

IN THE IOWA DISTRICT COURT IN AND FOR FREMONT COUNTY

DANNY JENNINGS, SHELLEY
JENNINGS, KRISTEN THATCHER,
STEPHEN THATCHER, IDA VAN SCYOC,
and TANDON VAN SCYOC,

Petitioners,

v.

FREMONT COUNTY, IOWA; BOARD OF
SUPERVISORS OF FREMONT COUNTY,
IOWA; CLINT BLACKBURN; CHRIS
CLARK; RANDY HICKEY; and DUSTIN
SHELDON,

Respondents,

and

SHENANDOAH HILLS WIND PROJECT,
LLC,

Intervenor.

CASE NO. EQCV025651

RULING ON INTERVENOR'S
MOTION FOR SANCTIONS

This case came before the Court on September 14, 2023, for hearing on Intervenor's Motion for Sanctions filed July 13, 2023. Petitioners filed a resistance on July 24, 2023. Hearing was held telephonically and reported. At hearing, Petitioners appeared by attorneys Shawn Shearer and Theodore Sporer. Respondents appeared by attorney Robert Livingston. Intervenor appeared by attorney Kristy Dahl Rogers. The Court has considered the filings, the arguments of counsel, and applicable law, and now makes the following:

FINDINGS OF FACT

On January 25, 2023, Petitioners filed this action asserting 23 claims regarding Fremont County's plan to allow Shenandoah Hills Wind Project, LLC, an affiliate of Invenergy, to construct

a collection of wind turbines in Fremont and Page Counties. An amended petition was filed February 8, 2023, which states the following claims:

1. Declaratory Judgment – Zoning Ordinance Prohibits Construction of WECS in the Agricultural District
2. Temporary and Permanent Injunctive Relief – Prohibit Issuance of WECS Building Permits for Structures in Violation of the Zoning Ordinance
3. Declaratory Judgment – Illegality and Invalidity of Road use and Decommissioning Agreements
4. Temporary and Permanent Injunctive Relief – Invalidate Road use and Decommissioning Agreements & Prohibit Actions in Furtherance Thereof
5. Declaratory Judgment – Adoption of the Wind Ordinance was an Illegal Act of the Board – Failure to Consider the Comprehensive Zoning Plan
6. Temporary and Permanent Injunctive Relief – Invalidate Wind Ordinance as an Illegal Act of the Board – Failure to Consider the Comprehensive Zoning Plan
7. Declaratory Judgment – Approving and Entering the Road Use Agreement and Decommissioning Agreement were Illegal Acts of the Board – Failure to Consider the Comprehensive Zoning Plan
8. Temporary and Permanent Injunctive Relief – Invalidate Approval and Entry of Road Use and Decommissioning Agreements as an Illegal Act of the Board – Failure to Consider the Comprehensive Zoning Plan
9. Declaratory Judgment – The Adoption of the Wind Ordinance was an illegal Act of the Board – Failure to Take Preliminary Votes at the First and Second Readings of the Proposed Wind Ordinance
10. Temporary and Permanent Injunctive Relief – The Adoption of the Wind Ordinance was an Illegal Act of the Board – Failure to Take Preliminary Votes at the First and Second Readings of the Proposed Wind Ordinance
11. Declaratory Judgment – The Adoption of the Wind Ordinance was an Illegal Act of the Board – Failure to Hold Three Readings of the Same Ordinance
12. Temporary and Permanent Injunctive Relief - The Adoption of the Wind Ordinance was an Illegal Act of the Board – Failure to Hold Three Readings of the Same Ordinance
13. Declaratory Judgment and Temporary & Permanent Injunctive Relief – Adoption of the Wind Ordinance and Approval and Entry of the Road Use Agreement and Decommissioning Agreement were Unreasonable, Arbitrary and Capricious
14. Declaratory Judgment and Temporary & Permanent Injunctive Relief – Supervisors Conflicts of Interest
15. Declaratory Judgment and Temporary & Permanent Injunctive Relief – Order to Enforce Obligation to Reapply Due to Material Changes in Application Information
16. Open Meetings Act – The Board Violated the Open Meetings Act in is Deliberation and Adoption of the Wind Ordinance.

