

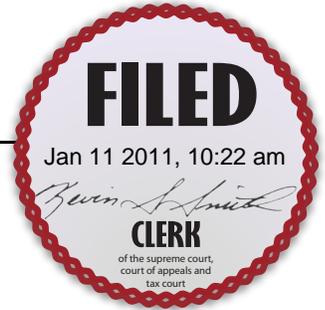
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE ESTATE OF )  
RAYMOND L. DOMELLE, )  
 )  
GLORIA DOMELLE, Personal Representative, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
CHARLES and MARIA BARMAN, )  
 )  
Appellees. )

No. 45A03-1004-ES-173

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APPEAL FROM THE LAKE CIRCUIT COURT  
The Honorable Lorenzo Arredondo, Judge  
Cause No. 45C01-0312-ES-404

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**January 11, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

The Estate of Raymond L. Domelle (the Estate) appeals from a \$68,500 judgment entered on a jury verdict in favor of Charles and Maria Barman. The Estate presents six issues for our review of which we find the following dispositive: Did the probate court err in denying the Estate's motion for summary judgment?

We reverse and remand.

Domelle died on September 14, 2003, while domiciled in Lake County. On March 5, 2004, the Barmans timely filed a claim against Domelle's estate in the amount of \$43,678.47. The claim alleged damages for, inter alia, exceeding easement boundaries, flooding due to improper culvert, tree damage and loss of hardwood, loss of use due to road damage by Domelle since March 1994, and damage to the Barmans' driveway. After the claim was denied by the personal representative of the Estate (Domelle's wife, Gloria), the Barmans filed a petition for trial with the probate court.

The claim centered on a dispute that arose in 1994, shortly after Domelle purchased undeveloped property adjoining property on which the Barmans lived in Lake County. An easement, designated as a public highway, ran across both properties. The portion of the easement on the Barmans' property had been improved by the Barmans in 1989 when they built on their land. Said improvements ended at the neighboring property line to the east (i.e., the property later purchased by Domelle).

Shortly after purchasing the property in 1994, Domelle began improving the portion of the easement on his property. In order to access this portion of the easement, Domelle had to travel over the portion located on the Barmans' property. Issues quickly arose between the neighboring landowners. The Barmans claimed that heavy equipment used by Domelle

damaged their portion of the easement, including a culvert, and that Domelle was improperly installing the roadway. The Barmans also complained that the construction was causing ongoing flooding to their property, resulting in the loss of mature trees. At some point, the Barmans apparently blocked Domelle's access to the easement.

In 1994, Domelle initiated litigation against the Barmans under cause number 45D04-9405-CP-797 (the Room Four cause) for interference with his use of the easement. The court entered a temporary injunction against the Barmans on August 1, 1996, which was clarified on October 24, 1996. During the Room Four litigation, the Barmans filed a counter-claim against Domelle alleging, among other things, that they had suffered property damage and the loss of the quiet enjoyment of their home/property. Further, in a separate action, Lake County filed suit against Domelle on September 30, 1998, seeking a permanent injunction and damages.<sup>1</sup>

The parties agree that by sometime in 1997 Domelle had ceased all work on the easement. In October 1998, Domelle and the Barmans filed their respective pre-trial contentions, damage itemizations, witness lists, and exhibits in the Room Four cause. Though the record before us regarding the Room Four cause is lacking, it appears that no further proceedings were held in that matter and the complaint and counter-claim lingered unresolved for a number of years until Domelle died in September 2003.

The Estate was opened on December 4, 2003, and the claim filed by the Barmans against the Estate was denied on April 28, 2004. Thereafter, the Barmans requested a jury

trial in the instant probate action. As a result of the litigation still pending in the Room Four cause, the probate court entered an order on June 3, 2004, continuing the probate case “until resolution of related case 45D04-9405-CP-00797 before Judge Svetanoff, Lake Superior Court, Civil Division, Room 4 in Gary, Indiana”. *Appellant’s Appendix* at 10.

