



## Case Summary

William Adams and Patricia Adams (“the Adamses”) appeal the Delaware Circuit Court’s dismissal of their complaint for fraud and fraudulent transfer against William Smith, Joanne<sup>1</sup> Smith, Danny Smith (“the Smiths”) and Danny L. Slusher (“Slusher”) (collectively “Defendants”). We conclude that the Delaware Circuit Court improperly dismissed this case on grounds of collateral estoppel because the Hamilton Superior Court never reached the same issue presented in this case in its 2009 proceedings supplemental order. We also conclude that the Adamses properly brought their claims in a new cause number pursuant to the Indiana Supreme Court’s ruling in *Rose v. Mercantile National Bank of Hammond*, 868 N.E.2d 772 (Ind. 2007). We therefore reverse and remand this case for further proceedings.

### Facts and Procedural History<sup>2</sup>

In August 2001 the Hamilton Superior Court entered judgment in favor of the Adamses and against the Smiths for three counts of corrupt business influence and one count each of fraud, deception, theft, common law fraud, constructive fraud, and breach of contract for a total of \$9,635,967.04 in damages. Appellants’ App. p. 35-38. The Adamses then instituted proceedings supplemental, which are a continuation of the original action, *see Rose v. Mercantile Nat’l Bank of Hammond*, 868 N.E.2d 772, 775 (Ind. 2007), in Hamilton Superior Court to help enforce their nearly ten million dollar

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<sup>1</sup> This defendant’s first name is spelled Joanne in the court records, but it appears that her name is actually spelled Joan. *See* Appellants’ App. p. 48 (“The way you spelled it is wrong, anyway, do you understand. It is Joan, it is not Joanne.”).

<sup>2</sup> We note that although the cover of Appellants’ Brief provides “Oral Argument Requested,” the Adamses did not file a motion for an oral argument in this case pursuant to Indiana Appellate Rule 52. Therefore, we do not treat the words on the cover of the brief as a request for an oral argument.

judgment against the Smiths. During a proceedings supplemental hearing in 2006, the Smiths indicated that they lived in a house at 8989 North Shaffer Road in Muncie, Delaware County, Indiana, which was owned by Slusher. Based on this information, the Adamses unsuccessfully tried to add Slusher as a garnishee defendant.

In an unrelated matter before a Delaware County Board of Zoning Appeals (“BZA”) hearing in September 2008, Danny Smith told the BZA that, although the mortgage to 8989 North Shaffer Road was in Slusher’s name, his “family has deed and title and ha[s] lived there for five years.” Appellants’ App. p. 76. Although the details are not clear from the record on appeal, at some point the Adamses returned to the proceedings supplemental case armed with the information that Danny Smith presented to the BZA. On March 13, 2009, the Hamilton Superior Court entered the following order in the proceedings supplemental case:

Plaintiff[s] appeared by counsel Peter C. King and Defendants William Smith, Joanne Smith and Danny J. Smith, appeared in person for Proceedings Supplemental Hearing on March 4, 2009. The Court heard evidence and argument. Plaintiff[s] requested that, as a result of the evidence presented to the Court, that the Court set aside and reopen evidence relating to Plaintiff[s’] efforts to add Danny Slusher (Slusher) and Ronald Gross (Gross) as Garnishee Defendants and to reform a deed pertaining to certain real estate at 8989 Shaffer Road in Muncie, Indiana. The Court took such request under advisement. The Court, subsequent to the hearing, received and reviewed Plaintiff[s’] Submission of Supplemental Information for Consideration Regarding the Hearing Held March 4, 2009[.] The Court, being duly advised, does now find and order as follows:

1. The Court previously addressed the issue of potential garnishee defendants Slusher and Gross and the reformation of the deed in question in March of 2006. Slusher and Gross had filed for summary judgment on the issue of the ownership of the real estate at 8989 Shaffer Road. The Court reviewed the pleadings and arguments of counsel and entered its order granting summary judgment in favor of Slusher and Gross and denying

Plaintiff[s'] request to reform the deed adding one or more judgment defendants to the deed.

