

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP243

Cir. Ct. No. 2012CV798

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

EUGENE GERHARTZ AND CATHERINE GERHARTZ,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF LOMIRA,

DEFENDANT,

JEFF ELSINGER AND BRENDA ELSINGER,

DEFENDANTS-RESPONDENTS,

HOMESTEAD MUTUAL INSURANCE COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for Dodge County:
BRIAN A. PFITZINGER, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Eugene and Catherine Gerhartz appeal summary judgment in favor of Jeff and Brenda Elsinger on the Gerhartzs' trespass claim against the Elsingers. The Gerhartzs argue that the Elsingers trespassed by installing a manhole cover and in-ground casing within the Town of Lomira's right-of-way across the Gerhartzs' property. For the reasons that follow, we affirm.

BACKGROUND

¶2 The Elsingers operate a large dairy farm on property to the west of the Gerhartzs' property, and they grow crops on farmland east of the Gerhartzs' property. The manure from the Elsingers' dairy farm is kept in a storage system, and is removed and spread over the Elsingers' farm fields one to two times per year, depending on the crop rotation. Traditionally, the manure was transported from the storage system to the farm fields in trucks holding approximately 5,500 to 6,000 gallons of manure.

¶3 In August 2010, with the Town's permission, the Elsingers installed within the Town's right-of-way across the Gerhartzs' property a manhole cover and an in-ground 8-inch steel casing, which extends from the Gerhartzs' property to the east into property owned by another individual. The in-ground casing is utilized by the Elsingers to pump large quantities of liquid cow manure from their dairy farm to their farm fields located east of the Gerhartzs' property.

¶4 Following the installation of the manhole cover and in-ground pipe, the Gerhartzs brought suit against the Town, alleging a claim for inverse

condemnation under WIS. STAT. § 32.10 (2013-14),¹ and against the Elsingers for civil trespass. All parties moved for summary judgment.

¶5 The circuit court entered summary judgment in favor of the Gerhartzs on their inverse condemnation claim. However, the court entered summary judgment in favor of the Elsingers on the Gerhartzs' trespass claim. The court determined that the Town had the right to authorize the installation of the manhole cover and in-ground casing within the Town's right-of-way on the Gerhartzs' property. And for this reason granted summary judgment in the Elsingers' favor.

¶6 The Gerhartzs appeal only summary judgment in favor of the Elsingers on the Gerhartzs' trespass claim.

DISCUSSION

¶7 The Gerhartzs contend that the Elsingers are not entitled to summary judgment on the Gerhartzs' trespass claim. The Gerhartzs' argument depends entirely on the following premise: that the Town's taking of their property is "void" because the land was not taken for any public use. From this void-taking premise, the Gerhartzs argue that the Town did not have authority to permit the Elsingers to install the manhole cover and in-ground casing and the Elsingers were thus trespassers upon the Gerhartzs' land.

¶8 The Elsingers contend, in part, that the Gerhartzs are judicially estopped from arguing that the Town's taking of the Gerhartzs' property was

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

unlawful and that the Town thus lacked authority to authorize the installation of the manhole cover and in-ground casing. For the reasons explained below, we agree with the Elsingers.

¶9 Judicial estoppel is invoked to prevent a party from “playing fast and loose with the courts” by asserting inconsistent positions in legal proceedings. *Feerick v. Matrix Moving Sys., Inc.*, 2007 WI App 143, ¶16, 302 Wis. 2d 464, 736 N.W.2d 172; *Olson v. Darlington Mut. Ins. Co.*, 2006 WI App 204, ¶4, 296 Wis. 2d 716, 723 N.W.2d 713. Judicial estoppel has been applied where inconsistent arguments or strategies occur in the same case. See *Feerick*, 302 Wis. 2d 464, ¶32 n.8-9. See, e.g., *State v. English-Lancaster*, 2002 WI App 74, ¶22, 252 Wis. 2d 388, 642 N.W.2d 627 (judicial estoppel bars complaint on appeal about cautionary instruction requested and received at trial); *State v. Michels*, 141 Wis. 2d 81, 97, 414 N.W.2d 311 (Ct. App. 1987) (judicial estoppel applied where argument on appeal inconsistent with argument made before the circuit court).

