FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THOMAS N. KAMP and LINDA J. KAMP,

Plaintiffs-Appellees,

vs.

THE BOARD OF ADJUSTMENT OF DAVENPORT, IOWA, et al.,

Defendants-Appellants,

RICHARD W. STEVENS,

Intervenor.

Filed November 20, 1984

4-303
84-04 127

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire and C. H. Pelton, Judges.

Defendants appeal from the district court order on certiorari review voiding the grant of a zoning variance to intervenor, asserting that failure to provide an oral hearing was in violation of Iowa R. Civ. P. 315 and due process clauses of the state and federal constitutions. VACATED AND REMANDED.

Michael J. Melloy, Davenport, City Attorney, for defendants-appellants.

Stephen W. Newport of Newport & Buzell, Davenport, for intervenor-appellant.

Curtis E. Beason of Lane & Waterman, Davenport, for plaintiffs-appellees.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

OXBERGER, C.J.

On appeal the appellants, the defendant and intervenor in the action below, contend error because they were not allowed a hearing in their certiorari claim. We vacate the judgment below and remand.

The City of Davenport Zoning Board of Adjustment granted a height variance to Richard Stevens, the intervenor. Plaintiffs challenged the variance using a petition for a writ of certiorari, and also filed a motion requesting an oral hearing pursuant to Iowa Rule of Civil Procedure 315. The hearing was set for August 24, 1983. The appellants and the respondent dispute whether the hearing was actually held. In either case, the judge presiding at that hearing, Judge J. Hobart Darbyshire, recused himself because of a conflict of interest. The matter was decided by Judge C. H. Pelton in his findings of fact, conclusions of law, without the benefit of another hearing before Judge Pelton. Judge Pelton found for the plaintiffs. Appellants say the lower court errred in not permitting a hearing to be held before Judge Pelton.

Appellants base their contention on the language of Iowa Rule of Civil Procedure 315, regarding a writ of certiorari, which states:

> When full return has been made, the court shall fix a time and place of hearing, and hear the parties upon the record made by the return. In its discretion, it may receive any transcript of the evidence taken at the original proceeding, and such other oral or written evidence as is explanatory of the matters contained in the return. Such transcript and additional evidence shall be considered for the sole purpose of determining the legality of the proceedings, and the sufficiency of the evidence before the original tribunal, board or officer to sustain its, or his action, unless otherwise provided by statute.

Petitioner and respondent then go on to argue whether additional evidence either must be or may be admitted in the hearing. We agree with respondent that the rules, applicable statutes and case law show the admission of evidence in such a hearing is discretionary. Iowa R. Civ. P. 315; Iowa Code 414.18 (1983); Anderson v. Jester, 206 Iowa 452, 461, 221 N.W. 354, 359 (1928). However, we do not find these

arguments pertinent to petitioner's claim. Admission of evidence is within the discretion of the trial court judge, but the statute shows the hearing must be held. The statute states the court "shall" fix a time and place of hearing, "and hear the parties upon the record made by the return." Iowa R. Civ. P. 315. This indicates the hearing must be held, and that oral arguments must be heard on whatever record is available. Therefore, while petitioner may not have been allowed to present whatever evidence it wanted to in addition to the record, it was entitled to a hearing and oral arguments.

The parties dispute whether oral arguments were held. Petitioner claims no hearing was ever held, while respondent says the oral arguments were made before Judge Darbyshire before he recused himself. No record was made of the arguments, but the affidavit of Judge Darbyshire shows he heard oral arguments. However, we are not convinced the presentation of oral arguments before Judge Darbyshire was sufficient when Judge Pelton decided the case. Respondent relies on the case of State v. Wrage, 279 N.W.2d 4 (Iowa 1979) for the proposition that if the arguments were heard before the first judge, it does not matter if a second judge rules on the case. Wrage does not support this argument. The court indicated that in certain circumstances where the judge may review the record to familiarize himself with the case, no harm occurs when he is substituted for the first judge. Id. at 7. The court said, "In most cases he (the judge) will do no more than to enter a record and make effective the conclusions of the judge who was present when the cause was submitted." Id. This is not the case here. Judge Pelton did not have the benefit of Judge Darbyshire's conclusions. No record was made of the oral arguments presented to Judge Darbyshire, so there were no means for Judge Pelton to familiarize himself with the arguments. In another jurisdiction, the court indicates that where the first judge recused

himself, the second judge could not determine the controlling issue of the case without a trial de novo on all the issues. Company A First Regiment v. State, 55 N.D 897, 904, 215 N W 477, 478 (1927) We hold it was error not to hear the oral arguments before the judge who made the ruling

Constitutional due process arguments were also mentioned by petitioner, but because of our decision here, we find it unnecessary to address this issue. We vacate the trial court determination and remand for court proceedings consistent with this opinion

VACATED AND REMANDED.