COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0740

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STEVEN M. LUCARELI AND CANDICE J. LUCARELI,

PLAINTIFFS-APPELLANTS,

V.

VILAS COUNTY AND JACK SMITH, INDIVIDUALLY AND AS AN EMPLOYEE OF THE STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Vilas County: DOUGLAS T. FOX, Judge. *Affirmed and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Steven and Candice Lucareli appeal orders awarding Jack Smith costs and attorney fees based on the Lucarelis' frivolous

action against him and denying their motion for reconsideration.[1] The Lucarelis argue that the trial court erred by denying their request for an evidentiary hearing, by failing to consider an earlier ruling by another judge and by applying an incorrect legal standard when it determined their action was frivolous. We reject these arguments and affirm the orders, and remand the cause to the circuit court to determine and include in the judgment reasonable costs and attorney fees Smith incurred in this appeal.

The Lucarelis own a parcel of land subject to Timber Ridge Land Company's easement over a portion of wetland on the property. Timber Ridge applied to the United States Army Corps of Engineers (COE) for a "nationwide permit" to fill .03 acres of wetland area for its driveway. The COE granted the permit and the County approved the project by rezoning the driveway out of wetland classification. The Lucarelis commenced this action, originally naming Timber Ridge and the DNR as defendants, seeking to enjoin Timber Ridge from proceeding with the project and alleging that the DNR deprived them of their right to receive just compensation for the "taking" of their property.

At a hearing on a motion for a preliminary injunction, Judge James Mohr noted that the Lucarelis had an arguable claim for the denial of their procedural rights. He expressly rejected their takings claim, however.

The Lucarelis subsequently reached a settlement with Timber Ridge, agreeing to purchase Timber Ridge's easement and to allow it to use the Lucarelis' existing driveway. At a hearing before Judge Fox, the Lucarelis dismissed their

[1] By order dated July 29, 1998, this court concluded that the notice of appeal was not timely to give this court jurisdiction to review the order dismissing the Lucarelis' action against Smith. This court's review is limited to questions involving frivolousness.

action against the DNR, but stated their intention to commence an action against Jack Smith, a DNR employee. Judge Fox granted the Lucarelis leave to amend their complaint to bring an action against Smith, but noted that he thought the issue was moot.

Before the Lucarelis commenced their action against Smith, they were informed of the DNR's role in the wetland filling permit process. The DNR's attorney explained in a letter that the DNR's role was only to verify that the proposed project fit within the "de minimus" category and therefore did not require additional water quality certification. The Lucarelis nonetheless filed an action against Smith, acknowledging the DNR's limited role, but alleging that Smith's input played a "significant and material" role in the COE's decision to issue the wetland fill permit, which in turn led to the Vilas County board's decision to rezone the property. The complaint alleged a taking and a denial of procedural due process because the Lucarelis were not given notice of the permits and hearings or decisions on the permits.

Smith filed a motion to dismiss the complaint and requested costs and attorney fees under § 814.025, STATS., on the ground that the Lucarelis' decision to continue the case after they were informed of the DNR's limited role and after Smith's attorney warned that he would pursue frivolousness costs established that the Lucarelis knew or should have known their action was frivolous. The Lucarelis responded by agreeing to voluntary dismissal of their complaint against Smith, provided the matter would not be deemed frivolous. They asserted that "resolution of Plaintiff's [sic] property dispute with Timber Ridge may make this matter moot" and that "it would appear that the damages at issue in this case may no longer justify a substantial investment of the Court's and counsel's time." The Lucarelis submitted a brief defending the merits of their

claim against Smith and disputing that the claim was frivolous. They did not request an evidentiary hearing.

The trial court dismissed the complaint against Smith and found that continuing the action against him was frivolous because the Lucarelis knew or should have known that the claim had no basis in law or equity and that their action could not be supported by a good-faith argument for an extension, modification or reversal of existing law. The Lucarelis filed a motion that the trial court construed as a motion for reconsideration, arguing that they were entitled to an evidentiary hearing on the frivolousness issue. The trial court concluded that the Lucarelis were not entitled to an evidentiary hearing because no disputed questions of relevant fact existed and there were sufficient facts in the record for the court to decide the issue. The court also concluded that the Lucarelis waived entitlement to such a hearing because they should have requested it before the court ruled that their case was frivolous. The Lucarelis then filed a second motion for reconsideration, arguing that they had relied on the pretrial order which set no deadline for briefing this issue, that Judge Mohr's earlier ruling provided them with an absolute defense to the frivolousness argument and that the trial court applied an incorrect legal standard in analyzing their takings claim. The trial court denied reconsideration and the Lucarelis appeal the finding of frivolousness and the order denying reconsideration.

Section 814.025, STATS., provides, in part:

> **Costs upon frivolous claims and counterclaims. (1)** If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the

> successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> **(2)** The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.
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> **(3)** In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
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> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Whether a claim is frivolous presents a mixed question of fact and law. ***Stoll v. Adriansen***, 122 Wis.2d 503, 513, 362 N.W.2d 182, 187-88 (Ct. App. 1984). The trial court determines what the facts are in order to determine what a reasonable litigant or attorney would or should have known regarding those facts. ***Id***. Findings of fact will not be set aside unless they are clearly erroneous. *See* § 805.17(2), STATS. The legal significance of the findings, in terms of whether knowledge of those facts would lead a reasonable litigant or attorney to conclude that the claim is frivolous, presents a question of law. ***Id***. We owe no deference to the trial court's decision on this question, although we do value its opinion and analysis. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993).