17. Open Meetings Act – The Board Violated the Open Meetings Act in its Deliberation and Approval of the Application
18. Open Meetings Act – The Board Violated the Open Meetings Act in its Deliberation, Approval, and Entry of the Road Use Agreement and the Decommissioning Agreement
19. Conditional – Declaratory Judgment and Temporary & Permanent Injunctive Relief – Void for Vagueness
20. Conditional – Declaratory Judgment and Temporary & Permanent Injunctive Relief – Illegal Act – Failure to Republish Amended Ordinances
21. Conditional – Declaratory Judgment and Temporary & Permanent Injunctive Relief – Illegal Delegation of Board Authority to Private Entities

Petitioners filed their suit through their attorneys Theodore Sporer and Shawn Shearer. On February 8, 2023, Shenandoah Hills Wind Project, LLC filed petition to intervene, which was granted by the Court on March 10, 2023. On March 30, 2023, Intervenor filed a Motion to Dismiss. Respondents filed a Motion for Judgment on the Pleadings on April 4, 2023. Petitioners filed their own Motion for Partial Judgment on the Pleadings concerning claim 1.

The Court filed a written ruling on the pending motions on June 13, 2023. In its ruling, the Court sustained the Intervenor's Motion to Dismiss and Respondents' Motion for Judgment on the Pleadings while denying Petitioner's Motion for Temporary Injunction and Motion for Partial Judgment on the Pleadings. As a result, the Court dismissed the case and assessed costs to the Petitioners. Petitioners then filed a notice of appeal.

Prior to the filing of this case, a similar action was brought in Page County *Hunter et al. v. Page County, Iowa et al.* case number EQCV105928 filed September 19, 2022. Many of the claims asserted in the *Hunter* case are the same or substantially similar to the claims of the present case. Shenandoah Hills Wind Project also sought to intervene in *Hunter*, but before hearing on the motion, the case was removed to federal court. The United States District Court for the Southern District of Iowa filed a written ruling on January 31, 2023, finding that Claim One was barred because petitioners failed to timely file a writ of certiorari and that enactment of the wind ordinance

was a legislative function not subject to review. Further, the court found that Open Meetings Act violation challenges were speculative for plausible relief to be granted. Claim Two was dismissed because the petitioners conceded the wind ordinance was clear and abandoned the due process claim. Claims Three and Four were dismissed because certiorari was the exclusive remedy. Petitioners then filed an appeal, which remains pending. Apart from the facts and legal issues presented, *Hunter* and the present case are also similar concerning the attorneys involved. In both cases, the petitioners are represented by Mr. Sporer and Mr. Shearer. In both cases, Shenandoah Hills Wind Project is represented by Bret A. Dublinske, Brant M. Leonard, and Kristy Dahl Rogers. In *Hunter*, Robert Livingston represented one of the Page County Supervisors individually. Here, Mr. Livingston represents Fremont County and the Board of Supervisors jointly.

CONCLUSIONS OF LAW

Under Iowa Rule of Civil Procedure 1.413,

Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after a reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.

Upon a violation of the Rule, the Court is required to impose "an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee." The purpose of the Rule is to "maintain a high degree of professionalism in the practice of law" and "discourage parties and counsel from filing frivolous suits and otherwise deter misuse of pleadings, motions, or other papers." *Barnhill v. Iowa Dist. Court for Polk County*, 765 N.W.2d

267, 273 (Iowa 2009). However, the Rule “is not meant to stifle the creativity of attorneys or deter attorneys from challenging or attempting to expand existing precedent” as our courts recognize that “[o]ur law is constantly evolving and hopefully improving because talented attorneys are willing to fight uphill battles.” *Id.* at 279.

“Counsel’s conduct is measured by an objective, not subjective, standard of reasonableness under the circumstances,” which looks to what a reasonably competent attorney admitted to practice before the district court would do under the circumstances. *Barnhill*, 765 N.W.2d at 273. In considering whether an attorney has conducted a reasonable inquiry, courts review factors set forth in *Mathias v. Glandon*, 448 N.W.2d 443 (Iowa 1989). The factors for reasonable inquiry into the law are:

- a. The amount of time that was available to the signer to research and analyze the relevant legal issues;
- b. The complexity of the factual and legal issue in question;
- c. The clarity or ambiguity of existing law;
- d. The plausibility of the legal positions asserted;
- e. Whether the signer is an attorney or *pro se* litigant;
- f. The knowledge of the signer;
- g. Whether the case was accepted from another attorney, and, if so, at what stage in the proceedings;
- h. The extent to which counsel relies upon other counsel to conduct the legal research and analysis underlying the position asserted;
- i. The resources reasonably available to the signer to devote to the inquiry; and
- j. The extent to which the signer was on notice that further inquiry might be appropriate.

