

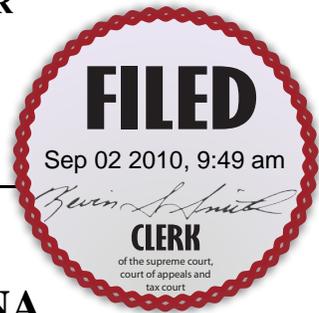
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

CONWELL CONSTRUCTION,)

Appellant-Plaintiff,)

vs.)

ABBAY ROAD DEVELOPMENT, LLC,)

Appellee-Defendant.)

) No. 49A05-0912-CV-741

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0708-CT-37119

September 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Conwell Construction (“Conwell”) filed a breach of contract claim and sought to foreclose a mechanic’s lien against Abbey Road Development, LLC (“Abbey Road”). Abbey Road counterclaimed seeking liquidated damages for Conwell’s alleged breach of contract by untimely performance. The trial court granted partial summary judgment to Conwell on the claim for liquidated damages, which interlocutory order was not appealed. Subsequently, Abbey Road was granted permission to amend its counterclaim to assert a claim for actual damages. Conwell obtained the trial court’s certification of this order for interlocutory appeal and we accepted jurisdiction. Conwell presents the sole issue of whether the trial court abused its discretion in permitting the amendment.¹ We affirm.

Facts and Procedural History

Conwell commenced site work and sewer installation for a residential subdivision

¹ Abbey Road purportedly restates the issues so as to challenge the September 4, 2008 order entered upon cross-motions for partial summary judgment. Abbey Road had no duty to seek an interlocutory appeal of that order, and elected not to do so. See Whitehurst v. Attorneys of Aboite, LLC, 925 N.E.2d 379, 386 (Ind. Ct. App. 2010), reh’g denied. Now, however, Abbey Road seeks to challenge that order as contrary to law upon several grounds. Conwell has filed a motion to strike and a request for attorney’s fees asserting that, in light of Abbey Road’s attempt to collaterally attack the partial summary judgment order over one year after its entry, we should strike the portions of the brief alleging error in the September 4, 2008 partial summary judgment order and grant Conwell attorney’s fees for time incurred in challenging the frivolous assertions.

Abbey Road responds that this Court must address “the more serious issue in this interlocutory appeal.” Appellee’s Brief at 5. An interlocutory order may be certified for appeal, as opposed to an issue. Harbour v. Arelco, Inc., 678 N.E.2d 381, 385 (Ind. 1997) (emphasis added). Although the trial court certifies an order, the trial court is not prohibited from identifying specific questions of law presented by the order, and such may be helpful. Indiana Dept. of Env’tl Mgm’t v. NJK Farms, Inc., 921 N.E.2d 834, 841 (Ind. Ct. App. 2010). Here, however, the interlocutory order certified was addressed solely to the amendment of Abbey Road’s counterclaim to assert actual damages, not the propriety of partial summary judgment entered in 2008. Because of the frivolous collateral attack, we grant the motion to strike but deny the request for attorney’s fees. Nonetheless, Abbey Road’s decision to not seek a timely interlocutory appeal of the trial court’s grant of partial summary judgment in favor of Conwell does not prevent Abbey Road from challenging the summary judgment order following final judgment (yet to be entered in this case). Keck v. Walker, 922 N.E.2d 94, 99 (Ind. Ct. App. 2010).

being developed by Abbey Road and, on an unknown date, signed a written contract (“the Contract”).² In early July of 2007, Conwell requested final payment but Abbey Road refused to tender it, claiming that Conwell’s work had been untimely. Conwell filed a notice of intention to hold a mechanic’s lien against the Abbey Road development property, claiming that a payment of \$34,358.00 was due and owing. On August 31, 2007, Conwell filed suit against Abbey Road in a three-count complaint alleging (1) breach of contract, (2) right to foreclose mechanic’s lien, and (3) unjust enrichment.

Abbey Road answered and filed a counterclaim. Counterclaim Count I alleged that Conwell had breached the contract by failing to timely complete his work and therefore Abbey Road was entitled to recover liquidated damages as specified in the Contract.³ Count II alleged Conwell’s failure to obtain maintenance bonds, and Count III alleged slander of title. On December 17, 2007, Abbey Road filed a motion for partial summary judgment, requesting summary judgment in its favor on “all of Conwell’s breach of contract theories” and seeking to clear its title to the Abbey Road development property. (App. 131.) Abbey Road also sought summary judgment in its favor on its counterclaim for breach of contract.

