

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0974-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

JOHN A. ZULLIGER AND BONNIE L. ZULLIGER,

PLAINTIFFS-APPELLANTS,

V.

**TOWN OF HARDING, A POLITICAL SUBDIVISION OF THE
STATE OF WISCONSIN, AND STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Lincoln County:
GARY L. CARLSON, Judge. *Affirmed.*

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

¶1 CANE, C.J. John and Bonnie Zulliger (the Zulligers) appeal a judgment dismissing their amended complaint against the State of Wisconsin.¹ The Zulligers' amended complaint sought a declaration of their rights with respect to a particular piece of property and damages for slander of title. Because we conclude that the Zulligers' collateral attack on an order to lay out a highway is barred by WIS. STAT. § 80.34(2), we affirm. We also affirm the dismissal of the tort claim against the State on sovereign immunity grounds because the Zulligers did not appeal the trial court's determination that the tort claim was barred by sovereign immunity.²

¶2 On October 23, 1998, the Zulligers filed a complaint in circuit court against the State and the Town of Harding. The allegations included the following: (1) The Zulligers owned a specific piece of property ("the disputed parcel") in the Town of Harding; (2) prior to May 1998, the Town claimed that it acquired ownership of the disputed parcel by virtue of a proceeding under WIS. STAT. § 80.02; (3) on or about May 28, 1998, the Town conveyed to the State of Wisconsin Department of Natural Resources an easement for highway purposes that included the disputed parcel; and (4) despite the Zulligers' claim that they lawfully owned the disputed parcel, neither the State nor the Town would relinquish its claim.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1997-98 version.

² In addition to not addressing the sovereign immunity decision in their notice of appeal, the Zulligers do not address it in their briefs. Therefore, we will affirm the trial court's ruling on that issue without further discussion.

¶3 The amended complaint sought a declaration of the parties' rights and damages from both defendants for slander of title.³ The State moved to dismiss the claims against it on two theories: (1) The Zulligers' action constituted a collateral attack on a WIS. STAT. § 80.02 proceeding and is barred because the challenge to the Town's order was not brought within ninety days of the date of the highway order; and (2) the slander of title claim is barred by sovereign immunity. The trial court granted the State's motion to dismiss on both grounds. The Zulligers appeal the judgment dismissing their amended complaint against the State.⁴

¶4 We review de novo a motion to dismiss for failure to state a claim, accepting all the alleged facts and reasonable inferences as true. *See Town of Eagle v. Christensen*, 191 Wis. 2d 301, 311-12, 529 N.W.2d 245 (Ct. App. 1995). The purpose of the motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. *See id.* at 311. Because pleadings are to be liberally construed, a claim will be dismissed only if it is clear that under no conditions can the plaintiff recover. *See id.*

¶5 The Zulligers present three arguments on appeal: (1) The time limits of WIS. STAT. § 80.34 are not applicable and therefore do not bar this action; (2) the State's construction of § 80.34 would lead to absurd results and

³ The complaint also sought damages from the Town for timber trespass. That claim was not addressed in the motion to dismiss and is not relevant to this appeal.

⁴ The Town did not join in the motion to dismiss and was not dismissed in the judgment. Instead, the trial court indicated that once the State was dismissed, it would continue with the remainder of the case "insofar as it exists against the [T]own of Harding." On appeal, the Town has filed a brief in support of the State's position, even though it remains a defendant in the Zulligers' action.

violate the requirements of due process; and (3) the Town is estopped from claiming its order is valid against the Zulligers. We reject all three arguments.

¶6 We first address the Zulligers' assertion that the time limits of WIS. STAT. § 80.34(2) are not applicable and, therefore, do not bar this action. Pursuant to § 80.34(2), the validity of a highway order "if fair on its face shall not be open to collateral attack, but may be tested by certiorari or other proper action or proceeding brought directly for that purpose" if commenced within ninety days of the date after the order is made. The Zulligers failed to bring the instant action, a collateral attack on the highway order, within ninety days after the order was made. Therefore, their only potential argument is that the order is not fair on its face.⁵

¶7 The Zulligers contend that the order is not fair on its face for two reasons: the Town did not issue them an award within ten days of the order, and they were not sent notice of the hearing. On their first argument, they rely on *Roberts v. Jeidy*, 256 Wis. 603, 42 N.W.2d 280 (1950), which held that a town board's order laying out a highway was not fair on its face when the town failed to file an award of damages within the statutory time limits. The Zulligers argue that because they were not issued an award within ten days of the Town's order, the order is not fair on its face.

¶8 *Roberts* is clearly distinguishable. In *Roberts*, no award of damages was issued to anyone. The Zulligers do not allege that the Town failed to issue any award but, instead, that the Town issued an award to the wrong party. This

⁵ The Zulligers essentially contend that an order that is not fair on its face is subject to a collateral attack that is not time-constricted.

argument must fail. The Town determined who owned the land during the hearing. The Zulligers cannot claim there was a defect in the process simply because they disagree with the Town's conclusion that someone else owned the disputed parcel.

