IN THE COURT OF APPEALS OF IOWA

No. 0-306 / 09-0860
Filed June 16, 2010

THOMAS C. FRITZSCHE,
Plaintiff-Appellant,

vs.

SCOTT COUNTY, IOWA BOARD OF SUPERVISORS, ROXANNA MORITZ, and SCOTT COUNTY, IOWA,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

Thomas Fritzsche, an attorney appearing pro se in this action asserting violations of the Open Meetings Act, appeals the district court's order denying him an award of attorney fees. **AFFIRMED.**

Thomas C. Fritzsche of Fritzsche Law Office, Bettendorf, pro se.

Michael J. Walton, County Attorney, for appellees.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Thomas C. Fritzsche is a licensed attorney who prosecuted this action pro se, asserting violations of the Open Meetings Act (Iowa Code ch. 21[1]) and Open Records Act (Iowa Code ch. 22) in connection with the application and interview process in 2008 seeking to replace the retiring Scott County Administrator. The district court concluded Fritzsche proved a single violation of the Open Meetings Act, but denied Fritzsche an award of attorney fees under Iowa Code section 21.6(3)(b). On Fritzsche's claim of error, we affirm.

I. Background Facts & Proceedings.

Fritzsche filed this action, eventually claiming numerous violations of the Open Meetings Act, Iowa Code chapter 21, and Open Records Act, Iowa Code chapter 22, in connection with the application and interview process in 2008 seeking to replace the retiring Scott County Administrator. Following somewhat convoluted proceedings, including three amended petitions, substitutions of parties, voluntary dismissals of parties, motions for sanctions, motions for summary judgment, and trial, the district court concluded Fritzsche proved a single violation of the Open Meetings Act. None of these rulings is challenged on appeal.

In its judgment, the court wrote:

> The only remedy sought herein by the plaintiff is an award of attorney fees. When the Court determines that a violation of Chapter 21 of the Code has occurred, the Court "[s]hall order the payment of all costs and reasonable attorney fees . . . to any party successfully establishing a violation of this Chapter." [Iowa Code § 21.6(30)(b)] . . . . The Court is unable to determine an appropriate attorney fee award under the record as it currently stands. The

[1] All references are to the 2007 Iowa Code.

> Court concludes that a hearing should be scheduled at which the parties may present evidence concerning the appropriateness of any attorney fee award herein.

Fritzsche filed a "statement for award of attorney's fees" in which he estimated his time spent on the case on a monthly basis. He requested attorney fees of $21,100 (105.5 hours at $200 per hour) and out-of-pocket expenses of $175.66.

The defendants resisted on factual and legal grounds. They noted Fritzsche's normal hourly fee was below that claimed; Fritzsche had not made any income from the practice of law in several years; and his experience in open meetings and open records litigation was several years ago. Relying on federal case law, the defendants argued an attorney acting pro se is not entitled to an award of attorney fees. *See Kay v. Ehrler*, 499 U.S. 432, 437, 111 S. Ct. 1435, 1438, 113 L. Ed. 2d 486, 492-93 (1991) (holding pro se attorney litigant was not entitled to fees under 42 U.S.C. § 1988[2]); *Falcone v. IRS*, 714 F.2d 646, 648 (6th Cir. 1983) (holding pro se attorneys/plaintiffs are not entitled to attorney fees

[2] Section 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

under 5 U.S.C. § 442; "Both a client and an attorney are necessary ingredients for an award of fees in a [Freedom of Information Act] FOIA case.").[3]

After a hearing, the district court denied Fritzsche's request for attorney fees. The court first noted that section 21.6(3)(b) awards for costs and attorney fees "should be confined to those costs and fees incurred in successfully establishing a . . . violation." *See Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 536 (Iowa 1980). The district court then compared the language of section 21.6(3)(b) to the federal statutes under which the federal courts had denied attorney fees to attorney litigants. The district court found the "rationale for denying an attorney fee award to a pro se attorney litigant under the federal statutes applies equally to the Iowa statute." In the alternative, the district court found that Fritzsche's claim would fail in any event because he had made "[n]o contemporaneous record of time engaged in the pursuit of the litigation" and "[a]t best, the Court would have to engage in its own educated speculation to arrive at an estimate of the reasonable amount of time the plaintiff spent in pursuit of the single issue on which he prevailed at trial."

II. Scope & Standard of Review.

Actions to enforce the open meetings statute are ordinary actions at law, and our review is for correction of errors at law. *Schumacher v. Lisbon Sch. Bd.*, 582 N.W.2d 183, 185 (Iowa 1998); *Telegraph Herald,* 297 N.W.2d at 533. Statutory interpretation is also reviewed for correction of errors at law. *Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 778 N.W.2d 184, 187 (Iowa 2010).

[3] "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 442(a)(4)(E)(i).

The district court's findings of fact are binding upon this court if they are supported by substantial evidence. Iowa R. App. P. 6.904(3)(*a*).

III. Analysis.

Pursuant to Iowa Code section 21.6(3)(b),

> [u]pon a finding by a preponderance of the evidence that a governmental body has violated any provision of this chapter, a court . . . [s]hall order the payment of all costs and reasonable attorney fees in the trial and appellate courts to any party successfully establishing a violation of this chapter.

