

NOTICE

Decision filed 05/10/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 130109-UB

NO. 5-13-0109

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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| LAKE ENVIRONMENTAL, INC., |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | St. Clair County. |
| |) | |
| v. |) | No. 11-MR-226 |
| |) | |
| DAMON T. ARNOLD, in His Capacity as Director |) | |
| of Public Health, and THE DEPARTMENT OF |) | |
| PUBLIC HEALTH, |) | Honorable |
| |) | Stephen P. McGlynn, |
| Defendants-Appellees. |) | Judge, presiding. |

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion in denying the plaintiff's motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994) because this court cannot conclude from the record that no reasonable circuit judge would have denied the plaintiff's motion.

¶ 2 Following protracted litigation at the administrative and circuit court levels, on July 3, 2012, the plaintiff, Lake Environmental, Inc., filed a motion, pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994), for sanctions against the defendants, Nirav

D. Shah, in his capacity as Director of Public Health,¹ and the Illinois Department of Public Health (IDPH). The motion was denied, and the plaintiff appeals. For the following reasons, we affirm the order of the circuit court.

¶ 3

FACTS

¶ 4 On February 18, 2008, IDPH issued a "notice of emergency work stop order" to the plaintiff, halting the plaintiff's work on an asbestos removal project at Scott Air Force Base. On September 18, 2008, IDPH moved for voluntary dismissal of the emergency stop work order proceedings on mootness grounds. The following day, former defendant Damon T. Arnold, in his then capacity as Director of IDPH, granted, with prejudice, the motion for voluntary dismissal. On March 25, 2010, IDPH sent the plaintiff a notice of intent to revoke the plaintiff's asbestos contractor's license, alleging as the basis for revocation noncompliance by the plaintiff with applicable laws and regulations, all related to the Scott Air Force Base project in 2008. Administrative proceedings followed, and ultimately, on July 28, 2011, Arnold issued a final administrative decision that revoked the plaintiff's license. This complaint for administrative review of that decision was filed in the circuit court on August 30, 2011.

¶ 5 On July 26, 2010, during the pendency of the administrative proceedings described above, IDPH initiated an action for civil penalties and injunctive relief against

¹Damon T. Arnold was the Director when this action commenced. He has since been replaced by Director Nirav D. Shah, who has been substituted as a party by operation of law. See 735 ILCS 5/2-1008(d) (West 2010).

the plaintiff in the circuit court of St. Clair County, also on the basis of the alleged violations during the Scott Air Force Base project in 2008. On September 19, 2011, the circuit judge in that case dismissed the civil penalties complaint, with leave to refile. Subsequently, in this case, on April 25, 2012, the same circuit judge ordered IDPH to reinstate the plaintiff's license pending his decision on the merits. On June 4, 2012, the judge entered an order that, *inter alia*, reversed the revocation of the plaintiff's license and remanded for "further proceedings to determine whether or not" the plaintiff's license "should be suspended or revoked." On July 3, 2012, the plaintiff filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). On July 24, 2012, a hearing was held on the motion, and at the conclusion of the hearing, the same circuit judge took the matter under advisement and told the parties that a written decision would follow. On November 26, 2012, the judge entered an order which stated, in full, "Plaintiff's request for sanctions pursuant to Rule 137 is denied." The plaintiff filed a motion to reconsider the denial of sanctions, which was heard by a different judge, as the initial trial court judge was no longer on the bench. The motion to reconsider, which noted, *inter alia*, the lack of an explanation for the denial of sanctions, was denied on February 7, 2013, again without explanation, and a timely appeal followed.

¶ 6 On July 10, 2014, this court issued an opinion finding that the circuit court had issued a final order over which this court had jurisdiction. *Lake Environmental, Inc. v. Arnold*, 2014 IL App (5th) 130109. This court reversed the circuit court's order denying the plaintiff's motion for sanctions and remanded this cause with directions that the circuit court enter a new order describing, with specificity, the reasons for its ruling. *Id.*

¶ 11. On September 24, 2015, the Illinois Supreme Court reversed this court's decision, finding that Illinois Supreme Court Rule 137 (eff. July 1, 2013) does not require the circuit court to explain its reasons for denying a motion for sanctions. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 15. The Illinois Supreme Court remanded the cause to this court with instructions that we review the record to determine whether a reasonable person could agree with the circuit court's decision to deny the motion for sanctions. *Id.* ¶ 17. Additional facts will be set forth as necessary throughout the remainder of this order.

¶ 7 ANALYSIS

¶ 8 The Illinois Supreme Court clearly set forth our standard of review and the requirements of Illinois Supreme Court Rule 137 (eff. July 1, 2013) in its opinion remanding this cause to this court for review of the record. *Id.* Illinois Supreme Court Rule 137 provides that:

"The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after 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 to cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 137(a) (eff. July 1, 2013).

