COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 25, 1996

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(1), STATS.

NOTICE

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

No. 95-2993

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DONALD MINNIECHESKE and JEREMY ERICKSON,

Plaintiffs-Appellants,

RODNEY C. JOHNSON,

Plaintiff,

v.

VILLAGE OF TIGERTON,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

CANE, P.J. Donald Minniecheske and Jeremy Erickson as trustees for the Life Science Church appeal a judgment entered on October 19, 1995, and amended on October 30, 1995, denying their request for substitution and recusal, dismissing the complaint, finding the complaint frivolous and awarding costs to the Village of Tigerton in the amount of $563.80. On appeal, the issues are whether the trial judge erred by refusing to recuse himself or to grant the requests for substitution. Also at issue is whether the trial court erred

by denying the appellants' motion to vacate the tax foreclosure judgment and dismissing their complaint. The judgment is affirmed.

The appellants filed a small claims complaint entitled "Complaint at Law" requesting restitution of land that had been foreclosed some years earlier because of the failure to pay taxes. The appellants, as a part of this action, also filed a motion to vacate the tax foreclosure judgment and asked for an evidentiary hearing on the motion. The trial court refused to hold an evidentiary hearing on their motion. Applying the doctrine of res judicata, the trial court dismissed the appellants' restitution action and reasoned that because the appellants were simply attempting to collaterally attack the in rem tax foreclosure action, the small claims complaint for restitution was frivolous.

The trial court correctly denied the appellants' substitution request. Earlier, Judge Thomas Grover had denied the appellants' motion for a temporary injunction to stop the Village of Tigerton from trespassing and damaging the land sought in the restitution complaint. Judge Grover also denied the later substitution request as untimely. Section 801.58 STATS., provides that any request for substitution shall be filed preceding the hearing of any preliminary contested matters. Therefore, the substitution request was filed untimely.

Judge Grover also properly rejected the appellants' argument that he should recuse himself because he was prejudiced and a defendant in the action. The appellants' claim of prejudice was that Judge Grover had already denied the requested temporary injunction and was therefore prejudiced. That is an insufficient basis. *See* § 801.58, STATS. It is undisputed that the trial court had never been made a party to the action, and the trial court referred to the appellants' unsuccessful attempt to name him as a defendant in the action as an attempt to harass the court and disqualify it from presiding on the case. Pursuant to § 757.19(2)(b), STATS., 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. Additionally, the appellants cite no instance where there is a conflict of interest, requiring the trial court to recuse itself.

Finally, the appellants argue at great length in their brief the merits of the tax foreclosure action, rather than the merits of this appeal. Additionally, they cite no authority for their alleged ability to now collaterally

challenge a tax foreclosure judgment which had not been timely appealed. This court agrees with the trial court that the appellants cannot in a small claims restitution proceeding collaterally challenge a tax foreclosure judgment for which the appeal time has expired. It has been established in law for some time that under the doctrine of claim preclusion, or res judicata, a final judgment is conclusive in all subsequent actions between the same parties or their privies as to all matters which were litigated which might have been litigated in former proceedings. ***NSP Co. v. Bugher,*** 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). Also, under the doctrine of issue preclusion or collateral estoppel, the final judgment is conclusive and forecloses relitigation in a subsequent action of issues of law or fact that have been actually litigated and decided in prior actions and identity of parties is not required. ***Id.*** at 550-51, 525 N.W.2d at 727. This court also agrees with the trial court that the small claims restitution action as an attempt to collaterally attack the tax foreclosure judgment is frivolous because the appellants knew or should have known the action was without any reasonable basis in law. *See* § 814.025, STATS.

The judgment dismissing the appellants' complaint seeking restitution of the land and awarding costs because the action was frivolous is affirmed.

By the Court.—Judgment affirmed.

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