2. Plaintiff[s'] oral request is tantamount to a motion for relief from judgment under rule 60(B). However, such request has not been reduced to writing, nor was notice provided to any of the Defendants or counsel for the Defendants prior to the hearing. It should be noted that due to reported scheduling conflicts, counsel for the Defendants were not present at the hearing on March 4, 2009, but Defendant Danny J. Smith elected to answer questions and testify at the hearing without counsel present.

3. The Court also notes that Plaintiff[s'] request is made nearly three years after the Court entered a final appealable order on the issue of the deed of the real estate in question.<sup>[3]</sup>

4. For these reasons, the Court denies Plaintiff[s'] requests.

5. The Court further notes that Defendant Danny J. [Smith]'s testimony at the hearing on March 4, 2009 appears to be in direct conflict with the documentary evidence admitted at the hearing on March 4, 2009 and the Transcription of the BZA Meeting September 25, 2008 submitted in Plaintiff's supplemental pleading following the hearing of March 4, 2009. The Court notes that such testimony may be perjur[y] or an attempt by Defendant Danny J. [Smith] to obstruct justice. The Court believes it has an ethical, legal and moral obligation to report this incident to the Hamilton County Prosecutor for investigation. The Court will instruct the Court Reporter to prepare a certified transcript of the hearing on March 4, 2009 and submit the same, along with copies of the evidence submitted by Plaintiff[s] at and following the March 4, 2009 hearing, to the Prosecuting Attorney for her investigation. Should the Prosecuting Attorney decline to investigate or file charges in this matter, the Court reserves the right to initiate contempt proceedings against Defendant Danny J. [Smith].<sup>[4]</sup>

*Id.* at 80-81. The Adamses did not appeal this order.

Instead, in August 2009, the Adamses filed a complaint in Delaware Circuit Court against Defendants and attached several exhibits to their complaint. Specifically, they

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<sup>3</sup> We note that this is in reference to the trial court's 2006 summary judgment order in the proceedings supplemental case.

<sup>4</sup> The trial court entered a nunc pro tunc order on March 20, 2009, correcting its order from the week before to insert Smith in place of Slusher. Appellants' Supp. App. p. 91.

alleged that the Smiths stated at the September 2006 proceedings supplemental hearing that Slusher owned 8989 North Shaffer Road (Exhibit B), but Danny Smith stated at the September 2008 BZA meeting that, although Slusher's name was on the mortgage for 8989 North Shaffer Road, the Smith family actually held title and deed to the property (Exhibit C). The Adamses further alleged that Slusher was "acting as a mere front man holding [the 8989 North Shaffer Road] property; and as such straw man for the real parties in interest, which are the judgment defendants, so as to preclude and hide such property from lawful attempts of collection by the judgment creditors and plaintiffs herein." *Id.* at 32. Based on these facts, the Adamses set forth two counts in their complaint: (1) fraud pursuant to Indiana Code section 35-43-5-4 and (2) fraudulent conveyance pursuant to Indiana Code section 32-18-2-17. The Adamses sought treble damages and attorney's fees pursuant to Indiana Code section 34-24-3-1.

Defendants filed a motion to dismiss the Adamses' complaint and attached thereto a copy of the Hamilton Superior Court's March 13, 2009, order. Specifically, they argued that pursuant to Indiana Trial Rule 12(B)(6), the complaint failed to state a claim upon which relief could be granted because it was barred by res judicata and/or collateral estoppel. That is, the Hamilton Superior Court's March 13, 2009, order, which was adverse to the Adamses, concerned the same issue raised in the present suit. Defendants also argued that pursuant to Trial Rule 12(B)(8), "substantially the same action is pending in the Hamilton Superior Court No. 3 under cause number 29D03-9812-CT-636." *Id.* at 78.

A hearing on the motion to dismiss was held before the Delaware Circuit Court in December 2009. At the hearing, Defendants offered into evidence—without objection from the Adamses—the Hamilton Superior Court’s March 13, 2009, order. Defendants’ attorney argued:

