IN THE COURT OF APPEALS OF IOWA

No. 8-480 / 07-1928
Filed July 30, 2008

VERNON LONG and DEVA LONG,
Plaintiffs-Appellants,

vs.

TRUSTEES OF GRANT TOWNSHIP, UNION COUNTY, IOWA, and JAMES (MONTY) IDE, Individually and as Township Trustee, and KEN PEPPMEIER, Individually and as Township Trustee, and EDWIN (EDDIE) EHM, Individually And as Township Trustee,
Defendants-Appellants.

Appeal from the Iowa District Court for Union County, Sherman W. Phipps, Judge.

Plaintiffs appeal the dismissal, following non-jury trial, of their lawsuit seeking relief for alleged violation of Iowa's open meetings statute. **AFFIRMED.**

Unes Booth of Booth Law Firm, Osceola, for appellants.

Timothy R. Kenyon, County Attorney, Creston, for appellee Union County.

Catherine Levine, Des Moines, for appellees.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, J.

Plaintiffs Long appeal the dismissal, following non-jury trial, of their lawsuit seeking relief for alleged violation of Iowa's open meetings statute. We affirm the decision of the district court.

The plaintiffs Vernon Long and Deva Long ("the Longs") own the west one-half of the northwest one-quarter of a section of land in Grant Township, Union County. Richard Ross and Joyce Ross ("the Rosses") own the east one-half of the northwest one-quarter of the same section. The two properties are separated by a north-south partition fence approximately one-half mile in length.

In March 2006 the Rosses filed a request that the township trustees, the individual defendants herein, act in their power as fence viewers pursuant to Iowa Code section 359.17 (2005) and Iowa Code chapter 359A and address a controversy between themselves and the Longs regarding the north-south partition fence. The trustees met with township clerk Theodore Ide and the Rosses and Longs on April 7, 2006; heard from the Rosses and Longs; and viewed the fences in question, which included at least one "water gap." Township clerk Theodore Ide then prepared a written order of the trustees, which was signed and filed on April 13, 2006.

The Longs attempted to appeal the decision of the trustees, but their appeal was apparently dismissed as untimely. They subsequently filed their petition in this case, alleging violations of Iowa's open meetings statute, Iowa Code chapter 21. Following a non-jury trial the district court prepared and filed written findings of fact and conclusions of law and a resulting order dismissing the Longs' petition. The Longs filed a motion pursuant to Iowa Rule of Civil

Procedure 1.904(2), which the trustees resisted and the court denied. The Longs appeal.

The Longs claim that

> [c]ontrary to the trial court's ultimate findings the evidence established that the Trustees' decision was made during a closed session . . . . Whether the decision was made in the field or at Trustee Ehm's shed, it was made at a time when the [Longs] were not allowed to be present.

The Longs claim that the trustees' actions violate Iowa Code sections 21.5(1)-(4). These generally provide, respectively, that a governmental body may hold a closed session only for certain specified reasons, and only by affirmative vote of two-thirds of its members or all the members present at the meeting; the vote of each member on holding the closed session, and the reason for holding the closed session, must be announced publically at the open session and entered in the minutes; final action shall be taken in open session unless otherwise expressly permitted by another provision of the Code; and detailed minutes and a tape recording of the closed session must be kept. The record does not suggest, and the defendant trustees do not claim, that the trustees complied with any of these provisions.

Actions to enforce the open meetings statute are ordinary actions. *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 533 (Iowa 1980). Our review would thus normally be for correction of errors at law. Iowa R. App. P. 6.4; *Dennett v. City of Des Moines*, 347 N.W.2d 691, 692 (Iowa Ct. App. 1984). This case was, however, filed as an equity action, and the parties agree it was tried in equity. Our review is thus de novo, Iowa R. App. P. 6.4, as we generally will hear a case on appeal in the same manner in which it was tried,

Johnson v. Kaster, 637 N.W.2d 174, 177 (Iowa 2001). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). "[W]e are especially deferential to the district court's assessment of witness credibility." *Johnson*, 637 N.W.2d at 178 (quoting *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 267 (Iowa 2000)).

One matter deserves preliminary mention. The trustees acknowledge that the Iowa open meetings statute applies to any "meeting" of the trustees, but urge in part that their action as fence viewers in this case did not constitute a "meeting." A meeting is relevantly defined as "a gathering . . . of a majority of the members of a governmental body where there is deliberation or action upon any matter *within the scope of the governmental body's policy-making duties*." Iowa Code § 21.2(2) (emphasis added). The trustees appear to argue that their action as fence viewers was not a "meeting" as it did not involve "policy-making duties." Their argument may well have merit, as their function as fence viewers appears to involve adjudicative duties rather than policy-making duties. *See, e.g., Rodine v. Zoning Bd. of Adjustment*, 434 N.W.2d 124, 126 (Iowa Ct. App. 1988) (distinguishing the rule making process by which administrative agencies issue statements of law or policy, which are of general, prospective applicability, from administrative adjudication, which applies policy to past actions and operates concretely upon individuals); *see also Bradley v. Bd. of Tr. of Washington Twp.*, 425 N.W.2d 424, 425 (Iowa Ct. App. 1988) (describing the trustees' actions when serving as fence viewers as "quasi-judicial.").