Conwell was granted leave to amend his complaint to add additional defendants, and did so on December 21, 2007.⁴ On December 31, 2007, Abbey Road answered the Amended

² The first paragraph of the pre-printed Contract indicated that it was executed in April, 2006, but no specific day was entered in the space provided.

³ The term “liquidated damages” applies when a specific sum of money has been stipulated by the parties to a contract as the amount of damages to be recovered by either party for a breach of the contract. Rogers v. Lockard, 767 N.E.2d 982, 990 (Ind. Ct. App. 2002).

⁴ As to Abbey Road, Conwell added an additional count to allege Fraud (related to construction bonds).

Complaint and filed a five-count counterclaim. Count I reasserted the breach of contract claim. Abbey Road sought liquidated damages of \$500.00 per day for delayed work, and ultimately demanded a judgment of “at least \$149,000.00, plus prejudgment interest[.]” (App. 164.) Count II sought reimbursement for maintenance bonds. Count III alleged slander of title; Count IV sought \$500 as statutory damages for neglect or refusal to release a lien. Count V alleged abuse of process.

On January 18, 2008, Conwell filed his opposition to Abbey Road’s motion for partial summary judgment and also filed a cross-motion for partial summary judgment on Count I of Abbey Road’s counterclaim (breach of contract). On September 4, 2008, the trial court entered its partial summary judgment order, finding that the liquidated damages provision of the Contract was an unenforceable penalty. Alternatively, the trial court found that the principles of waiver and estoppel prevented Abbey Road from asserting a claim for liquidated damages. The trial court concluded in relevant part, “Conwell is entitled to judgment as a matter of law on Abbey Road’s claim for liquidated damages, and summary judgment is hereby entered in favor of Conwell and against Abbey Road on Count I of Abbey Road’s Counterclaim.” (App. 323.) The trial court specifically found that the designated record established that Conwell’s performance was not untimely.

At the same time, the trial court incongruously concluded that genuine issues of material fact existed, but precluded summary judgment for Abbey Road: “As for Abbey Road’s cross-motion, there remain genuine issues of material fact as to the Effective Date of the Contract, the date on which Conwell was to complete his work, whether he timely

completed the work or was justified in any delays, the applicability of the liquidated damages provision, the date such damages began to accrue, the date on which they stopped accruing and, therefore, the amount of liquidated damages Conwell is liable for, if any. Therefore, Abbey Road’s motion for summary judgment on Count I of its Counterclaim is hereby denied.” (App. 323.) (emphasis added.) Abbey Road did not seek interlocutory review nor did it petition the trial court for clarification or reconsideration of the partial summary judgment order.⁵

On March 5, 2009, Abbey Road filed a “Motion to Amend Counterclaim” for the purpose of asserting a claim for actual damages arising from Conwell’s alleged breach of the Contract.⁶ (App. 324.) Abbey Road’s amended allegations were not confined to untimely performance; Abbey Road claimed damages related to “delay, unfinished work, and improperly performed work.” (App. 327.) Conwell filed his opposition to the amendment. On June 12, 2009, the trial court entered an order permitting the amendment to the counterclaim.

On September 14, 2009, the trial court granted Conwell’s motion for summary judgment on Counterclaim Count III (slander of title), denied other pending motions for summary judgment, and set an oral argument hearing on the matter of the interlocutory appeal. On December 2, 2009, the trial court certified its “Order Granting Motion to Amend

⁵ We have some doubt as to the validity of the summary judgment order, but note that it was not appealed.

⁶ The motion asserted in relevant part, “Such Amended Counterclaim is now appropriate because of the Court’s Summary Judgment ruling that the liquidated damages provision of the contract is unenforceable. If such provision is unenforceable, then Abbey Road is not limited to liquidated damages, and is entitled to seek recovery of actual damages arising from Plaintiff Conwell’s contract breaches.” (App. 324.)

Counterclaim dated June 12, 2009” for interlocutory appeal. (App. 363.) On February 2, 2010, this Court accepted jurisdiction.

Discussion and Decision

I. Standard of Review

Indiana Trial Rule 15 governs the amendment of pleadings and provides in relevant part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires.

Amendments to the pleadings are to be liberally allowed in order that all issues involved in a lawsuit may be presented to the jury. Hendrickson v. Alcoa Fuels, Inc., 735 N.E.2d 804, 818 (Ind. Ct. App. 2000). Additionally, when a claim or defense asserted in the amended pleading arose out of an occurrence that had been set forth in the original pleading, the amendment relates back to the date of the original pleading. Ind. Trial Rule 15(C).