Thereafter, in the Room Four cause, the Estate filed a motion to dismiss Domelle’s complaint and the Barmans’ counter-claim pursuant to Rule 41(E) of the Indiana Rules of Trial Procedure. Following a hearing, on January 20, 2005, Judge Svetanoff entered an order vacating the temporary injunction entered in 1996 and dismissing, pursuant to T.R. 41(E), the complaint and counter-claim with prejudice.

Back in the probate action, the Estate filed a motion for summary judgment on the basis that the Barmans’ claim was barred by the statute of limitations and the doctrine of res judicata. In response, the Barmans asserted that the damages in the Room Four cause were “continuing damages”. *Appellant’s Appendix* at 153 (“[t]he point being that the damages caused in 1994 by the Decedent still exist”). Further, with respect to res judicata, they argued that the dismissal in the Room Four cause was not on the merits. On July 15, 2005, following a hearing, the probate court denied the Estate’s motion for summary judgment “on the basis of the allegation that there exists continuing damages, thereby creating an issue of fact barring summary judgment.” *Id.* at 162.

The Estate subsequently filed a motion to correct error regarding the summary judgment ruling. The Estate argued that the court improperly focused on whether the

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<sup>1</sup> The county alleged that Domelle was making improvements without authority and in a manner not in conformity with the applicable Highway Department Standards and had failed to cease and desist after being

damages were continuing, which was irrelevant to the res judicata issue, and erroneously allowed the Room Four judgment to be collaterally attacked. The motion to correct error was denied by operation of law.

On February 7, 2006, the Estate filed an amended motion to dismiss (amending a December 2005 motion), relying upon statute-of-limitation grounds. The probate court granted the motion to dismiss in part on June 19, 2006. Accordingly, the only portions of the Barmans' claim left to be tried related to flooding damages resulting from an alleged improper culvert installed by Domelle and loss of use due to road damage allegedly caused by Domelle since March 1994.

Following a two-day jury trial in August 2009, the Barmans obtained a verdict against the Estate in the amount of \$68,500. The Estate now appeals on numerous grounds, one of which we find dispositive.

The Estate argues that the trial court erred in denying its motion for summary judgment because the Barmans' claims had been resolved in the Room Four case. Specifically, the Estate asserts that the Room Four case involved the same parties and the same claims and thus the Barmans' claim in the probate court should have been dismissed as res judicata.

Summary judgment is appropriate if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895

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so instructed.

N.E.2d 1191 (Ind. 2008); Ind. Trial Rule 56(C). “When the material facts are undisputed and the question presented is a pure question of law, we review the matter de novo.” *Franklin Elec. Co., Inc. v. Lutheran Hosp. of Indiana*, 926 N.E.2d 1036, 1042 (Ind. Ct. App. 2010), *trans. denied*. Further, the party appealing a summary judgment decision has the burden of persuading us that the decision was erroneous. *Franklin Elec. Co., Inc. v. Lutheran Hosp. of Indiana*, 926 N.E.2d 1036.

In the instant case, there is no dispute that the Room Four case (initiated in 1994) was dismissed with prejudice pursuant to T.R. 41(E).<sup>2</sup> The question before us concerns the legal effect of that ruling on the probate matter.

T.R. 41(E) provides:

Failure to prosecute civil actions or comply with rules. Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff’s costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

A dismissal for failure to prosecute, pursuant to T.R. 41(E), “operates as an adjudication upon the merits” unless the court in its order for dismissal otherwise specifies. T.R. 41(B). The Room Four court expressly indicated that the dismissal was with prejudice, and therefore dismissal “act[ed] as an adjudication on the merits.” *Small v. Centocor, Inc.*, 731 N.E.2d 22, 27 (Ind. Ct. App. 2000), *trans. denied*.