Basically, the plaintiffs now sue for fraud and fraudulent conveyance in this county, and we have moved to dismiss that action on the grounds that substantially the same action is pending in another court, specifically, the Hamilton County Superior Court No. 3. We also allege in our motion that the claims under the Delaware County case are barred by res judicata and/or collateral estoppel. Now, in replying to our motion, plaintiffs cite some authority for the proposition that within a proceeding supplemental they cannot advance a new theory, and, therefore, in their view, had to . . . file a new action, but I think the procedural history that you will see . . . is that they have attempted something, if not exactly that, something very close to that in Hamilton County. They have attempted to get the Hamilton County Superior Court No. 3 to reform the deed to reflect the Smiths as owners of the Shaf[f]er Road property in Delaware County. They have brought Mr. Slusher in as a garnishee defendant in that case, even though he’s not in the caption as an original defendant. They have gone after that property and they have alerted the Hamilton County Superior Court No. 3 to the same facts that give rise to the Delaware County action. For example, they have provided that Hamilton County Superior Court No. 3’s transcript of the Delaware County BZA hearing, the one in which, what I think they believe to be a smoking gun, was offered by Danny Smith, who mistakenly said that he owned the property, and they haven’t gotten the result they want in Hamilton County, so we’re here, and we contend that because this matter, the substance of this case, is within the purview of the Hamilton County Superior Court No. 3 and has been, in fact, litigated there, that they can’t get another bite of the apple here in Delaware County, and we are, therefore, asking the Court to dismiss this case here in Delaware County . . . .

Tr. p. 7-8. The Adamses responded that the cause of action in Delaware Circuit Court was “distinctly different” because it “deals with fraud,” “a fraudulent conveyance,” and “now more importantly, it deals with conspiracy, conspiracy to commit fraud with Mr. Danny Slusher[, who] was not in front of the Court when the Court ruled on March 13,

2009, in Hamilton County. He was not a defendant.” *Id.* at 11. In addition, the Adamses cited *Rose v. Mercantile National Bank of Hammond*, 868 N.E.2d 772 (Ind. 2007), and argued that because they were seeking treble damages, they could not seek them in the proceedings supplemental case but rather had to seek them in a brand new cause number. *Id.* at 13.

The Delaware Circuit Court entered the following order in January 2010:

1. Plaintiffs obtained a judgment in Hamilton County Superior Court 3 in cause number 29D03-9812-CT-636 against the Defendants William E. Smith, Joanne Smith and Danny J. Smith for \$9,635,967.04 on August 30th, 2001.
2. Proceeding Supplemental was held in regards to the above judgment in the Hamilton County Superior Court 3.
3. As part of the Proceeding Supplemental the Plaintiffs attempted to attach real estate in the name of Danny L. Slusher know[n] as 8989 Shaffer Road in Delaware County alleging that it really belonged to the Smith Defendants which the Hamilton County Superior Court 3 denied.
4. The primary issue in the case before this court is whether 8989 Shaffer Road belongs to the Smith Defendants or Danny L. Slusher.
5. *Since the question of ownership has been previously decided Plaintiffs are not entitled to raise that issue a second time and therefore this cause of action should be dismissed.*

Appellants’ App. p. 6-7 (emphasis added). The Adamses now appeal.

### **Discussion and Decision**

We initially note that Defendants did not file an appellees’ brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments for him, and we apply a less stringent standard of review with respect to showings of reversible error. *Zoller v. Zoller*, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). That is, we

may reverse if the appellant establishes prima facie error, which is an error at first sight, on first appearance, or on the face of it. *Id.*

The Adamses appeal the trial court's dismissal of their complaint against Defendants. Defendants filed their motion to dismiss pursuant to Trial Rule 12(B)(6) alleging res judicata and/or collateral estoppel and Rule 12(B)(8) alleging that the same action is pending in another state court. Although the trial court did not expressly indicate the basis for its dismissal, it is apparent that the court dismissed the case on grounds of collateral estoppel—"question of ownership has been previously decided"—and thus the dismissal was pursuant to Trial Rule 12(B)(6).<sup>5</sup> "If affidavits or other materials are attached to [a] 12(B)(6) motion, it is treated as one for summary judgment under Rule 56." *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 990 (Ind. 2009) (citing Ind. Trial Rule 12(B)). Here, Defendants attached a copy of the Hamilton Superior Court's March 13, 2009, order to their motion to dismiss and also relied on this order at the motion to dismiss hearing, without objection from the Adamses. Therefore, we treat the trial court's dismissal of the Adamses' complaint as a grant of summary judgment in favor of Defendants.