A trial court retains broad discretion to grant or deny amendments to pleadings, and we will reverse only upon a showing of abuse of that discretion. Turner v. Franklin County Four Wheelers Inc., 889 N.E.2d 903, 906 (Ind. Ct. App. 2008). An abuse of discretion has occurred if the decision of the trial court is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. Id. We look at factors including undue delay, bad faith or dilatory motive on the part of the movant,

repetitive failure to cure deficiency by amendment previously allowed, undue prejudice to the opposing party, and futility of the amendment. Id.

II. Analysis

Conwell contends that the trial court misapplied the law by allowing the amendment because Abbey Road's counterclaim for actual damages is barred as a compulsory counterclaim which is now untimely because it was not raised in prior litigation.⁷ Conwell also contends that the doctrines of res judicata, issue preclusion, law of the case, and election of remedies preclude the amendment.

Conwell's contentions are based upon the premise that a final judgment has been entered as to the breach of contract claim. However, a "partial" summary judgment is by its nature an order that disposes of less than all of the issues between the parties; it is therefore interlocutory. See Keck v. Walker, 922 N.E.2d 94, 99 (Ind. Ct. App. 2010) (observing that an order granting partial summary judgment was not a final judgment).

The doctrines of law-of-the-case and res judicata are similar in that both operate to preclude litigation regarding matters that have already been litigated. In re Adoption of Baby W., 796 N.E.2d 364, 372 (Ind. Ct. App. 2003), trans. denied. Specifically, the law-of-the-case doctrine provides that an appellate court's determination of a legal issue is binding upon both the trial court and the Court on appeal in any subsequent appeal involving the same case and substantially the same facts. Id.

⁷ Indiana Trial Rule 13(A) requires that a pleading "state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim[.]" Subsection (F) provides, "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

The doctrine of res judicata, which prevents the repetitious litigation of disputes that are essentially the same, is divided into two branches: claim preclusion and issue preclusion. Wright v. State, 881 N.E.2d 1018, 1021 (Ind. Ct. App. 2008), trans. denied. “For principles of res judicata to apply, there must have been a final judgment on the merits and that judgment must have been entered by a court of competent jurisdiction.” Matter of Sheaffer, 655 N.E.2d 1214, 1217 (Ind. 1995). A final judgment “disposes of all issues as to all parties, to the full extent of the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such issues.” State ex rel. Neal v. Hamilton Circuit Court, 248 Ind. 130, 134, 224 N.E.2d 55, 57 (1967).

Claim preclusion applies where a final judgment on the merits has been rendered and acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. Wright, 881 N.E.2d at 1022. Issue preclusion bars the subsequent litigation of a fact or issue if that fact or issue was necessarily adjudicated in a former lawsuit and the same fact or issue is presented in a subsequent lawsuit. Shell Oil Co. v. Meyer, 705 N.E.2d 962, 968 (Ind. 1998).

The necessary predicate that the foregoing doctrines have in common is finality of prior litigation. In the same vein, the “election of remedies” doctrine operates to prevent excessive and repetitive litigation and double recovery. Hoover v. Hearth & Home Design Center, Inc., 654 N.E.2d 744, 745 (Ind. 1995). “What remains of the election of remedies doctrine after the adoption of Trial Rule 8(E) is substantive law that acts as a bar to double recovery. Cahoon v. Cummings, 734 N.E.2d 535, 543 (Ind. 2000). Where the claimant has

two co-existing but inconsistent remedies and has elected to pursue one remedy to a conclusion, he may not thereafter pursue a subsequent claim on a second inconsistent theory. See id. Here, Abbey Road sought liquidated damages and “all other proper relief.” (App. 164.) In Hudson v. McClaskey, 597 N.E.2d 308 (Ind. 1992), our Indiana Supreme Court held that a plaintiff whose complaint sought rescission and “all other further and proper relief” should be permitted to amend the specifically-requested remedy in the complaint from rescission of contract to damages based on fraud in the making of the contract, after the appellate court held that rescission was legally impossible. See also UFG, LLC v. Southwest Corp., 848 N.E.2d 353 (Ind. Ct. App. 2006) (applying Hudson to hold a buyer who requested “specific performance and legal damages” was entitled to remand for a determination of legal damages after the court determined specific performance was not possible), trans. denied.

Assuming the validity of the first partial summary judgment order, the trial court has determined that Conwell did not breach the Contract by failing to timely perform and that the liquidated damages provision of the Contract is unenforceable. Now, Abbey Road seeks to establish that Conwell’s performance was defective and that Abbey Road is due actual damages. These issues have not been litigated to a conclusion and no double recovery is imminent.

The trial court was free, absent an abuse of discretion, to permit amendment. There is no showing that Abbey Road acted in bad faith in attempting to amend its counterclaim. There are no prior failures to cure pleading deficiencies. As for “futility,” it is a determination which the trier of fact is to make after a full presentation of the evidence.

