

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 10, 1995

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

NOTICE

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

Nos. 94-2157
94-2226

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

94-2157

WAUSHARA COUNTY,

Plaintiff,

v.

RICHARD MACK,

Defendant-Third Party
Plaintiff-Appellant,

JOHN DAVIS, MICHAEL MOE,
EAGAN AGENCY LTD., LEWIS MURACH,

Third Party Defendants-Respondents.

94-2226
COUNTY OF WAUSHARA,

Plaintiff,

v.

RICHARD MACK,

**Defendant-Third Party
Plaintiff-Appellant,**

**JOHN DAVIS,
MICHAEL MOE,**

Third Party Defendants-Respondents.

APPEAL from a judgment and orders of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(b), STATS. Richard Mack appeals from a judgment and orders issued in a civil forfeiture action. He raises three issues on appeal: (1) "restraints" issued against Mack are unconstitutional; (2) the trial court lacked jurisdiction; and (3) the trial court had jurisdiction to decide Mack's counterclaim and cross-claims against Waushara County, John Davis, Michael Moe, Eagan Agency Ltd. and Judge Lewis Murach.

We conclude that the "restraints" issued against Mack were proper and that the trial court had jurisdiction. We also conclude that the trial court did not have jurisdiction to decide Mack's counterclaim and cross-claims. We therefore affirm. We also conclude that Mack should be sanctioned for his scandalous and disrespectful briefs.

BACKGROUND

On July 16, 1992, Waushara County commenced a forfeiture action against Richard Mack, alleging that Mack had violated Waushara County's trespassing ordinance by installing a pier in violation of the riparian rights of his neighbor, John Davis. Mack counterclaimed, seeking to recover damages from Waushara County. Mack later filed a cross-claim against Davis and Michael Moe. Mack also filed a second cross-claim and a *lis pendens* against Eagan

Agency Ltd., Davis and Judge Murach. The trial court dismissed the counterclaim and cross-claims without prejudice. This appeal followed.

JURISDICTION

Mack claims that the trial court lacked jurisdiction over him because process was never served on him. Were Mack correct, we would be required to dismiss his appeal because no action would exist in which he could file his counterclaim and cross-claims. But we need not consider this issue. Mack has appeared in this action. He moved for appointment of legal counsel, he demanded a jury trial, he requested the production of documents, and he moved for a protective order and an evidentiary hearing. He also filed a motion to dismiss, and a counterclaim and cross-claims. Where an appearance is made and relief is sought on other matters, an objection based upon lack of personal jurisdiction is waived. *Artis-Wergin v. Artis-Wergin*, 151 Wis.2d 445, 452, 444 N.W.2d 750, 753 (Ct. App. 1989). We conclude that because Mack has appeared in this action, he has waived his objection based upon lack of personal jurisdiction.

COUNTERCLAIM/CROSS-CLAIMS

Mack next contends that the trial court had jurisdiction to decide the counterclaim and cross-claims against Waushara County, Davis, Eagan Agency Ltd. and Judge Murach.

Section 801.01(2), STATS., provides in part, "Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin *except where different procedure is prescribed by statute or rule.*" (Emphasis added.) Section 66.119(3)(b), STATS., provides that different procedure:

If a person appears in court in response to a citation, the citation may be used as the initial pleading, unless the court directs that a formal complaint be made, and the appearance confers personal jurisdiction over the person. *The person may plead guilty, no contest or not guilty....* A plea of not guilty shall put all matters in the case at issue, and the matter shall be set for trial.

(Emphasis added.)

Counterclaims and cross-claims are not permitted in forfeiture actions because § 66.119(3)(b), STATS., authorizes only a limited number of possible responses. A counterclaim or a cross-claim is not one of those responses. If Mack desired to initiate claims, he should have pursued them as separate actions.

"RESTRAINTS"

Mack also argues that his First Amendment rights were violated because the trial court wrongfully restrained him from filing a *lis pendens* against the property in dispute. But the court correctly dismissed the counterclaim and cross-claims and we have previously explained why it was proper to do so. Without a claim against Davis, Mack cannot file a *lis pendens* affecting Davis's real estate. Section 840.10(1), STATS. The court did not err by enjoining Mack from filing further *lis pendens* affecting this action.

PRESIDING JUDGE

This case was originally assigned to Judge Jon P. Wilcox. We take judicial notice that Judge Wilcox was subsequently appointed to the Wisconsin Supreme Court and took his oath of office on September 3, 1992. Judge Murach replaced Judge Wilcox as circuit judge for Waushara County. Mack claims that Judge Murach did not have jurisdiction to preside over the case because Judge

Murach took the case without being assigned to the civil forfeiture action.¹ However, Mack received actual notice that Judge Murach had been assigned to the case when he received the order for a pretrial conference signed by Judge Murach on May 25, 1993. Such notice triggered the ten-day period for substitutions under § 801.58(1), STATS.² Mack's request for substitution was not timely because Judge Murach's order for a pretrial conference was filed more than one year before Mack's request for substitution.