The Delaware Circuit Court essentially determined that collateral estoppel prevented it from deciding the issue of the ownership of the Shaffer Road property because the Hamilton Superior Court had already decided this issue in its March 13, 2009, order. Collateral estoppel is a subdoctrine of res judicata. *Runkle v. Runkle*, 916

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<sup>5</sup> Even if the trial court dismissed the case pursuant to Trial Rule 12(B)(8), we would not affirm on that basis. Rule 12(B)(8) prevents two courts from *concurrently* entertaining the same case, and the Hamilton Superior Court was not concurrently entertaining the same case when the Delaware Circuit Court case was filed. See *Keith v. Dooley*, 802 N.E.2d 54, 56 (Ind. Ct. App. 2004), *trans. denied*.

N.E.2d 184, 190 (Ind. Ct. App. 2009), *trans. denied*. Collateral estoppel “bars subsequent litigation of a fact or issue which was adjudicated in previous litigation if the same fact or issue is presented in a subsequent lawsuit.” *Fitz v. Rust-Oleum Corp.*, 883 N.E.2d 1177, 1182 (Ind. Ct. App. 2008), *reh’g denied, trans. denied*. In that circumstance, the first adjudication will be held conclusive even if the second action is on a different claim. *Portside Energy Corp. v. N. Ind. Commuter Transp. Dist.*, 913 N.E.2d 221, 234 (Ind. Ct. App. 2009), *trans. denied*. However, collateral estoppel requires the necessary adjudication in a former suit of the same issue presented in a subsequent suit. *Id.* at 235. The former adjudication can only be conclusive as to those issues that were actually litigated and determined therein. *Id.* Collateral estoppel does not extend to matters that were not expressly adjudicated and that can be inferred from the prior adjudication only by argument. *Id.* Issue preclusion requires, among other things, identity of issues. *Id.* A two-part analysis determines whether collateral estoppel should be applied: “(1) whether the party against whom the former adjudication is asserted had a full and fair opportunity to litigate the issue and (2) whether it would be otherwise unfair under the circumstances to permit the use of issue preclusion in the current action.” *Fitz*, 883 N.E.2d at 1182-83.

As can be seen from the Hamilton Superior Court’s March 13, 2009, order, the court never reached the merits of who owned the Shaffer Road property in light of Danny Smith’s 2008 testimony before the BZA. Rather, the court found that, although the Adamses had asked the court to reform the deed to the Shaffer Road property in 2006

(two years before the BZA hearing) to add Slusher as a garnishee defendant, the Adamses' current oral request to reform the deed:

is tantamount to a motion for relief from judgment under rule 60(B). However, such request has not been reduced to writing, nor was notice provided to any of the Defendants or counsel for the Defendants prior to the hearing. It should be noted that due to reported scheduling conflicts, counsel for the Defendants were not present at the hearing on March 4, 2009, but Defendant Danny J. Smith elected to answer questions and testify at the hearing without counsel present.

3. The Court also notes that Plaintiff[s'] request is made nearly three years after the Court entered a final appealable order on the issue of the deed of the real estate in question.

4. For these reasons, the Court denies Plaintiff[s'] requests.

Appellants' App. p. 80-81. In order to apply collateral estoppel, the issue must have been litigated and determined in the former suit. However, this issue was never decided in the Hamilton Superior Court's March 13, 2009, order because the court found it was procedurally barred from doing so. The Delaware Circuit trial court erred by dismissing the Adamses' complaint on this ground.

As for whether the Adamses properly filed this action under a new cause number in Delaware County as opposed to pursuing it in the proceedings supplemental case in Hamilton Superior Court, we turn to *Rose v. Mercantile National Bank of Hammond*, 868 N.E.2d 772 (Ind. 2007). In that case, our Supreme Court explained that proceedings supplemental are used by judgment creditors to help enforce judgments and that such proceedings offer "the judgment creditor judicial resources for discovering assets, reaching equitable and other interest[s] not subject to levy and sale at law and to set aside fraudulent conveyances." *Id.* at 775 (quotation omitted). Proceedings supplemental are

generally governed by Trial Rule 69(E). *Id.* A plaintiff may move for a proceeding supplemental in the court where judgment was rendered by alleging that the plaintiff's judgment will not be satisfied and that the defendant or another party has property that ought to be applied toward the judgment. Ind. Trial Rule 69(E).