ANALYSIS

The basis of Intervenor’s motion is that Petitioners should have known, based upon the *Hunter* rulings, that their claims were not meritorious and that proceeding with this action was frivolous. Intervenor’s point out that they put Petitioners on notice by sending a Rule 1.412 letter in both *Hunter* on September 22, 2022, and in this case on February 6, 2023, informing Petitioners

that their petition was not well ground in law and requested that it be dismissed. In response, Petitioners assert that there was no controlling precedent when they filed their petition and the present motion is an attempt to collaterally attack the Court's prior order that dismissed the case.

The issue of whether there has been a violation of Rule 1.413 necessitating sanctions "is inextricably entwined with the determination of issues in the underlying actions." *Franzen v. Deere and Co.*, 409 N.W.2d 672, 675 (Iowa 1987). As the Court has already ruled on the underlying issues on summary judgment, it will not repeat them here. Intervenor's assert that counsel for Petitioners have violated the inquiry duty of Rule 1.413, by failing to conduct a reasonable inquiry into the law relevant to the petition. As such, the Court addresses each *Mathias* factor individually.

a) Time available for research and analysis

The wind ordinance at issue in the petition was first read in spring of 2020 and became effective on August 12, 2020. The Intervenor's application was approved on July 13, 2022. The road use and decommissioning agreements were executed December 28, 2022. In sum, the conduct that Petitioners complained of occurred over two and half years, which is a significant amount of time in which legal research and analysis could be performed. Further, because the issues of this case are nearly identical to issues presented in *Hunter*, it is presumed that the research and analysis for those issues would have already been completed. The Court finds this factor weighs in favor of sanctions.

b) Complexity of the factual and legal issues

The wind farm project is a large-scale endeavor that has been ongoing for many years and involves multiple governmental jurisdictions and parties. Most significantly, this case involves Article III, section 39A of the Iowa Constitution, known as county home rule, which allows a county to determine their local affairs and government with certain limitations. While the text of the section

is not particularly complex, the contours of its meaning and interplay with other laws is relatively untested. However, as the *Hunter* court noted, “the problems raised here are not issues of first impression in the State.” Further, this Court was able to summarily dismiss all claims of this action without rigorous analysis. The Court finds this factor weighs in favor of sanctions.

c) Clarity or ambiguity of existing law

As stated above, there is some ambiguity in the area of county home rule law. However, many of the claims put forth by the petition concern other topics in general municipal law that are settled. Additionally, the existing law was further clarified by the *Hunter* court, which counsel for Petitioners would have been aware of before filing their amended petition. The Court finds this factor weighs in favor of sanctions.

d) Plausibility of legal positions asserted

This factor looks to how plausible the claims are; not the likelihood of being successful. Some claims, such as claims 9-12 that alleged procedural defect in the adoption of the wind ordinance, are plausible. On the other hand, claims 1 and 2, which allege a violation of Fremont County’s comprehensive plan, are not plausible claims. This fact was noted by this Court and the *Hunter* court. Claims 5 and 7 both cite to Iowa Code section 351.1, which was not only repealed in 1994, but also concerned a requirement that dogs wear license tags after a certain age further impinging the plausibility of the petition. While there are some claims that are plausible, the majority of claims have minimal plausibility due to weak factual or legal bases, or because the issues were already decided in *Hunter*. The Court finds this factor weighs in favor of sanctions.

e) Whether the signer is an attorney or pro se litigant

The signers in this case are both attorneys. The Court finds this factor weighs in favor of sanctions.

f) Knowledge of the signer

The record reflects that counsel for Petitioners are both licensed attorneys and have practiced law for a number of years both in Iowa and in other states. Apart from the general level of knowledge presumed to be held by all attorneys licensed in our state, the level of experience jointly held by Petitioners' counsel indicates a higher degree of knowledge. The Court finds this factor weighs in favor of sanctions.

g) Whether the case was accepted from another attorney, and, if so, at what stage

This factor is inapplicable as counsel for Petitioners have represented Petitioners throughout the case.

h) Extent to which counsel relies upon other counsel to conduct the legal research and analysis underlying the position asserted

There have been no facts or allegations that counsel for Petitioners relied upon other counsel. The Court finds this factor weighs in favor of sanctions.