Mack also asserts that Judge Murach "meddled" with this case by holding *ex parte* proceedings. *Ex parte* proceedings are permissible so long as they comply with Supreme Court Rule 60.20.³ Mack does not claim that such *ex parte* proceedings resulted in any procedural or tactical advantage to any party. Thus, Judge Murach did not err by holding *ex parte* proceedings.

¹ We take judicial notice that Waushara County has only one circuit judge. Mack does not explain who other than Judge Murach would be assigned to this case. Nor does he explain why an "assignment," a ministerial function of the clerk's office, is significant.

² Section 801.58(1), STATS., provides:

Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case.... If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment

³ Supreme Court Rule 60.20(2), provides in part:

A judge may initiate, permit, engage in or consider *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits if all of the following conditions are met:

- (a) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication.

Mack also claims that the second cross-claim naming Judge Murach as a party precluded Judge Murach from dismissing the counterclaim and two cross-claims. Section 757.19(2), STATS., provides in part:

Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

....

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(Emphasis added.)

Mack's second cross-claim was a transparent attempt to obtain a substitution of judge after Mack was prohibited from doing so by § 801.58(1), STATS. Judge Murach did not disqualify himself. Had Judge Murach determined that Mack's request was sham or frivolous, we would agree. But because § 66.119(3)(b), STATS., required Judge Murach to dismiss Mack's cross-claim against the judge, we need not consider whether Mack's cross-claim was sham or frivolous. The cross-claim was improper, and without a cross-claim against Judge Murach, there was no reason for Judge Murach to disqualify himself.

SANCTIONS

Davis asks us to impose sanctions upon Mack for Mack's scandalous and libelous claims against the trial court and other parties. In an order in this case dated April 12, 1995, Mack was warned that his statement on transcript contained disrespectful and scandalous accusations against the trial court. We concluded:

However, we notify Mack that any further disrespectful and scandalous accusations against the trial court, the parties or their counsel in these appeals will result in sanctions under § 802.05(1), STATS.

This order did not deter Mack. His briefs contain the following statements:

(1) Later, by and at about July 29, 1994[,] the individual person Lewis Murach did attempt to cover up the earlier misrepresentations by John Davis in the matter under color of law.

(2) This was met with a conspiracy by the persons John Davis, Lewis Murach, Eagan Agency Ltd. to obstruct the due administration of justice in this suit by selling plaintiff's land, state owned land, and Davis land to an unsuspecting buyer for the illicit benefit of John Davis and Eagan Agency, Ltd[.], giving rise to another cross[-]claim with Lis Pendens against those parties.

(3) Lewis Murach not only usurped the judicial power of the court in these actions, but did so in clear violation of the law, and not only with the inability to act in an impartial manner but with clear personal interest against appellant.

(4) Each requirement of law was intentionally violated by Murach for his own selfish gain

and

(5) Davis, with the [C]ounty, developed a conspiracy to sell Davis land and public property and some of

Mack's property as though all was Davis property,
for the illicit gain of Davis and the conspirators.

These remarks are as disrespectful and scandalous as the accusations Mack made about Judge Murach giving rise to our April 12, 1995 order. They require a sanction, which we will order. The only question is, what sanction?

In *Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995), the court examined Mack's dishonest and frivolous *pro se* litigation behavior. The court concluded that the imposition of monetary sanctions had no effect on Mack. *Id.* at 186. Consequently, it concluded that the best sanction was to order the clerks of the federal courts within the Seventh Circuit to return unfiled any papers submitted either directly or indirectly by or on behalf of Richard Mack, with the exception of criminal cases in which Mack is a defendant and applications for habeas corpus. *Id.* at 186-87. The court permitted Mack to move to rescind or modify the order after two years from the date of the order. *Id.* at 186.

We recognize that Mack is indigent, at least for the purpose of being permitted to file appeals without the payment of filing fees. We also recognize that any sanction we impose should be narrowly tailored to serve its purpose. Our purpose is to tame Mack's disrespectful and scandalous assertions in the material he submits to this court and to the trial courts. Though we recognize that monetary sanctions have no effect on Mack, a monetary sanction is a start. It is our intent that further disrespectful and scandalous statements made by Mack will be met with a sanction similar to the one meted out by the Seventh Circuit. It is our hope that the possibility of such a sanction will have the desired effect on Mack's future behavior. Accordingly, Richard Mack is ordered, by way of sanction, to pay to the Clerk of the Court of Appeals, 231 East State Capitol, P.O. Box 1688, Madison, WI, 53701, the sum of \$100. As a further sanction, respondents may tax treble costs.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.