¶ 9 If a party or an attorney violates Rule 137, the court may, upon motion or its own initiative, impose sanctions upon the individual who signed the filing, the represented

party, or both. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 13 (citing Ill. S. Ct. R. 137(a)). The rule is designed to discourage frivolous filings, not to punish parties for making losing arguments. *Id.* ¶ 15 (citing *In re Estate of Wernick*, 127 Ill. 2d 61, 77 (1989)). "Furthermore, Rule 137 provides that circuit court judges *may* impose sanctions when the rule is violated; they are not required to do so." (Emphasis in original.) *Id.* "A circuit court's decision to deny a motion for sanctions is reviewed for abuse of discretion." *Id.* ¶ 16 (citing *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998)). An abuse of discretion occurs when no reasonable person would agree with the circuit court's decision. *Id.* (citing *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 52). In reviewing a circuit court's decision to deny sanctions, this court ought to focus on whether the record provides an adequate basis for upholding the decision and not on the circuit court's specific reasons for doing so. *Id.* With these principles in mind, we turn to the plaintiff's appeal.

¶ 10 The plaintiff's motion for sanctions asserts that IDPH violated Rule 137 because it had no legal basis for defending the plaintiff's petition for administrative review. In support of its position that IDPH should have conceded that there was no legal basis for it to revoke the plaintiff's contractor's license, the plaintiff essentially presents three arguments. Before addressing the substance of these arguments, it is important to reiterate that if a party violates Rule 137, it is not mandated that the circuit court impose sanctions on that party, but rather the circuit court has the discretion to do so. See *Lake Environmental, Inc.*, 2015 IL 118110, ¶ 15. Accordingly, in showing an abuse of discretion, the plaintiff's burden on appeal is more stringent than merely showing that any

reasonable circuit judge would have found that IDPH violated Rule 137. Rather, we must affirm the decision of the circuit court unless we find that IDPH violated Rule 137 *and* the violation occurred under circumstances where no reasonable circuit judge would have denied a motion for sanctions. To this end, the plaintiff has cited no case, and this court is aware of none, where a reviewing court in our state has reversed a circuit court's order denying a motion for sanctions. This is not to say that such a showing would be impossible, but it is a high threshold to show an abuse of discretion, given the language of Rule 137. With this in mind, we turn to the three arguments the plaintiff presents on appeal.

¶ 11 The plaintiff's first argument on appeal is based on *res judicata*. According to the plaintiff, no reasonable circuit judge would have denied the motion for sanctions because IDPH knew or should have known, prior to commencing proceedings to revoke the plaintiff's contractor's license, that its prior dismissal of the emergency stop work order proceeding precluded any further claim against the plaintiff based on its work on the 2008 asbestos removal project at Scott Air Force Base. The circuit court ultimately found that *res judicata* applied to bar both the proceeding to revoke the plaintiff's contractor's license and the prior proceeding to impose civil penalties, and IDPH did not appeal these judgments. However, as explained below, our review of the record and applicable law reveals that such a conclusion was not so well established that any reasonable judge would have found that IDPH's arguments to the contrary were to be considered frivolous such that they merited sanctions.

¶ 12 Under the doctrine of *res judicata*, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim or cause of action. *Godare v. Sterling Steel Casting Co.*, 103 Ill. App. 3d 46, 50 (1981). The doctrine extends to matters decided and that could have been decided. *Id.* Where the decision of an administrative agency is made for a purpose similar to those of a court and in proceedings which are "adjudicatory," "judicial," or "quasi-judicial," such a decision can have a *res judicata* effect. *Id.* at 51.

¶ 13 Section 20 of the Commercial and Public Building Asbestos Abatement Act (the Act) (225 ILCS 207/20 (West 2008)) sets forth the powers and duties of IDPH with respect to its implementation. These powers include, but are not limited to, enacting rules relating to the safe performance of asbestos abatement activities in commercial and public buildings, assessment of civil penalties for violations of the Act and rules promulgated thereunder, and training and licensing of persons and firms that perform inspection and abatement activities. *Id.* To that end, pursuant to rules promulgated by IDPH:

"In circumstances of substantial danger to the environment or to the public health of persons or to the welfare of persons, the Department may direct an entity to cease and desist asbestos abatement activities, to halt the activity causing or contributing to the danger, or to take such other action as may be necessary. The contractor or contractors subject to the order will be removed from the list [of response action contractors licensed under the Act] provided for in Section 20 of

[the Act]. The Department shall authorize the reinstatement of the asbestos abatement activities and reinstatement of the contractor to the Department's list of contractors when the activities that are the subject of the emergency stop work order have been brought into compliance with the requirements of applicable State and federal requirements and this Part." 77 Ill. Adm. Code 855.630 (2008).

