion for summary judgment. The court found the defendants violated the Open Records Act,

¹ Chapter 22 of the Iowa Code provides for open access to and examination of certain public records. It will be referred to as the “Open Records Act” for purposes of this opinion.

though it denied the plaintiffs' request for damages and injunctive relief. The court also found the plaintiffs were entitled to attorney fees, to be determined upon submission of a proper affidavit. Significant confusion occurred following the summary judgment ruling. The plaintiffs believed the district court's denial of their request for an injunction meant the underlying issue would proceed to trial. The defendants understood the district court's ruling on the issue of the injunction to be a final order concluding all litigation. In replying to the plaintiffs' certification of fees, the defendants requested a clarification from the court on the meaning and effect of the summary judgment ruling.

On June 17, 2011, the district court clarified the summary judgment ruling. In the ruling the court noted an error on the issue of injunctive relief. Correcting the error, the district court revised the earlier summary judgment ruling and granted the requested injunction, awarding the plaintiffs the "full relief requested in their petition," including attorney's fees in the amount of \$9,692.46. An injunction was filed ten days later. No appeal was taken from the June 17, 2011 ruling.

On June 30, 2011, the plaintiffs filed a motion requesting additional attorney fees for the period from March 18, 2011, the date of the original summary judgment ruling, through June 28, 2011. The district court denied the request on August 8, 2011. The plaintiffs then filed a motion to reconsider, which was resisted by the defendants. In their resistance the defendants also requested the imposition of sanctions. The motion to reconsider motion for sanctions was denied on September 13, 2011; however, the clerk of court failed

to notify the parties of the ruling. Three months later, on December 13, 2011, the district court entered an order finding there were no further issues for the court to decide. It was at this time the parties became aware of the earlier ruling.

Plaintiffs filed a motion to extend the time for filing a notice of appeal under Iowa Rule of Appellate Procedure 6.101(5). On January 19, 2012, our supreme court granted the motion, providing the plaintiffs with ten days to file their notice of appeal. The plaintiffs filed their appeal on February 1, 2012, and the defendants filed their cross-appeal on February 6, 2012.

II. Discussion

A. Timeliness of the appeal

The date of the filing of this appeal is significant. Due to the clerk's failure to advise the parties of the September ruling, the plaintiffs were required to seek permission from our supreme court before they could properly appeal the September 13, 2011 order. The extension of time in which to file an appeal was granted on January 19, 2012. In doing so, the order stated "[w]ithin ten days from the filing date of this order, the plaintiffs shall file a notice of appeal with the clerk of district court if they desire to take an appeal from the ruling denying their request for additional attorney fees in this case." The plaintiffs filed their notice of appeal with the Scott County district court on February 1, 2012.² The notice is

² Notice of appeal was filed with the Clerk of the Iowa Supreme Court on the same day.

dated January 30, 2012. The ten-day period granted by our supreme court ended on January 30, 2012.³

The notice was filed after the ten-day period set by our supreme court order expired. Normally filing outside the required time period would strip this court of jurisdiction to hear the appeal. See *In re Marriage of Mantz*, 266 N.W.2d 758, 759 (Iowa 1978) (“It is axiomatic that compliance with our rules relating to time for appeal are mandatory and jurisdictional. Where an appellant is late in filing, by as little as one day, we are without jurisdiction to consider the appeal.”). Our rules of appellate procedure, however, toll the deadline for filing the notice of appeal in an appeal taken as a matter of right when notice is timely served so long as the notice is actually filed within a reasonable time. Iowa R. App. P. 6.101(4). We find the supreme court order extended the time to appeal as a matter of right, and the plaintiffs served notice of their appeal on January 30, 2012, within the ten-day period provided by the supreme court order. Notice was filed on the following day, within a reasonable time for doing so. Despite notice being filed outside the ten-day period, the deadline to file the notice of appeal was tolled on January 29, 2012, and the appeal is timely.

B. Fees

On August 9, 2011, the district court entered a ruling denying the plaintiffs’ request for additional fees.⁴ The fees were requested, in a motion filed June 30,

³ January 29, 2012 was the tenth day; however the tenth day fell on a Sunday. By law, the ten-day period was extended until the next business day. Plaintiffs time for filing expired on January 30, 2012.

⁴ The course of events in June 2011 is important. On June 17, 2011, the district court entered a ruling granting the plaintiffs’ request for injunctive relief and awarding them

2011, to compensate plaintiffs' attorneys for expenses incurred from March 18, 2011 through June 17, 2011, when the district court determined the plaintiffs were entitled to injunctive relief.⁵ The district court relied upon several bases to deny the request for additional fees, all of which are challenged by the plaintiffs in this appeal.