Judgment creditors commonly invoke proceedings supplemental to bring fraudulent transfer actions:

[Fraudulent transfer claims] have for their sole purpose the removal of obstacles which prevent the enforcement of the judgment by the executive officers of the state through the levy of execution. . . . While the action may involve a conveyance said to be fraudulent, *the recovery is not for the wrong or tort. It is not in damages.*

*Rose*, 868 N.E.2d at 776 (emphasis added) (quotation omitted). If a fraudulent transfer action is successful, “[t]he conveyances continue valid as between the grantor and grantee, and the only effect of the judgment is to subject the property to execution as though it were still in the name of the grantor.” *Id.* (quotation omitted).

Seeking new damages is different from fraudulent transfer claims and does not fit the purpose for proceedings supplemental. *Id.* In *Rose*, the judgment creditor, Mercantile National Bank of Hammond, pursued the two shareholders (James Rose and Robert Underwood) of the judgment debtor, Jasper-Newton Utility Company, Inc., through proceedings supplemental contending fraudulent transfer. *Id.* at 773. Mercantile then amended the complaint to bring a new tort claim for treble damages and attorneys’ fees pursuant to the Crime Victims’ Compensation Act. *Id.* Although the trial court allowed the amendment and granted summary judgment to Mercantile, thus awarding attorneys’ fees and treble damages far in excess of the original judgment, our Supreme

Court reversed, holding that “[p]roceedings supplemental are only for collecting existing judgments, not for seeking new ones[.]” *Id.* That is,

Unlike the fraudulent transfer claims, Mercantile’s attempt to seek new damages from Rose and Underwood by adding a Crime Victims’ claim does not fit the purpose for proceedings supplemental. While the CVCA claim was based on the same facts as the fraudulent transfer claim, the remedy sought for the CVCA claim amounted to three times the original judgment amount, plus attorneys’ fees. Allowing a new claim to be tacked on at this stage would be just as unfitting as opening up any other litigation to add new claims after judgment. Such an approach to collections would lay the groundwork for perpetual motion—a far cry from the timely and efficient system of conflict resolution the nation’s judiciary strives to provide. Proceedings supplemental are appropriate only for actions to enforce and collect existing judgments, not to establish new ones.

*Id.* at 777. Therefore, our Supreme Court found it “prudent policy that any action to assist in collection of an original judgment, i.e. a proceeding supplemental, must be filed under the same cause number as the original action. Conversely, any action that may result in imposition of a new judgment should be filed under a new cause number.” *Id.*

The Adamses’ Delaware Circuit Court complaint alleged fraud pursuant to Indiana Code section 35-43-5-4 and sought treble damages and attorney’s fees pursuant to Indiana Code section 34-24-3-1, which provides:

If a person suffers a pecuniary loss as a result of a violation of *IC 35-43*, *IC 35-42-3-3*, *IC 35-42-3-4*, or *IC 35-45-9*, the person may bring a civil action against the person who caused the loss for the following:

- (1) *An amount not to exceed three (3) times the actual damages of the person suffering the loss.*
- (2) *The costs of the action.*
- (3) *A reasonable attorney’s fee.*
- (4) *Actual travel expenses that are not otherwise reimbursed under subdivisions (1) through (3) and are incurred by the person suffering loss to:*

- (A) have the person suffering loss or an employee or agent of that person file papers and attend court proceedings related to the recovery of a judgment under this chapter; or
  - (B) provide witnesses to testify in court proceedings related to the recovery of a judgment under this chapter.
- (5) A reasonable amount to compensate the person suffering loss for time used to:
- (A) file papers and attend court proceedings related to the recovery of a judgment under this chapter; or
  - (B) travel to and from activities described in clause (A).
- (6) Actual direct and indirect expenses incurred by the person suffering loss to compensate employees and agents for time used to:
- (A) file papers and attend court proceedings related to the recovery of a judgment under this chapter; or
  - (B) travel to and from activities described in clause (A).
- (7) All other reasonable costs of collection.

(Emphases added). As in *Rose*, the Adamses' complaint seeks attorney's fees and treble damages which could result in the imposition of a new judgment. It therefore was properly filed under a new cause number. Accordingly, we reverse the trial court and remand for further proceedings.

Reversed and remanded.

NAJAM, J., and BROWN, J., concur.