The principle of res judicata and collateral estoppel is the prevention of repetitious litigation of essentially the same dispute. *Indiana Ins. Co. v. American Cmty. Servs., Inc.*, 718 N.E.2d 1147 (Ind. Ct. App. 1999). “The doctrine of res judicata bars relitigation of a claim after a final judgment has been rendered when the subsequent action involves the same claim between the same parties or their privies.” *Id.* at 1155. Four requirements must be satisfied for a claim to be precluded under the doctrine of res judicata:

- 1) the former judgment must have been rendered by a court of competent jurisdiction;
- 2) the former judgment must have been rendered on the merits;
- 3) the matter now in issue was, or could have been determined in the prior action;
- and 4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.

*Id.*

Although the Barmans’ appellate arguments are often difficult to follow, it is clear that only the second requirement listed above is at issue in this case.<sup>3</sup> The Barmans baldly assert that the dismissal pursuant to 41(E) was not a judgment on the merits and note further: “[i]f there had been a trial in Room Four, and those issues were actually litigated that would be a separate issue, and would raise the res judicata claim.” *Appellees’ Brief* at 25. In light of our discussion above, this argument is erroneous and ignores the dictates of T.R. 41(B). The

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<sup>2</sup> It is important to note that we are not addressing the propriety of the dismissal in the Room Four case, as that final judgment was not appealed by the Barmans.

<sup>3</sup> The Barmans also direct us to the Journey’s Account Statute, Ind. Code Ann. § 34-11-8-1 (West, Westlaw through 2010 2nd Regular Sess.), and assert that “the cause of action migrated to the estate cause.” *Appellees’ Brief* at 25. This statute, however, has no applicability to the case at hand. The Journey’s Account Statute is intended to “enable diligent plaintiffs, who may have erred procedurally--but not negligently--in prosecuting their actions, to continue their lawsuits.” *Mercantile Nat’l Bank of Hammond v. Underwood*, 906 N.E.2d 881, 887 (Ind. Ct. App. 2009) (noting that the purpose of the statute is to “insure the diligent suitor the right to a hearing in court until he reaches a judgment on the merits” and that the statute is typically used to save an action filed in the wrong court), *trans. denied*. Clearly, there was nothing diligent about the

dismissal constituted an adjudication on the merits. *See Small v. Centocor, Inc.*, 731 N.E.2d 22. Thus, the Barmans should have been barred from continuing to litigate claims in the probate court that had already been determined in the Room Four action.<sup>4</sup>

The denial of the Estate's motion for summary judgment was in error. Therefore, we vacate the jury verdict entered in favor of the Barmans and, on remand, direct the probate court to enter judgment in favor of the Estate.

Judgment reversed and remanded.

BARNES, J., and CRONE, J., concur.

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Barmans' prosecution of the claims against Domelle in the Room Four action, as their counter-claims were dismissed for failure to prosecute.

<sup>4</sup> The Barmans do not dispute, nor could they, that the claims raised in both actions were essentially the same. To be sure, in their pre-trial contentions filed with the Room Four court in 1998, the Barmans detailed their claims in part as follows:

That since approximately May of 1994, agents, servants, employees and assigns of Domelle have continuously exceeded the boundaries of the easement, have cause [sic] gravel and other alleged road material to be deposited on the Barman property, have passed onto Barmans [sic] property and have caused said easement to be blocked....

\* \* \* \*

That on or about the 3<sup>rd</sup> day of October, 1996, Domelle installed upon his property, a culvert which was to allow for the drainage of surface water from Domelle's property.

That because of the negligence of Domelle, said culvert was improperly installed in that the culvert opening is not large enough, the culvert pipe is installed at the wrong height and said culvert pipe is installed at the wrong pitch to allow for the proper draining of the surface water from Barman's and Domelle's property. That as a result of the negligent installation of said culvert by Domelle, there has been improper runoff of water and flooding upon Barmans' property.

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*Appellant's Appendix* at 133-135.