1. Plaintiff as Attorney

The district court denied the request for additional attorney fees, in part, because attorney David Roston was also named a plaintiff. Holding Roston was not entitled to fees for his self-representation, the district court denied the entire request for fees because it did not itemize which fees were incurred advancing his personal claim.

Attorney fees are not available absent a statute or contract providing for them. *Kent v. Emp't Appeal Bd.*, 498 N.W.2d 687, 689 (Iowa 1993). Section 22.10 requires "the payment of all costs and reasonable attorney fees . . . to any plaintiff successfully establishing a violation of this chapter in the action brought under this section." Iowa Code § 22.10. As correctly implied by the district court ruling, Roston is entitled to fees which were earned while he was acting as an attorney. An attorney is "one who is designated to transact business for another; a legal agent." Black's Law Dictionary 124 (7th ed. 1999). Roston can only be compensated for fees earned while acting on behalf of the other plaintiffs, and he

"the full relief requested in their petition." The injunction was entered on June 27, 2011. Three days later, on June 30, 2011, the plaintiffs filed their motion for an award of attorney fees. The fees requested in the June 30, 2011 filing are the fees we consider today.

⁵ The plaintiffs also request fees through June 30, 2011, when they filed their application for additional fees.

may not be compensated under the statute for fees incurred while acting on his own behalf.

For reasons unclear in the record, this action was brought in the names of the D.D. and A.D. as well as in Roston's own name. From the earliest pleadings, however, Roston has identified himself as an attorney representing D.D. and A.D. There is nothing in the pleadings that indicates Roston was pursuing his own interests other than seeking fees for which he would otherwise be eligible under the law. Though Roston should not have included himself as a named plaintiff in this action, and though it would have been preferable if he had clarified in his fee affidavit that all fees were incurred as a part of his representation of the other plaintiffs, we find Roston was acting as an attorney throughout the proceedings and would be entitled to attorney fees if otherwise proper.

2. Effect of Summary Judgment

The district court ruling denies the plaintiffs' motion for additional fees, in part, on the basis the "case was essentially over . . . on February 22, 2011." The court goes on, however, to concede the March 18, 2010 order was inconsistent and good cause existed to seek clarification.⁶

The March 18, 2011 ruling on summary judgment appears to have attempted to end the proceedings. In the ruling, the district court stated as follows:

[T]he Court finds that the imposition of an injunction in this suit, pursuant to I.C.A. § 22.8, is illogical since Plaintiffs have failed to

⁶ The March 18, 2011 ruling awarded fees incurred to that point. The amount of those fees was determined in the June 17, 2011 ruling. The issue in this appeal is whether the plaintiffs are entitled to fees incurred after March 18, 2011.

prove the existence of additional documents in Defendants' possession. . . . As Plaintiffs have provided nothing other than conjecture to refute Defendants' affidavit stating that all documents have been turned over, there is no genuine issue regarding Defendants' failure to produce all records requested pursuant to the Open Records Act.

The district court later corrected this ruling by finding it had inadvertently analyzed the case under section 22.8, when the proper analysis was under section 22.10. The distinction is important as the sections shift the burden between the plaintiffs and defendants. Section 22.8 governs injunctions which restrain examination of public records and requires the party seeking the injunction to demonstrate authorization for such relief under the section. Section 22.10, on the other hand, governs injunctions which allow for the examination of public records and does not require similar proof by the plaintiff.⁷ Recognizing the difference, the district court properly granted the injunction because the defendants violated the act.

Additional litigation was necessary after the March 18, 2011 ruling on the motion for summary judgment. It was incorrect to find the litigation was "essentially over" on March 18 when the injunction was not filed until June 27, 2011. Fees incurred up until that point are recoverable under section 22.10(3)(c).

⁷ The act states that once the plaintiff has demonstrated that the defendant is subject to the chapter, the burden shifts to the defendant to demonstrate compliance. Iowa Code § 22.10(2).

3. Fees for Fees

The district court also denied an award of fees incurred after the injunction was entered.⁸ The plaintiffs had relied primarily upon *Lynch v. City of Des Moines*, 464 N.W.2d 236 (Iowa 1990) and *Jones v. MacMillan Bloedel Containers, Inc.*, 658 F.2d 236 (8th Cir. 1981) to support their request for these fees. The district court found the cases could be distinguished, however no analysis on this point was provided.