i) Extent to which counsel had to rely upon other counsel to conduct the legal research and analysis underlying the positions asserted

There have been no facts or allegations that counsel for Petitioners relied upon other counsel. The Court finds this factor weighs in favor of sanctions.

j) Resources reasonably available to the signer to devote to the inquiry

The Court is unaware of what resources were available to counsel for Petitioners; therefore, the Court does not give any weight to this factor.

k) Extent to which the signer was on notice that further inquiry might be appropriate

Intervenor's Rule 1.412 letters should have put counsel on notice that further inquiry might be appropriate. Specifically, the *Hunter* letter was sent September 22, 2022 – four months before this Petition was filed. Additionally, the fact the *Hunter* court chose to exercise its supplemental

jurisdiction to summarily dismiss the claims should have informed counsel that the claims in *Hunter*, that were then again asserted here, may have legal or factual defects requiring further inquiry. The Court finds this factor weighs in favor of sanctions.

“The test of an attorney’s actions in zealously pursuing his or her client’s interests is one of reasonableness.” *Barnhill*, 765 N.W.2d at 279. Having reviewed each of the *Mathias* factors individually, the Court concludes that counsel for Petitioners have violated the inquiry duty of Rule 1.413 by asserting unreasonable claims. The lengthy petition in this case is largely based upon untenable bases of law, on legal matters already settled by Iowa courts and the *Hunter* court, and upon speculation and conjecture. The quantity and quality of legal and procedural defects in the pleadings render Petitioners’ counsel’s actions unreasonable, and the Court finds they have crossed the line from zealous advocacy into frivolousness by asserting claims that could not be successful, despite the ample notice of the defects present.

While it is true that federal interpretation of State law is not binding precedent upon this Court, it is persuasive authority. *Goodpaster v. Schwan’s Home Service, Inc.*, 849 N.W.2d 1 (Iowa 2014). Further, the basis for the *Hunter* court’s order was Iowa case law that is binding upon this Court. Rule 1.413 is not meant to punish those who argue for a modification or reversal of existing law made when made in good faith. However, counsel for Petitioners have not advocated for a modification or reversal. Rather, they have asserted the same claims with nearly identical facts and parties in apparent nonacceptance of prior case law. It appears to the Court that counsel for Petitioners, after *Hunter* was dismissed, sought a second bite at the apple and filed this action regardless of its deficiencies.

In resistance to Intervenor’s motion, counsel for Petitioners assert that because this Court temporarily restrained the Fremont County Board of Supervisors, the Court cannot now find claims

were asserted in bad faith. The Court does not find this argument persuasive. The Court's March 28, 2023, order only restrained the Supervisors from taking permanent action on pending matters until hearing was held. It made no finding on the merits of the claims or whether they were in violation of Rule 1.413. Counsel for Petitioners also argues that Intervenor's motion is too late and should be equitably estopped. Rule 1.413 does not contain any deadlines within which a motion for sanctions must be brought, and our case law does not prevent a party from waiting until a final judgment has been issued to file their motion. Therefore, the Court finds Intervenor's Motion timely.

As the Court has found that counsel for Petitioners have violated Rule 1.413 by initiating and maintaining this case despite it not being warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, an appropriate sanction shall be ordered. Intervenor seeks monetary sanctions for fees and costs incurred after the dismissal of *Hunter*, and request an opportunity to present additional briefing on matters relevant for the Court's determination of the sanction. The Court agrees that further briefing would be beneficial and so orders a briefing schedule set forth below.

RULING

IT IS THEREFORE ORDERED that Intervenor's Motion for Sanctions filed July 13, 2023, is granted. Intervenor and Respondents shall have three weeks after the filing of this order to brief the Court regarding an appropriate sanction. After Intervenor and Respondents have both filed briefs or after the three-week period in which to file briefs has expired, Petitioners shall have three weeks to file any responsive brief regarding an appropriate sanction. When all briefs have been filed or the period in which to file briefs has expired, Court Administration shall schedule a hearing on the matter.



State of Iowa Courts

Case Number
EQCV025651
Type:

Case Title
JENNINGS ET AL VS FREMONT COUNTY IOWA ET AL
OTHER ORDER

So Ordered

A handwritten signature in black ink, appearing to read 'Eric J. Nelson', written over a horizontal line.

Eric J. Nelson, District Court Judge,
Fourth Judicial District of Iowa

Electronically signed on 2023-11-07 13:31:21