"A prevailing party may support the district court judgment on any ground contained in the record, provided that the affirmance on that ground does not alter the rights of the parties established in the judgment." *Meier v. Senecaut III*, 641 N.W.2d 532, 540 n.1 (Iowa 2002). Even if we disagree with the district court's basis for its decision, we may nevertheless affirm if there exists an alternative ground, raised in that court and urged on appeal, that can support its decision. *Hansen v. Seabee Corp.*, 688 N.W.2d 234, 238 (Iowa 2004). However, "[w]e will not affirm a ruling on a ground not urged in the district court." *Estate of Harris v. Pappa John's Pizza*, 679 N.W.2d 673, 679 (Iowa 2004). The record does not appear to demonstrate that the trustees ever claimed in the district court that their performance of duties as fence viewers on April 7, 2006, did not constitute a "meeting." We thus will not consider this argument as a basis for affirmance of the district court's decision.

Some ten years prior to the present proceedings the trustees had met as fence viewers to assign responsibility for the fence between the Rosses and the Longs. Their decision assigned responsibility for approximately the north three-fourths to the Rosses and responsibility for approximately the south one-fourth to the Longs. The south one-fourth included a "water gap" at a creek, responsibility for maintaining the water gap being assigned to the Longs, and a ditch. The decision of the fence viewers apparently included no time limitations within which the Longs were to repair the "water gap" when it was washed out or otherwise came into disrepair. Thus the primary, if not sole, reason the Rosses requested the fence viewers to act in 2006 was to more clearly define the Longs' responsibility concerning the "water gap."

Our review of the record confirms the district court's finding that the testimony of the several witnesses is not entirely consistent. Our review also makes it clear that the court implicitly found certain testimony by Mr. Long, some of it supported by testimony of Mrs. Long, less credible than the testimony of other witnesses, leading the court to give greater credence to the testimony of the several other witnesses on those points on which their testimony was consistent with each other, was different from the testimony of the Longs, did not support the testimony of the Longs, or some combination of these circumstances.

Several examples of such testimony will suffice. The Longs testified that when the participants first met at the north end of the partition fence on April 7, trustee's chairman Ehm announced several things, including an announcement that after viewing the fence the trustees would move to Ehm's nearby machine shed and only the trustees would be allowed to go there. This testimony is unsupported by any other witness. It is indirectly contradicted by the testimony of chairman Ehm, who in describing his opening announcement of the agenda for the day included no mention of moving to his machine shed or that only trustees would be allowed there. The Longs' testimony on this point is in part directly contradicted by the testimony of trustee Ide, who testified that chairman Ehm did not ever tell anybody that they could not go to Ehm's machine shed, as well as the testimony of Mr. Ross, who testified that no one ever told him he could not go to Ehm's place.

Mr. Long testified that after the participants had walked to the south end of the fence (not all went the full distance) and returned to the area of the creek the trustees took Mr. Ross about fifty feet away and talked with him. The record

does show that all participants in the viewing did not remain together at all times. Trustee Peppmeier was the only trustee that walked the last one hundred or so feet to the south end of the fence. The Rosses did at certain locations travel by their pickup truck separately from others who were walking. During the participants' return to the road at the north end of the fence some walked behind and considerably separate from others. No testimony other than Mr. Long's, however, supports his assertion that one or more of the trustees deliberately separated Mr. Ross from the others in order to talk to him, or the implication that the trustees may have discussed with Mr. Ross separately anything of substance related to the performance of their duties.

Finally, the Longs testified that when the participants had viewed the fence and returned to the road and chairman Ehm stated the trustees and clerk were moving to Ehm's machine shed, Mr. Long requested to accompany them and his request was denied by Ehm. This testimony is directly contradicted by the testimony of all three trustees, clerk Ide, and Mr. Ross.

Upon our de novo review we find no reason to disagree with the district court's implicit credibility findings and resulting placement of greater weight on the testimony of the several witnesses other than the Longs.

Briefly and somewhat summarily stated, the district court found, among other things, that the decision of the trustees was made and communicated to the property owners at the site of the partition fence after walking the fence and before the trustees moved to Ehm's machine shed; the property owners knew where the trustees were moving to and could have gone there if they wished; moving to Ehm's shed was primarily so the trustees could hear each other (the

evidence shows the day was very windy) and communicate their decision to clerk Ide who is hearing impaired but is required to make minutes of the proceeding and write the trustees' decision; and moving to the shed was also to check the trustees' handbooks to assure that their decision was within the scope of their authority.

We disagree with the district court on one small point. We find that the decisions[1] by the trustees were discussed and made not entirely after walking the fence but instead were discussed, made, and communicated largely as the trustees noted deficiencies while walking and viewing the fence. Upon our de novo review we in all other respects fully agree with the noted findings by the court.

We conclude, as the district court did, that the Longs have not proved by a preponderance of the evidence that the actions of the trustees included a closed session. Finding no violation of Iowa's open meetings statute, we affirm the judgment of the district court.

AFFIRMED.

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[1] The trustees' decisions largely confirmed the previous decision as to which property owners would be responsible for what portions of the partition fence; required the Rosses to add some fence posts and raise the fence slightly in certain locations; and required the Longs to securely fasten fence wires to some posts, fence water gaps with no less than three barbed wires, and repair water gaps within certain time limits.