In *Lynch*, our Supreme Court examined the fee shifting portion of a civil rights statute and found the “purpose of the act is to provide the injured party full relief, including the payment of the litigation expense of attorney fees.” *Lynch*, 646 N.W.2d at 241. The fee shifting provisions at issue in *Lynch* are now found in section 216.15(9)(a)(8).⁹ *Id.*; see Iowa Code § 216.15(9)(a)(8). Because we find the statute in *Lynch* and section 22.10 to be materially similar, we find the analysis in *Lynch* to be persuasive. To be afforded the full relief contemplated by law, an attorney must be able to collect fees incurred while attempting to collect the fees guaranteed by law. Roston was entitled to fees up through and including preparing his application for fees filed on June 30, 2011. The total amount of previously uncompensated expenses incurred from March 18, 2011,

⁸ These fees would cover the work performed by the plaintiffs’ attorney between June 17, 2011, when the district court decided the injunction should be granted, and June 30, 2012, when the application for additional fees was filed. The work performed during this time was for the purpose of requesting and receiving an additional award of attorney fees.

⁹ The fee-shifting language was previously found in section 601A.15(8)(a)(8).

through June 30, 2011, is \$5,903. This is the additional amount Roston is entitled to recover.

4. Additional grounds

The district court provided several other reasons for denying plaintiffs' motion for additional fees. The court determined fees were inappropriate because there had not been a timely motion to amend the previous award. We find it was not necessary for the plaintiffs to file a motion to amend because the request for additional fees covered fees that had not yet incurred when the earlier request for fees was decided by the court.

The district court also denied additional fees because some were incurred while addressing the issue of attorney fees. For reasons previously detailed, we disagree.

Finally, the district court denied fees because the plaintiffs were not successful on all of their claims. The petition requested an injunction requiring production of certain documents plus damages, attorney fees, and costs. The ruling found there had been a violation of the Open Records Act and awarded attorney fees. The district court denied the request for a fine and the request for injunctive relief. The injunction was later entered. The extent of the plaintiffs' losses in this matter is limited to the district court's denial of the request for imposition of a fine and the plaintiffs' unsuccessful motion to strike the defendants' answer.¹⁰ The fees denied, however, were not tied to those unsuccessful pursuits, but instead were incurred while successfully pursuing a

¹⁰ The district court recognized the plaintiffs' level of success in the June 17, 2011 ruling, saying "the [p]laintiffs are entitled to the full relief requested in their Petition."

clarification of the district court's earlier ruling and obtaining an injunction. Plaintiffs should be compensated, under the law, for their successful efforts reflected in the requested fees.

C. Cross-appeal

The cross-appeal was filed within the required time following plaintiffs' notice of appeal. See Iowa R. App. P. 6.101(2)(b). Having reviewed the cross-appeal, however, we find it to be without merit.

III. Disposition

We find the plaintiffs are entitled to an additional award of attorney fees in the amount of \$5903. We reverse and remand the case to the district court with directions to enter an order awarding the fees.

REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.

Eisenhauer, C.J., concurs; Danilson, J., dissents.

DANILSON, J. (dissenting)

I respectfully dissent. I do not agree that the present appeal was taken as a matter of right and that the appeal was perfected by mailing. Here, our supreme court granted a limited extension by supreme court order pursuant to Iowa Rules of Appellate Procedure 6.101(5) and 6.1003(2). “Lack of notice of the entry [of the judgment] by the clerk does not affect the time to appeal” Iowa R. Civ. P. 1.442(6). However, the supreme court “may” extend the time to appeal where the clerk fails to notify a party of a final order or judgment. Iowa R. App. R. 6.101(5). The appeal was not taken as a matter of right.

Moreover, the supreme court’s order stated, “[w]ithin ten days from the filing date of this order, the plaintiffs shall file a notice of appeal with the clerk of the district court if they desire to take an appeal from the ruling” If the deadline to appeal was fixed by statute or rule, an extension to Monday, January 30, 2012, would exist pursuant to Iowa Code section 4.1(34) (“In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday.”). But this deadline was fixed by a court order not a statute or rule. See *George v. Gander*, 154 N.W.2d 76, 77-78 (Iowa 1967) (concluding section 4.1(34) did not apply to extend time for filing that was not prescribed by any statute or rule). Under these facts I do not agree that the appellant may use an extra day because the tenth day was a Sunday, and then also be entitled to toll the discretionary and limited extension by mailing the

notice of appeal on the eleventh day. I would conclude the appellant has not timely appealed and dismiss for lack of jurisdiction.