There is no dispute that Fritzsche, a party, "successfully establish[ed] a violation of this chapter."[4] Thus, under section 21.6(3)(b), the court shall order the payment of "costs and reasonable attorney fees." The question presented is whether a lawyer who represents himself may be awarded "attorney fees."

A statute must be read as a whole and given its plain and obvious meaning, a sensible and logical construction. *Telegraph Herald*, 297 N.W.2d at 532. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. *Auen v. Alcoholic Beverages Div*., 679 N.W.2d 586, 590 (Iowa 2004).

An "attorney" is "a person legally appointed *by another to act as an agent* in the transaction of business." American Heritage College Dictionary 92 (4th ed. 2004) (emphasis added). A "fee" is defined as a "charge for professional services." *Id*. at 509. Both terms contemplate a relationship between parties: an attorney acts as agent for another; a fee is paid for the services of another. To

[4] Defendants emphasize the limited nature of Fritzsche's success. Any attorney fees to which Fritzsche may be entitled would have to be prorated to those attributable to the individual violation proved. *See Telegraph Herald*, 297 N.W.2d at 536.

sanction an award of "attorney fees" in the absence of an agency relationship would require a strained reading of the statute. We seek to avoid interpretations that produce such strained, impractical, or absurd results. *See Telegraph Herald*, 297 N.W.2d at 532.

In *Omdahl v. West Iron County Board of Education*, 733 N.W.2d 380, 386 (Mich. 2007), the Michigan Supreme Court held that although an attorney acting pro se was a successful party under that state's open meetings act,[5] no "actual attorney fees" were incurred and therefore no fee award could be made. The Michigan court determined that the existence of an agency relationship between separate identities, attorney and client, is required for an award of attorney fees under the act. *Omdahl*, 733 N.W.2d at 384. "Clearly, the word 'attorney' connotes an agency relationship between two people." *Id.*

Other courts, too, have recognized this rationale. In *Falcone*, 714 F.2d at 648, the court stated, "Both a client and an attorney are necessary ingredients for an award of fees in a [Freedom of Information Act] FOIA case." The *Falcone* decision was cited in *Kay,* 499 U.S. at 434-35, 111 S. Ct. at 1436, 113 L. Ed. 2d at 491. The Supreme Court concluded that the word "attorney" in the fee provision "assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." *Kay*, 499 U.S. at 435-36, 111 S. Ct. at 1437, 113 L. Ed. 2d at 491-92.

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[5] Michigan's Open Meetings Act provides for attorney fees under Michigan Compiled Laws section 15.271(4):

> (4) If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

The court explained that the specific purpose of the fee provision was to "enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Id.* at 436, 111 S. Ct. at 1437, 113 L. Ed. 2d at 492. The Supreme Court asked, "The question then is whether a lawyer who represents himself should be treated like other *pro se* litigants or like a client who has had the benefit of the advice and advocacy of an independent attorney." *Id.* at 435, 111 S. Ct. at 1437, 113 L. Ed. 2d at 491. The court stated an attorney who appears pro se

> is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom.

Id. at 437, 111 S. Ct. at 1438, 113 L. Ed. 2d at 492-93. The *Kay* court concluded, "[t]he statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Id.* at 438, 111 S. Ct. at 1438, 113 L. Ed. 2d at 493.

Following the *Kay* decision, many courts have held that several different fee shifting statutes preclude awards of fees to attorney litigants who appear pro se. *See*, *e.g.*, *Burka v. U.S. Dep't of Health & Human Servs.*, 142 F.3d 1286, 1288-90 (D.C. Cir. 1998) (finding pro se attorney-litigants are not entitled to attorney fees under FOIA); *Ray v. U.S. Dep't of Justice,* 87 F.3d 1250, 1252 (11th Cir. 1996) (concluding "the principles announced in *Kay* apply with equal force in this [FOIA] case to preclude the award of attorney's fees Ray seeks for his own work"); *State ex rel. Thomas v. Ohio State Univ.*, 43 N.E.2d 126, 131

(Ohio 1994) (holding pro se attorney-litigant in mandamus action asserting public records claims was not entitled to attorney fees award); *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1375 (Utah 1996) (holding a law firm does not incur fees when it uses its own attorneys in a collection action, noting "an attorney's fee 'presupposes a relationship of attorney and client' which does not exist in pro se situations" (citation omitted)). *But see In re Hudson*, 345 B.R. 477 (N.D.N.Y. Bankr. 2006) (finding pro se attorney-debtor may recover reasonable litigation costs under 28 U.S.C. § 7430 if the debtor overcomes the following statutory "hurdles": is a prevailing party, who did not unreasonably protract the proceedings, exhausted administrative remedies, and IRS had not established its position was substantially justified).

IV. Conclusion.

In view of the statutory language and policy considerations involved, we hold a pro se attorney litigant may not seek an award of attorney fees under section 21.6(3)(b) of the Open Meetings Act. The district court was correct in denying Fritzsche an award of attorney fees pursuant to section 21.6(3)(b). In light of our holding, we need not address Fritzsche's second claim that the district court erred in its alternate rationale. We affirm.

AFFIRMED.