COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2696

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

PAUL B. RUBENALT, AND HEATHER F. RUBENALT,

PLAINTIFFS-APPELLANTS,

V.

DALE E. REEVE,

DEFENDANT-RESPONDENT,

AMERICAN FAMILY MUTUAL INS. CO.,

INTERVENOR.

APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DE CHAMBEAU, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Paul and Heather Rubenalt appeal from a judgment dismissing their nuisance action against Dale Reeve. At trial the Rubenalts

presented evidence that Reeve, their next door neighbor, owned dogs that barked constantly, causing a public nuisance. The court entered judgment for Reeve after the jury returned a verdict of no nuisance and no damages. The issues are: (1) whether a prior municipal court judgment finding Reeve's dogs a public nuisance precluded him from defending against the Rubenalts' nuisance allegation, and (2) whether the trial court improperly limited counsel's questioning on *voir dire*. We affirm.

Reeve received a citation for violating Mazomanie's animal nuisance ordinance. That ordinance provided:

> It shall be unlawful for any person knowingly to keep or harbor any dog which habitually barks … to the great discomfort to the peace and quiet of the neighborhood or in such manner as to materially disturb or annoy persons of ordinary sensibilities. Such dogs … are hereby declared a public nuisance. A dog … is considered to be in violation of this Section when two formal, written complaints are filed with the Village Board or Chief of Police within a four-week period.

Reeve received a trial in municipal court and was found guilty. He did not appeal.

The Rubenalts subsequently commenced this action. They filed a pretrial motion contending that the municipal court judgment barred Reeve from defending on liability. In ruling against the Rubenalts, the trial court noted that it did not have a high degree of confidence that the same nuisance issue was tried in municipal court, because of the ambiguous wording of the ordinance. Additionally the court noted that Reeve represented himself at the municipal trial. However, the court did allow the Rubenalts to use the municipal court judgment as evidence against Reeve.

During *voir dire*, the court barred the Rubenalts' counsel from asking the jurors whether "any of you believe the sound of a barking dog can never be annoying." That exclusion, and the denial of the issue preclusion motion, comprise the two issues on appeal.

The trial court properly concluded that the municipal court judgment should not prevent Reeve from defending the liability issue. Issue preclusion bars relitigation of an issue actually litigated and decided in a prior action. ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 549, 525 N.W.2d 723, 727 (1995). Here, because the ordinance was ambiguous, the trial court could not determine that the identical nuisance issue was in fact tried in the prior action. The ordinance provides for conviction when two formal, written complaints are filed within a four-week period, regardless of the truth of those complaints. Without a transcript of the municipal court proceeding, the trial court correctly concluded that it could not determine with any degree of confidence whether the actual existence of the nuisance or merely the existence of the complaints was the litigated issue.

The Rubenalts cannot reasonably complain of prejudice from the trial court's decision to limit *voir dire*. The trial court barred one specific question. The court's ruling left the Rubenalts free to ask other questions regarding prospective jurors' opinions concerning barking dogs. Even if the trial court's ruling was error, an issue we need not reach, the absence of any prejudice precludes a remedy. *See* § 805.18(2), STATS. (harmless errors are disregarded).

Also before the court is Reeve's assertion that the appeal is frivolous. We may award actual costs and reasonable attorney fees where a party pursues an appeal in bad faith or without any basis in law or equity. RULE 809.25(3), STATS. We cannot conclude from the record and briefs before us

that this appeal was pursued in bad faith or is so lacking in merit as to be frivolous. We therefore deny Reeve's request for actual costs and fees.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)(5), STATS.