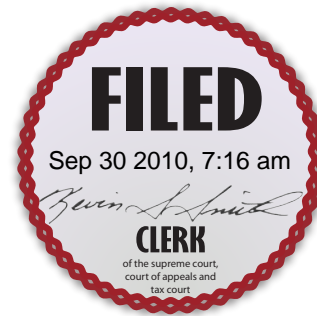


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

THE OSLER INSTITUTE, INC.,)

Appellant-Plaintiff,)

vs.)

RICHARD C. MILLER, et al.,)

Appellee-Defendant.)

No. 84A05-1003-PL-237

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Matthew L. Headley, Special Judge
Cause No. 84D04-0809-PL-10982

September 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff The Osler Institute, Inc. (Osler) brings this interlocutory appeal from the trial court's grant of appellee-defendant Richard C. Miller's motion to dismiss Osler's complaint. Concluding that Osler's action against Miller is precluded by the doctrine of res judicata, we affirm the trial court's dismissal of Osler's complaint against Miller.

FACTS

Osler is an Indiana business, located in Vigo County, that prepares, organizes, and presents live medical review board courses in various specialties to physicians throughout the United States. As part of its business, Osler also sells DVDs of those courses. In May 2005, Miller, then employed by Osler, incorporated Nighthawk Medical Educators, Inc. (Nighthawk), for purposes of competing with Osler in the business of continuing medical education. Miller was joined by two other Osler employees, Deborah McIntosh and Constance Stanley, as well as other persons not employed by Osler. By July 2005, Miller, McIntosh, and Stanley had left their employment at Osler.

On July 6, 2005, Osler filed suit in an Illinois court against Nighthawk, Miller, McIntosh, Stanley, and others. In its complaint, Osler alleged that the former Osler employees had breached their fiduciary duties and duties of loyalty to Osler, that they had misappropriated Osler's trade secrets, that they had tortiously interfered with Osler's business relationships, and that they had engaged in a civil conspiracy. Osler also alleged that Miller had breached his contract with Osler and that Nighthawk had tortiously interfered with Osler's contracts and fiduciary duties. In light of those allegations, Osler requested the following relief: a preliminary injunction, to be made permanent, a return

of all proprietary trade secret information, “all damages suffered,” costs, punitive damages, and any other relief the court deemed just and equitable. Appellant’s App. p. 44-45.

On September 14, 2005, the Illinois court accepted and entered a Consent Decree. Pursuant to the Consent Decree, the defendants “provided sworn statements to the effect that they do not have any Osler trade secret[s], confidential information, or student and faculty records in their possession, custody and/or control.” Id. at 49. Nonetheless, the defendants were enjoined from competing with Osler in the United States. Further, Miller was fined \$30,000, Stanley was fined \$10,000, and McIntosh was fined \$10,000. The Illinois court expressly “retain[ed] jurisdiction of this action for the purpose of enforcing or modifying this Consent Decree and for the purpose of granting such additional relief as may be necessary or appropriate.” Id. at 50. The court defined the term of its retained jurisdiction as “36 months from the date of entry,” which expired on September 14, 2008. Id. at 48.

On September 26, 2008, less than two weeks after the Illinois court’s jurisdiction over the Consent Decree expired, Osler filed the instant action in the Vigo Superior Court against the individuals named in the Illinois action as well as numerous other individuals. According to its First Amended Complaint, Osler accused the Indiana defendants of “continu[ing] to operate their continuing medical education business under other names . . . from various locations in Vigo County.” Id. at 56. Osler also alleged “the theft, conversion and unauthorized use of its power[-]point presentations, lecture DVD[s], and lecture notes for medical review courses.” Id. at 59. Osler specified that it “first learned”

of the alleged conduct “[o]n September 27, 2006,” while the Consent Decree was still in effect. Id. As a result of the alleged behavior, Osler sought money damages.

On July 29, 2009, Miller—who had been a party to the Illinois action and was also a party to the Indiana action—filed his motion to dismiss the Indiana complaint as against him. Among other reasons, Miller asserted that the Indiana trial court lacked subject matter jurisdiction, that dismissal was appropriate out of comity to the Illinois court, and that Osler’s claim against him was barred by res judicata. On November 13, the trial court granted Miller’s motion and, subsequently, the court certified its order for interlocutory appeal. This appeal ensued.¹

DISCUSSION AND DECISION

Osler appeals the trial court’s grant of Miller’s motion to dismiss. Miller’s motion included several exhibits, including the Consent Decree, Osler’s complaint in the Illinois court, and several affidavits. Thus, matters outside the pleading were presented to and considered by the trial court. Accordingly, the trial court’s ruling on Miller’s motion was a ruling on summary judgment under Indiana Trial Rule 56. See Ind. Trial Rule 12(B); Runkle v. Runkle, 916 N.E.2d 184, 189-90 (Ind. Ct. App. 2009), trans. denied.