The trial court properly denied the Lucarelis' motion for a hearing on the question of frivolousness. The request for a hearing cited three issues on which the Lucarelis wished to make a record: (1) the value of their property after rezoning; (2) whether Smith improperly cited an unpublished decision; and (3) the exact rate of pay for Smith's publicly employed attorney. None of these issues relates to whether the Lucarelis' claim against Smith was frivolous. No hearing is required to determine that a reasonable attorney[2] would have inquired further into the facts and law before commencing this action against Smith. The record shows Smith gave advance warning that he would allege the action was frivolous, the trial court's observation that the matter appeared moot, and the Lucarelis' opportunity to have learned of Smith's limited role in the process. Because the Lucarelis' conduct is judged by an objective standard, *see* ***Riley v. Lawson***, 210 Wis.2d 478, 491, 565 N.W.2d 266, 272 (Ct. App. 1997), no hearing was required on their actual knowledge.[3]

The Lucarelis argue that they should be allowed to rely on Judge Mohr's statement at the preliminary injunction hearing that the Lucarelis, as property owners, appeared to have procedural rights ignored by the DNR. This argument fails for several reasons. First, this issue was not timely called to the trial court's attention. Second, Judge Mohr's comments were made in an action where Smith was not a named party and where the complaint alleged that the

[2] Steven Lucareli is an attorney. At trial, he appeared *pro se* in this matter and apparently also represented his wife.

[3] In addition, the Lucarelis' request for a hearing was not timely. Their argument that the scheduling order did not require them to request a hearing on frivolousness when they briefed Smith's motion has no merit. The scheduling order was not so detailed that it could anticipate all of the issues that might arise. The argument that a party should not be required to request a hearing on a frivolousness motion unless the scheduling order sets a time for that request is itself frivolous.

DNR, not the COE, had issued the permit in question. Third, an attorney is not allowed to file pleadings without further research into the facts and law based solely on a statement made by a judge regarding adjudication of a different claim against different defendants after new and undisputed facts have become known.

Finally, the Lucarelis' complaint also alleged a takings claim against Smith even though Judge Mohr specifically stated that he saw no takings claim against the other defendants at the time he ruled on the preliminary injunction. The Lucarelis' argument that Judge Mohr's rulings were the law of the case is meritless. If rulings made at the preliminary stages were binding on the court throughout a case, rulings on temporary restraining orders for example would necessarily become permanent.

The Lucarelis' claims against Smith were frivolous. Regardless of whether the takings claim refers to physical occupation or a regulatory restriction, a taking of an identifiable property right must support the claim. *See* ***Reel v. Enterprise v. City of La Crosse***, 146 Wis.2d 662, 670-75, 431 N.W.2d 743, 747-49 (Ct. App. 1988). The Lucarelis have not identified any property physically occupied or restricted by virtue of Smith's activities. By settling the claims against Timber Ridge, the Lucarelis prevented any occupation of their land. As the trial court noted before the action against Smith was filed, that settlement rendered moot all takings claims against Smith because it prevented any physical occupation from taking place.

The Lucarelis' procedural due process claims against Smith are frivolous because they assume he had a role in the permitting process, which he did not. The Lucarelis were informed before they amended the complaint to include Smith that the COE, not the DNR, issued the wetland fill permit to Timber

Ridge. They argue that Smith was required to consider other alternatives to filling the wetland. That requirement applies only when the DNR is the permitting authority.[4] Pursuant to a DNR notice published January 6, 1993, the COE is given permit authority to allow construction of short driveways across wetlands. The size of the area to be filled, .03 acres, fits the classification of an activity having de minimus environmental impact. The COE permit takes effect unless the DNR acts within thirty days by notifying the applicant that State water quality certification is required.

The trial court correctly viewed the role of the DNR and Smith in this matter as "acquiescing" in the COE's authority to issue a permit. The Lucarelis claim that Smith denied them notice and an opportunity to be heard in this acquiescence unreasonably stretches their due process rights. Because previously published DNR notices determined that requests to fill small amounts of wetland for driveways were de minimus, the only action Smith could have taken to prevent the COE permit would be to lie about the size of the project or ignore the DNR's published guidelines. Smith's role consisted of determining that the COE, not the DNR, was the appropriate authority to issue the permit. The Lucarelis' allegation that his input played a "significant and material" role is a careless and unfounded misstatement of fact and law.

The Lucarelis argue that their position could be supported by a reasonable extension, modification or reversal of existing law to recognize the right of input by land owners. They do not identify the law that would need to be extended to give them a right to notice and a hearing before a State agency

[4] The Lucarelis' argument is not based on legal authority, but on a misleading newspaper headline.

acquiesces in a federal agency's exercise of jurisdiction. They also fail to relate their action against Smith, as an individual and an employee of the DNR, to their proposed extended right. Smith's responsibility was only to follow established procedures which he undeniably accomplished by verifying that the project fell within the de minimus driveway category. The Lucarelis argue that ***Gillen v. City of Neenah***, 219 Wis.2d 807, 829-35, 580 N.W.2d 628, 636-38 (1998), supports their action. In ***Gillen***, the court held that a citizen asserting a violation of the public trust doctrine can sue a private party whom the citizen believes was inadequately regulated by the DNR, to enjoin damage to navigable waterways. ***Gillen*** does not support the Lucarelis' action for damages against a DNR employee after the project has been abandoned and no damage has occurred. Likewise, a lawsuit against Smith is not the appropriate method to lobby for a change of any law or regulation.

Finally, we conclude that this appeal constitutes a continuation of the Lucarelis' frivolous actions against Smith. The Lucarelis continue to assert positions that are unsupported by law and that cannot be reasonably reached by expanding existing law. Therefore, we remand the matter to the circuit court to determine and include in the judgment costs and attorney fees attributed to this appeal.

By the Court.—Orders affirmed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.