¶9 The Zulligers also claim the order is unfair on its face because they did not receive notice of the hearing pursuant to WIS. STAT. § 80.05(2)(a).⁶ There is no allegation that the Town failed to file any of the required notices or orders. Instead, the Zulligers' only challenge to the order is that they were not given individual notice of the hearing via registered mail. They offer no authority to support their allegation that this makes the order unfair on its face.

¶10 It is undisputed that the Town gave the notice required by WIS. STAT. § 80.05(2)(a) to the party it believed was the owner. Moreover, the Zulligers do not allege that the Town failed to give notice by publication as required by § 80.05(2)(c), or that there was not a public hearing on the matter as required by WIS. STAT. §§ 80.02 and 80.06. The purpose of giving public notice and having a public hearing is to allow anyone potentially affected by the proposal, including those who believe they are the rightful owners of the property,

⁶ WISCONSIN STAT. § 80.05, "**Notice of meeting; service and publication**," provides in relevant part:

(2) The applicants shall:

(a) At least 10 days prior to the date of hearing give notice by registered mail to all occupants and owners of record of lands through which the highway may pass or, if the application is for discontinuance, to the occupants and to the owners of record of all lands abutting on the highway.

(b) Give notice by registered mail to the department of natural resources and to the county land conservation committee in each county through which the highway may pass.

(c) Publish a class 2 notice, under ch. 985.

to participate in the proceedings. The Zulligers had the opportunity to do so.⁷ Therefore, we conclude that the Zulligers have not alleged anything in their complaint that would lead us to conclude that the order is unfair on its face.

¶11 In their second argument, the Zulligers argue that a construction of WIS. STAT. § 80.34(2) not requiring actual notice to every potential owner would lead to absurd results:

Should the State's position be adopted, the potential for "skullduggery" abounds. Someone who wants a road condemned and the land taken from a private citizen could just make up the name of an owner or provide the name of a friend. The notice would go to the fictitious owner, no one would appear at the hearing, an order describing the correct land but the wrong owner could be entered. In three months, the real owner of the lands is just out of luck and the land is gone.

¶12 This argument ignores the safeguards incorporated in WIS. STAT. ch. 80. First, in addition to giving actual notice to all known owners pursuant to WIS. STAT. § 80.05(2)(a), the Town is required to give notice by publication pursuant to § 80.05(2)(c). Second, the Town is required to hold a public hearing, *see* WIS. STAT. §§ 80.02 and 80.06, and to publicize it at least ten days before the hearing. *See* WIS. STAT. § 80.05(2). Finally, the order is subject to collateral attack for

⁷ The briefs suggest that the Zulligers may have actually participated in the hearing and may have submitted materials for the Town to review prior to their decision. However, because this information is not part of the record or, more specifically, the complaint we are reviewing, the fact that the Zulligers may have had actual notice of the hearing and may have taken advantage of the opportunity to argue their case is not a basis for our decision.

ninety days. *See* WIS. STAT. § 80.34(2).⁸ All of these provisions provide a safeguard against the “skullduggery” predicted by the Zulligers.

¶13 Moreover, the Zulligers’ argument fails because if their interpretation of the statute were accurate, a new type of “skullduggery” could abound. Specifically, the same fictitious names and friends could file collateral attacks on highway orders years after the orders are entered simply by claiming they did not have actual notice of the original hearings. Under the Zulligers’ analysis, these claims would be viable and could delay highway construction. We reject this reasoning. WISCONSIN STAT. § 80.34(2) provides a logical remedy for anyone aggrieved by a highway order: it allows collateral attacks within ninety days of the order. This balances the rights of those who feel aggrieved by the proceeding against the Town’s right to proceed with highway construction, confident there will be no legal challenges after ninety days.

¶14 The Zulligers’ final argument is that the Town is estopped from claiming the order is valid. The Zulligers allege in their brief (but not in their complaint) that sometime after the first order was entered, the Town served notice on the Zulligers that it was seeking to lay a highway over lands owned by the Zulligers. The notice the Zulligers refer to is not in the record, and we have no further information about this allegation. In any event, the argument is not relevant to this appeal, because only the State was dismissed from this case. The Town remains a party. It is up to the trial court to consider and rule on the Zulligers’ argument on the estoppel issue. For the reasons discussed, the trial

⁸ Pursuant to this statute, the Zulligers’ action could have been brought as a valid collateral attack on the order if it had been brought within 90 days of the order. The briefs do not address why the Zulligers failed to bring the action within 90 days.

court's judgment dismissing the Zulligers' amended complaint against the State is affirmed.

By the Court.—Judgment affirmed.

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