¶ 14 Here, pursuant to this section, IDPH initiated an emergency stop work order proceeding, and once the work site had been brought into compliance, IDPH dismissed the proceeding as moot in order to allow the asbestos abatement activities of the Scott Air Force Base project to recommence. IDPH also reinstated the plaintiff's position on the list of response action contractors as required by the above-quoted rule. In order for *res judicata* to apply to bar IDPH from taking any further action against the plaintiff based on these activities, the issue was whether IDPH could, within the existing statutory and administrative framework, pursue additional action against the plaintiff within the context of these emergency stop work order proceedings. *Godare*, 103 Ill. App. 3d at 50 (*res judicata* applies to bar matters that could have been decided in the prior proceeding). Although the circuit court found that this was the case, and that *res judicata* required IDPH to initiate proceedings to revoke the plaintiff's contractor's license within the emergency stop work order proceeding or not at all, we find that applying *res judicata* in this particular administrative context was a matter of first impression in Illinois.

¶ 15 The plaintiff cited no authority, before the circuit court or on appeal, that is directly on point for the application of *res judicata* in this or any similar situation, and our research has revealed none. While this court is without jurisdiction to determine the

merits of this issue, we find that because the emergency stop work order proceeding appears to be limited in its scope to the immediate situation occurring at the job site, and there is no clear authority on this point, IDPH could make a good-faith argument that other remedies could not be pursued in the context of this proceeding and had to be brought in separate proceedings. For this reason, we find that a reasonable judge could find that IDPH's refusal to concede the issue of *res judicata* did not merit sanctions.

¶ 16 The plaintiff's second argument on appeal is that it was an abuse of discretion to deny its motion for sanctions because IDPH should have known that its action to revoke the plaintiff's contractor's license was preempted by federal law. As with the issue of *res judicata*, the circuit court ultimately found that because IDPH relied on alleged violations of federal regulations promulgated by the Occupational Safety and Health Administration (OSHA) to revoke the plaintiff's contractor's license, IDPH's actions were preempted and therefore invalid. However, as with the issue of *res judicata*, our review of the record and applicable law reveals that such a conclusion was not so well established that any reasonable judge would have found that IDPH's arguments to the contrary were to be considered frivolous such that they merited sanctions.

¶ 17 The plaintiff and the circuit court relied on the decision of the Supreme Court of the United States in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, (1992), in determining that IDPH's findings and resulting actions in revoking the plaintiff's asbestos contractor's license were invalid because they are preempted by OSHA. In *Gade*, the Court held that nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted as in

conflict with OSHA regulations. *Id.* at 98-99. The Court found that although OSHA regulations do not foreclose a state from enacting its own laws to advance the goal of worker safety, it does restrict the ways in which it can do so. *Id.* at 103. The Court concluded that if a state wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor. *Id.* at 103-04.

¶ 18 Although the circuit court found that the Court's decision in *Gade* was on point and thus IDPH's actions in this case were preempted and thus invalid, we find that the facts in *Gade* were markedly different than those in the case at bar. In *Gade*, the state regulations at issue governed the licensing of hazardous waste crane and hoisting equipment operators. *Id.* at 92. These licensing requirements contained training requirements above and beyond those required of the same workers under OSHA regulations. *Id.* at 94. Here, IDPH, in its regulations governing procedures for abatement of asbestos in commercial and public buildings, required that removal of asbestos-containing materials be conducted in accordance with regulations promulgated pursuant to OSHA, as well as other federal regulations governing air quality. IDPH's revocation of the plaintiff's contractor's license was based, in large part, on alleged violations of these regulations. Neither the plaintiff nor the circuit court cited authority finding federal preemption in this particular context, where federal regulations are used by a state regulatory authority as a benchmark for its licensing standards. Accordingly, while the circuit court ultimately found in favor of the plaintiff on the preemption issue, and this

court is without jurisdiction to review this determination, a reasonable judge could find that IDPH was making a good-faith argument to distinguish *Gade* in this context.

¶ 19 The plaintiff's final argument on appeal is that it was an abuse of discretion for the circuit court to refuse to award sanctions in this case because IDPH persisted in defending the plaintiff's appeal of the revocation of its license despite actual knowledge that it would lose. Because the circuit court had already dismissed the related civil penalties litigation on *res judicata* and preemption grounds, the plaintiff argues that IDPH's refusal to concede and reinstate the plaintiff's license in the instant case demonstrated "vindictive animus" toward the plaintiff. We note that the plaintiff cites no authority to this court in support of its argument on this point. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2103). To the extent that the plaintiff is arguing that IDPH's defense in this matter was interposed for an improper purpose as described in Rule 137, we note that the circuit court did not consider any such evidence. We further note that the considerations as to whether *res judicata* would apply would be different for the civil penalties litigation than for the instant action insofar as the circuit court would need to consider whether each remedy could have been brought in the initial proceeding. In any case, we find that reasonable judicial minds could differ as to whether continuing to defend the instant case in light of the dismissal of the civil penalties litigation amounts to sanctionable conduct. As such, we cannot say the circuit court abused its discretion.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the November 26, 2012, order of the circuit court of St. Clair County, which denied the plaintiff's motion for sanctions, is affirmed.

¶ 22 Affirmed.