Mullen v. Cogdell, 643 N.E.2d 390, 399 (Ind. Ct. App. 1994), trans. denied. On interlocutory review, this Court will not speculate on futility. See id. We do not find the trial court's decision to permit amendment to be unduly prejudicial to Conwell; indeed, it seems particularly appropriate in light of the partial summary judgment order's facial inconsistency (in its recitation that genuine issues of material fact remain as to Conwell's potential liability).

Accordingly, even assuming the validity of the first partial summary judgment order, the trial court did not abuse its discretion by issuing an order permitting Abbey Road's amendment to its counterclaim.

Affirmed.

BARNES, J., concurs.

MAY, J., concurs in result with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

CONWELL CONSTRUCTION,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 49A05-0912-CV-741
)	
ABBEY ROAD DEVELOPMENT, LLC.,)	
)	
Appellee-Defendant.)	

MAY, Judge, concurring in result.

I agree with the majority’s result but would arrive there via another route.

I fully concur with footnote one, slip op. at 2, in which the majority holds we cannot review the law and evidence underlying a 2008 order addressing cross-motions for summary judgment on Count I of Abbey Road’s counterclaim.⁸ That 2008 order was not certified for appeal by the trial court nor accepted by us for permissive interlocutory appeal. *See* Ind. Appellate Rule 14(B). Accordingly, we do not have jurisdiction to review the merits underlying the court’s decisions in that order.

The arguments regarding the issue over which we *do* have jurisdiction -- whether the trial court abused its discretion by permitting Abbey Road to amend Count I of its

⁸ Count I demanded liquidated damages pursuant to the contract based on Conwell’s alleged failure to complete the work within the timeframe established by the contract.

counterclaim -- are premised on language in that 2008 order that purports to grant summary judgment to Conwell on Count I. Because judgment already was granted to him on that Count, Conwell argues, the amendment violates numerous doctrines that prohibit parties from being permitted “a second bite at the apple.” (Appellant’s Br. at 21.) But the 2008 order was facially invalid⁹ as a grant of summary judgment to Conwell, and I would therefore decline to accept the parties’ assertions and attempt to resolve questions about the amendment of a complaint based on a judgment that cannot exist.

Originally, Count I of Abbey Road’s counterclaim alleged Abbey Road was entitled to contractually-defined liquidated damages because Conwell failed to timely complete the contracted work. The 2008 order, which purported to grant summary judgment to Conwell on that Count, contains the following two final paragraphs:

87. For all the above reasons, Conwell is entitled to judgment as a matter of law on Abbey Road’s claim for liquidated damages, and summary judgment is hereby entered in favor of Conwell and against Abbey Road on Count I of Abbey Road’s Counterclaim.

88. As for Abbey Road’s cross-motion, there remain genuine issues of material fact as to the Effective Date of the Contract, the date on which Conwell was to complete his work, whether he timely completed the work or was justified in any delays, the applicability of the liquidated damages provision, the date such damages began to accrue, the date on which they stopped accruing and, therefore, the amount of liquidated damages Conwell is liable for, if any. Therefore, Abbey Road’s motion for summary judgment on Count I of its Counterclaim is hereby denied.

(App. at 323.) Those paragraphs cannot be reconciled.

Paragraphs 87 and 88 address the same Count of Abbey Road’s counterclaim:

⁹ The majority notes the incongruent conclusions that I believe makes the order invalid: “At the same time, the trial court incongruously concluded” Slip op. at 4.

Conwell's liability for contractually defined liquidated damages for alleged late performance that breached the contract. Summary judgment is appropriate only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

In Paragraph 88, the court denied summary judgment for Abbey Road because there were genuine issues of material fact regarding Conwell's timely completion of the work and the applicability of the liquidated damages provision. It therefore was not possible that Conwell was entitled to judgment as a matter of law on the liquidated damages claim as the court concluded in Paragraph 87, and there could have been no summary judgment for Conwell. Because there was no valid summary judgment, I would not address whether the trial court abused its discretion by permitting Abbey Road to amend Count I following the grant of summary judgment to Conwell on that Count.

Because the summary judgment order is invalid on its face, Abbey Road's motion to amend Count I of its cross-claim was made before entry of partial judgment for either party. Thus, all of Conwell's arguments against amendment, which were based on Abbey Road being given a second opportunity to litigate the same claim, are moot. Conwell has not argued the court would abuse its broad discretion by permitting amendment of the complaint when neither party has been granted summary judgment as to one issue, so I would affirm on that ground. Accordingly I concur in the result.