¶10 For judicial estoppel to apply, the following three elements must be met: (1) the later position must be clearly inconsistent with the earlier legal strategies or arguments; (2) the facts at issue are the same in both instances; and (3) the party to be estopped must have convinced the first court to adopt his or her position. *Feerick*, 302 Wis. 2d 464, ¶¶17, 20. Whether the elements of judicial estoppel have been met is a question of law, which this court reviews *de novo*. *Id.*, ¶17.

¶11 The first element requires that the party against whom judicial estoppel is asserted must be asserting a legal position that is inconsistent with a legal position previously asserted. On appeal, the Gerhartzs argue that the Town’s taking of their property is unconstitutional, and thus void, because their property

was not taken for a public purpose. In order for a government's taking of private property to be constitutional, the taking must be for public use and just compensation for the private property must be paid. *Town of Beloit v. County of Rock*, 2003 WI 8, ¶43, 259 Wis. 2d 37, 657 N.W.2d 344.

¶12 As stated above, before the circuit court, the Gerhartzs asserted an action for inverse condemnation under WIS. STAT. § 32.10 against the Town. An action under § 32.10 is a condemnation proceeding initiated by the property owner rather than the government. A property owner who asserts a claim for inverse condemnation under § 32.10 must prove that his or her property has been occupied by an entity that possesses the power of condemnation but that the power of condemnation has not been exercised. *See* § 32.10. The Gerhartzs asserted that the Town had taken their property by permitting the installation of the manhole cover and in-ground casing within the Town's right-of-way across their property, and the Gerhartzs sought just compensation for that taking. The Gerhartzs argue that their argument on appeal is not inconsistent with their argument before the circuit court because in both instances they argue that the Town unlawfully took their property. They argue that before the circuit court, they argued that the taking was unlawful because they had not been provided just compensation for the taking, and that they are now arguing that the taking was unlawful because the property was not taken for public use. However, a necessary element of the Gerhartzs' inverse condemnation claim before the circuit court was that the Town's taking must have been for public use. *Town of Beloit*, 259 Wis. 2d 37, ¶43. To now argue that the taking was not for a public use and that as a result, the Town's taking was not constitutionally valid is wholly inconsistent with their prior legal position that they were entitled to just compensation from the Town because the Town had condemned their property.

¶13 The second factor requires that the facts at issue now and before be identical. We are faced here with inconsistent legal arguments being made in the same case. The facts as they were when the Gerhartzs asserted their claim for inverse condemnation are the same facts before us on appeal.

¶14 The final factor requires that the Gerhartzs must have convinced the circuit court to adopt their first argument. The Gerhartzs argued before the circuit court that there had been a taking of their property by the Town. The circuit court agreed and entered summary judgment in favor of the Gerhartzs on that claim, and ordered the Town to pay the Gerhartzs an amount of just compensation determined by the court. Thus, the court agreed with and adopted the Gerhartzs' first argument.

¶15 Because each of the elements of judicial estoppel are met here, we conclude that the Gerhartzs are estopped from now arguing that the Town's taking is "void" because it is unconstitutional. Because we have concluded that the Gerhartzs are estopped from making this argument, we affirm.²

² The Elsingers have filed a motion for attorney's fees and costs under WIS. STAT. § 809.25(3) on the ground that the Gerhartzs' appeal is frivolous. The rules for appellate procedure authorize this court to award costs, fees, and attorney fees as a sanction only if we conclude that the appeal was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or the party or the party's attorney "knew, or should have known, that the appeal ... [had no] 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." WIS. STAT. Rule 809.25(3)(c). In order to award attorney fees, we must conclude that the entire appeal is frivolous. *Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. This court determines whether an appeal is frivolous as a matter of law, considering "what a reasonable party or attorney knew or should have known under the same or similar circumstances." *Larson v. Burmaster*, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134 (quoted source omitted).

Applying this standard, we cannot say that the Gerhartzs' entire appeal is frivolous. Accordingly, we deny the Elsingers' motion.

CONCLUSION

¶16 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

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