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Runkle, 916 N.E.2d at 190. Additionally, we construe all facts and reasonable inferences drawn therefrom in favor of the nonmovant. Id. Further, we will affirm a grant of summary judgment if

¹ No other named defendant joined Miller’s motion to dismiss, and no other named defendant has filed a brief in this appeal. As such, our holdings in this decision apply only to Miller.

sustainable on any theory found in the evidence designated to the trial court. O'Brien v. 1st Source Bank, 868 N.E.2d 903, 906 (Ind. Ct. App. 2007).

In its order on Miller's motion, the trial court stated that it was "dismiss[ing] this action for want of subject matter jurisdiction and under the doctrine of comity." Appellant's App. p. 72. We do not resolve this appeal in accordance with those rationales, however. Indiana's trial courts have the general authority to address claims for theft and conversion. See Ind. Code §§ 33-28-1-2(a), 33-33-84-5; see also K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006) (observing that "[s]ubject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs"). And the doctrine of comity is discretionary in its application. Am. Econ. Ins. Co. v. Felts, 759 N.E.2d 649, 660-61 (Ind. Ct. App. 2001). Instead, we resolve this appeal on the mandatory doctrine of res judicata, which was argued before the trial court and fully briefed in this appeal. See Perry v. Gulf Stream Coach, Inc., 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007) (holding that "res judicata . . . compels judgment") (alteration and quotation omitted).

The doctrine of "[r]es judicata serves to prevent repetitious litigation of disputes which are essentially the same," and "consists of two distinct components, claim preclusion and issue preclusion." Dawson v. Estate of Ott, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003).

Claim preclusion is applicable when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim between the same parties. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action. Claim preclusion applies when the following four factors are present: (1) the former judgment was rendered by a court

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

Id. (internal citations omitted).

In the instant case, there is no dispute that the Illinois court had jurisdiction over the prior action and rendered a final judgment on the merits of that action. There is also no dispute that Osler and Miller were parties to the Illinois action and are parties in the case herein. Consequently, claim preclusion bars Osler's Indiana action against Miller.

Notwithstanding this conclusion, Osler counters that res judicata applies "only where the matters in issue in the present case were actually controverted and actually determined in the prior action," and points out that its Indiana action raises claims not raised in the Illinois action. Reply Br. p. 4. Although it is certainly true that res judicata prohibits the repetitious litigation of the same claims, it also prohibits the subsequent litigation of claims that "could have been[]" determined in the prior action." Perry, 871 N.E.2d at 1048 (emphasis added).

Thus, we turn to whether Osler's Indiana claims could have been raised in the Illinois litigation. On that issue, Osler asserts that it "did not know and could not have known that [Miller] had converted its property prior to [the] resolution of the [Illinois] litigation" Reply Br. p. 3. But, according to Osler's Indiana pleading, "[o]n September 27, 2006, [Osler] first learned of the theft, conversion, and unauthorized use of its power[-]point presentations, lecture DVD[s], and lecture notes for medical board review courses by the defendants" Appellant's App. p. 59. And September 27, 2006, was just over a year after the Illinois court entered the Consent Decree, and about

two years before the Illinois court's stated jurisdiction over that decree was set to expire. As such, Osler's assertions in this appeal that it "did not know about the theft, conversion and unauthorized use of its property until after the conclusion of the [Illinois] litigation," Reply Br. p. 5, are without merit and lack candor.

Having been aware of the newly alleged conversion almost two full years before the expiration of the Illinois court's jurisdiction to enforce the Consent Decree, Osler could well have raised its Indiana claims in the Illinois action. Osler's newly discovered information was within the subject matter of the Consent Decree, which was based, among other things, on Osler's original allegations that Miller had misappropriated Osler's trade secrets. Further, the Illinois court expressly retained jurisdiction over the parties to that action "for the purpose of enforcing or modifying this Consent Decree and for the purpose of granting such additional relief as may be necessary or appropriate." Appellant's App. p. 50. Hence, Osler could have raised its Indiana claims to the Illinois court.

Finally, Osler asserts that Miller obtained the Illinois judgment through fraud and, as such, he is not entitled to use that judgment as a shield to the Indiana claims. Specifically, Osler notes that, in the Consent Decree, Miller attached an affidavit in which he swore that he did not have any Osler trade secrets in his possession, custody, or control. Osler then states that it relied on that apparently fraudulent statement in executing and stipulating to the Consent Decree.

We certainly agree that a judgment obtained through fraud cannot be used defensively. See Morris v. Jones, 329 U.S. 545, 550-51 (1947). But Osler has not

alleged in the Indiana action or to the Illinois court that Miller committed either fraud or perjury. Osler certainly could have raised that issue to the Illinois court. And, in any event, Osler learned of Miller's alleged conversion with almost two full years remaining on the Illinois court's jurisdiction over the parties. Again, Osler had ample opportunity to ask the Illinois court to resolve the issues Osler raised in the Indiana court, but it did not. As a result, the Illinois court's judgment became a final judgment, and res judicata consequences attached to that judgment. Accordingly, the trial court here did not err in dismissing Osler's complaint against Miller, and we affirm the trial court's judgment.

The judgment of the trial court is affirmed.

VAIDIK, J., and BROWN, J., concur.