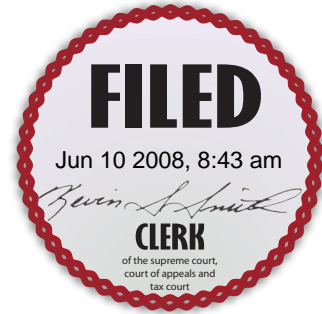


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID W. WOOLF,)

Appellant-Defendant,)

vs.)

No. 03A01-0711-CV-511

ELZIE D. HALE and THERESA A. HALE,)

Appellees-Plaintiffs.)

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Judith Stewart, Special Judge
Cause No. 03D01-0202-MF-0219

JUNE 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

Pro-se Appellant-Defendant David Woolf appeals the trial court's grant of summary judgment in favor of Appellees-Plaintiffs Elzie and Theresa Hale in the Hales' quiet title action. Woolf raises one issue for our review: whether the trial court erred in granting summary judgment in favor of the Hales. The Hales, in turn, request appellate attorney fees pursuant to Indiana Appellate Rule 66(E).

We affirm the grant of summary judgment, and deny the Hales' request for attorney fees.

In 2000, following the highly contentious dissolution of Roger and Julie Perry's marriage, the trial court awarded Roger a real estate parcel and family business known as Lot One Perry Plaza, ("Lot One"). However, in order to equalize the property distribution, the court ordered Roger to pay Julie \$87,068.00 within sixty days of the date of the order at which time Julie was to execute a quitclaim deed to the real estate. The trial court gave Julie a first lien on Lot One in the sum of \$87,068.00 plus post judgment interest until the judgment was paid in full. The court also ordered Roger to pay Julie's attorney \$25,000.00 in attorney fees, and gave the attorney a second lien on Lot One until the fees were paid in full.

In December 2001, Roger transferred Lot One to his mother, Alma Perry, by quitclaim deed. In February 2002, Julie and her attorney filed an action against Roger to foreclose on the judgment liens. Alma subsequently transferred the property to Woolf by quitclaim deed. In October 2002, Woolf leased the property to Roger. In February 2003, the trial court ordered that Lot One be sold in a Sheriff's Sale to satisfy the liens created in the Perrys' dissolution decree. Woolf was notified of the pending sale.

In June 2003, Julie purchased Lot One at the Sheriff's Sale, and in October 2003, she conveyed Lot One to the Hales by warranty deed. In May 2004, the Hales filed a quiet title action against Woolf and others. Three years later, in May 2007, Woolf filed a summary judgment motion wherein he alleged that he had legal title to Lot One. In support of his motion, Woolf submitted the quitclaim deeds showing that Roger conveyed Lot One to Alma, who in turn conveyed it to Woolf. Woolf also tendered an affidavit from Roger wherein Roger stated that he discharged the judgment liens on Lot One in January 2002 when he tendered full payment to Julie and her attorney.

After a hearing, the trial court granted summary judgment in favor of the Hales. Specifically, the trial court found as follows:

All grantees of or through Richard Perry subsequent to July 26, 2000 had either actual or constructive notice of the judgment liens of Julie Perry and [her attorney], and all such subsequent grantees of Roger Perry took any interest they obtained in the property subject to the judgment liens in favor of Julie Perry and [her attorney]. . . .

The assertion in Roger Perry's affidavit that he tendered payment of the judgment liens prior to the Sheriff's sale cannot defeat the Hales' title or summary judgment because Mr. Woolf cannot collaterally attack the judgment liens or the resulting Sheriff's Sale.

Appellant's App. at 49, 50. The trial court granted summary judgment in favor of the Hales, and Woolf appeals.

On appeal from a summary judgment, we face the same issues that were before the trial court and follow the same process. *Diversified Investments, LLC v. U.S. Bank, NA*,

838 N.E.2d 536, 539 (Ind. Ct. App. 2005), *trans. denied*. Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing Ind. Trial Rule 56(C)). The party that lost in the trial court has the burden of demonstrating that the grant of summary judgment was erroneous. *Id.* In the summary judgment context, although we are not bound by the trial court's specific findings and conclusions, they aid our review by providing a statement of reasons for the trial court's action. *Id.*

Here, Woolf claims that the trial court erred in granting summary judgment in favor of the Hales. Specifically, he claims that he has legal title to Lot One as evidenced by the quitclaim deeds and Roger's affidavit wherein Roger stated that he discharged the judgment liens on Lot One in January 2002, before Julie filed an action to foreclose on the judgment liens and before the June 2003 Sheriff's sale. However, a party must raise an issue at the first available opportunity. *See Ingram v. State*, 463 N.E.2d 483, 486 (Ind. Ct. App. 1984) (holding that failure to raise an issue at the first available opportunity results in waiver of the issue on appeal). Here, Woolf should have raised his claim before the Sheriff's Sale. He cannot now collaterally attack the sale. *See Dipert v. Killingbeck*, 112 N.E.2d 306, 308, 124 Ind. App. 18 (1953) (holding that a Sheriff's sale cannot be collaterally attacked). The trial court did not err in granting summary judgment in favor of the Hales.

We now turn to the Hales' request for attorney fees pursuant to Indiana Appellate Rule 66(E), which provides that this court may assess damages if an appeal is frivolous or in bad faith and that such damages are discretionary and may include attorney fees.

However, our discretion to award attorney fees is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or the purpose of delay. *Pardue v. Smith*, 875 N.E.2d 285, 292 (Ind. Ct. App. 2007). In addition, although Indiana Appellate Rule 66(E) provides this court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect on the exercise of the right to appeal. *Id.*

Here, although we affirm the trial court's grant of summary judgment in favor of the Hales, we decline their request for attorney fees because the record does not support a finding that Woolf's claims were permeated with bad faith, frivolity, or vexatiousness. The award of attorney fees in favor of the Hales is therefore unwarranted. *See id.*

Affirmed and request for attorney fees is denied.

BAKER, C.J., and BRADFORD, J., concur.