

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2011

A. John Voelker
Acting 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. 2010AP1942-FT

Cir. Ct. No. 2009CV714

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JEFFREY P. GREY AND LORI L. GREY,

PLAINTIFFS-APPELLANTS,

V.

BREMER BANK, NATIONAL ASSOCIATION,

DEFENDANT-RESPONDENT.

APPEAL from judgment of the circuit court for Polk County:
MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jeffrey Grey and Lori Grey appeal a summary judgment dismissing their claims against Bremer Bank, National Association.¹

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version.

The circuit court dismissed the Greys' claims as barred by claim preclusion. We agree and, therefore, affirm.

¶2 The relevant facts are undisputed. Bremer Bank commenced a real estate foreclosure and replevin action against the Greys. The Greys did not appear in that action, and the circuit court entered judgment against them. The judgment, entered on December 18, 2008, included the following language: “[Bremer Bank] is entitled to recovery of the secured personal property and the recovery of the liquor license pursuant to the terms of the liquor license agreement set out in [Bremer Bank’s] complaint.” The Greys did not redeem the real estate, and a sheriff’s sale was held on June 24, 2009. Bremer Bank was the successful bidder, and the circuit court confirmed the sale on July 8, 2009.

¶3 On September 16, 2009, the Greys brought this action against Bremer Bank. In their complaint, the Greys alleged that they owned the Countryside Inn and personal property located in the inn. The complaint acknowledged that a foreclosure judgment had been entered and that the real estate had been sold pursuant to that judgment. The Greys alleged that the sale of the real estate “extinguish[ed] the entire debt owed” by them to Bremer Bank. The complaint further alleged that Bremer Bank “has retained the personal property owned” by the Greys “although due demand has been made for the return” of the personal property. The Greys alleged that Bremer Bank had converted the personal property and demanded that Bremer Bank return the property. The Greys also sought treble damages, actual attorney fees, and investigative costs.

¶4 After filing an answer denying most of the allegations of the complaint, Bremer Bank moved for summary judgment. Bremer Bank’s arguments were twofold—first, no conversion could have occurred because the

Greys' ownership interest in the personal property was extinguished by the foreclosure judgment and, second, the Greys' claim was barred by claim preclusion.²

¶5 The circuit court granted Bremer Bank's motion, agreeing with both of Bremer Bank's arguments. The circuit court wrote, "[i]f the Greys had issues with the nature or scope of the foreclosure action they could have asked for reconsideration or appealed the judgment. ... Since Bremer [Bank] was awarded the personal property of Countryside Inn in the foreclosure case, [it] couldn't possibly convert property [it] ha[s] legal authority over." The circuit court further rejected, as not supported by any legal authority, the Greys' contention that Bremer Bank's claim to the personal property was extinguished when the sheriff's sale was confirmed.

¶6 Whether claim preclusion applies under a given set of facts is a question of law which we review de novo. *Menard, Inc. v. Liteway Lighting Prods.*, 2005 WI 98, ¶23, 282 Wis. 2d 582, 698 N.W.2d 738. Claim preclusion has three elements: (1) identity of parties; (2) identity of the causes of action; and (3) a final judgment on the merits in a court of competent jurisdiction. *See id.* Under the doctrine of claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated *or which might have been litigated* in the former matter." *Id.*, ¶26 (citation omitted). Further, a plaintiff may be precluded "from asserting claims in a subsequent action that the party failed to assert in a previous action in which it was

² In its motion, Bremer Bank used the term "res judicata." In *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 549-50, 525 N.W.2d 723 (1995), the supreme court stated that the principle of "res judicata" should be referred to as "claim preclusion."

a defendant.” *Id.*, ¶27 (citation omitted). Wisconsin has adopted the common-law compulsory counterclaim rule which “bars a subsequent action by a party who was a party in a previous suit if ‘a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action.’” *Id.*, ¶¶27-28 (citation omitted).

¶7 The application of those principles compels summary judgment in favor of Bremer Bank. The Greys allege Bremer Bank converted their personal property. To succeed on that claim, they must establish ownership of the personal property. *See Bruner v. Heritage Companies*, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999) (The elements of tortious conversion are intentionally controlling or taking property belonging to another, without the owner’s consent, resulting in serious interference with the owner’s rights to possess the property.). Under the terms of the foreclosure judgment, however, Bremer Bank was “entitled to recovery of the secured personal property” located on the real estate. Therefore, the Greys cannot establish a basic prerequisite of a conversion claim, namely, that they owned the personal property in question. Moreover, if the Greys were to succeed in this lawsuit and establish that Bremer Bank converted their personal property, that judgment would “nullify” or “impair” Bremer Bank’s ownership right to the personal property, as established in the foreclosure action. Claim preclusion bars such an action. *See Liteway Lighting*, 282 Wis. 2d 582, ¶28.

¶8 In their appellate brief, the Greys concede that “the judgment of foreclosure and replevin gave [Bremer Bank] the right to the possession of the personal property.” They assert, however, that because Bremer Bank “did not take possession of the personal property until the sale was confirmed,” “all debt” to Bremer Bank was “extinguish[ed],” and ownership reverted back to the Greys when the sale was confirmed. The Greys do not cite any legal authority for that

argument and, therefore, we do not address that contention. *See Racine Steel Castings v. Hardy*, 139 Wis. 2d 232, 240, 407 N.W.2d 299 (Ct. App. 1987) (Arguments unsupported by reference to legal authority need not be considered.).

¶9 The Greys also contend that claim preclusion should not be applied because their claim does not arise out of the same transaction. They note that Bremer Bank’s lawsuit was for real estate foreclosure and replevin of personal property, while their lawsuit is for conversion, and they assert that the two lawsuits “are not related in time, space, origin or motivation.” The Greys’ position defies common sense. The personal property that was the subject of the replevin part of Bremer Bank’s lawsuit is the same personal property that the Greys now assert they own. The two lawsuits are plainly related.

¶10 The Greys also suggest that the Uniform Commercial Code supports their position, and they cite to “Section 409.506.” The language that the Greys quote, however, is from a statutory section that has not existed for over nine years. *See* 2001 Wis. Act 10, § 78 (repealing and recreating WIS. STAT. ch. 409). We need not address Greys’ UCC claim any further.³

By the Court.—Judgment affirmed.

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

³ Bremer Bank suggests that WIS. STAT. § 409.623 is the relevant UCC provision and it does not support the Greys. We agree. Under § 409.623(2), a person may redeem collateral by “tender[ing] ... all obligations secured by the collateral; and [of t]he reasonable expenses and attorney fees described in [WIS. STAT. §] 409.615(1)(a).” It is undisputed that the Greys defaulted on their obligation to Bremer Bank. The UCC does not afford any relief to the Greys.

