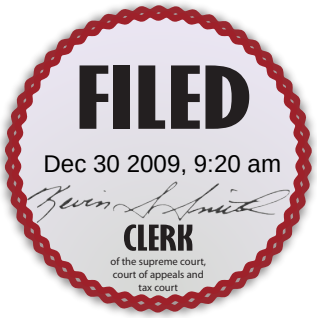

ATTORNEY FOR APPELLANT:

ROBERT E. STOCHEL
Hoffman & Stochel
Crown Point, Indiana

ATTORNEYS FOR APPELLEES:

Barbara Borns

DAVID C. JENSEN
JOHN P. TWOHY
LOGAN C. HUGHES
Eichhorn & Eichhorn, LLP
Hammond, Indiana

Spangler, Jennings & Dougherty, P.C.

GREGORY J. TONNER
Spangler, Jennings & Dougherty, P.C.
Merrillville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BOWMAN HEINTZ BOSCIA & VICIAN, P.C., Appellant-Plaintiff,	)	
vs.	)	No. 45A05-0905-CV-249
BARBARA BORNS, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CLARENCE BORNS, DECEASED, and SPANGLER, JENNINGS & DOUGHERTY, P.C., Appellees-Defendants.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D01-0704-PL-43

December 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Bowman, Heintz, Boscia & Vician, P.C. ("Bowman Heintz") appeals the grant of summary judgment in favor of Appellees-Defendants Clarence Borns[1] and Spangler, Jennings & Dougherty, P.C. We affirm.

Issue

Bowman Heintz raises the issue of whether the trial court erred in granting the motion for summary judgment of the Appellees on the premise that collateral estoppel, which was raised defensively, bars the lawsuit.

Facts and Procedural History

On November 8, 1999, Associates Financial Services Company ("Associates"), a consumer lending business that had sold collection accounts to Bowman Heintz, filed a complaint ("Associates Lawsuit") in the United States District Court Southern Division of Indiana against Bowman Heintz and Glenn Vician, alleging breach of fiduciary duty, legal malpractice and breach of contract. Bowman Heintz and Vician filed their answer and counterclaimed, alleging fraud, tortious interference with contractual relationships, tortious interference with business relationships, criminal conversion, defamation and abuse of process. Within the counts for tortious interference with contractual and business

[1] Borns passed away on March 25, 2009, and his Estate was properly substituted to represent his interests.

relationships, the counterclaim alleged:

> On or about December 17, 1999[,] an employee, agent, or someone acting in concert with Associates mailed from an Associates' office in Coppel, Texas by U.S. Postal Service, Priority Mail, copies of the Complaint Associates filed in this matter to several of Bowman Heintz's collection clients, including Ford Motor Credit Company and Chrysler Credit Corporation.

Appellant's Appendix at 102-103. In a motion for a preliminary and permanent injunction, Bowman Heintz and Vician alleged that Clarence Borns,[2] who was associated with the law firm Spangler, Jennings & Daugherty, P.C. ("Spangler Jennings") and handled certain Indiana consumer loan accounts for Associates, was the individual who mailed copies of the Complaint to clients of Bowman Heintz. Concluding that Borns was not an agent of Associates, the District Court denied the injunction motion on September 5, 2000.

In apparent response to the ruling, Bowman Heintz and Vician filed a motion for permissive joinder of Borns as a counterclaim defendant. The District Court denied the motion on November 3, 2000. The order noted that the Case Management Plan set April 1, 2000, as the deadline for amendments to the complaint and countercomplaint and that the Counterclaimants had failed to show cause why any amendment was necessary. On June 6, 2003, Associates filed a motion for summary judgment on the counterclaims. On March 31, 2004, the District Court granted the motion for summary judgment of Associates as to the counterclaims in the Associates Lawsuit, concluding in part as to the claim on tortious interference with contract:

> . . . Bowman Heintz has not evidenced that Borns mailed the complaint as an agent of or with the authority of Associates. To establish a claim for tortious

[2] Borns was previously the senior partner of Bowman Heintz's predecessor law firm.

> interference with contract, Bowman Heintz must prove by a preponderance of the evidence the following elements: (1) the existence of a valid and enforceable contract; (2) Associates' knowledge of the existence of the contract; (3) Associates' intentional inducement of breach of contract; (4) the absence of justification; and (5) damages resulting from Associates' wrongful inducement of the breach. Leveee v. Beeching, 729 N.E.2d 215, 221 (Ind. Ct. App. 2000) (citing Biggs v. Marsh, 446 N.E.2d 977, 983 (Ind. Ct. App. 1983)). As discussed in Section A.1.a[3] of this order, there is no evidence that Borns or anyone [from] Associates mailed unsolicited copies of the complaint to Chrysler or Sears. Therefore, there is no evidence that Associates' intentionally induced either of those Bowman Heintz clients to breach their contracts with Bowman Heintz.
>
> Moreover, with respect to Ford Credit, there is no evidence from which to draw an inference that Borns mailed unsolicited copies of the complaint as Associates' agent or its attorney. See Sections A.1.a, b. & c. Without this connection, there is no evidence that Associates intentionally induced Ford Credit to breach their contracts with Bowman Heintz. In addition, there is no evidence that has been presented to the Court that Ford Credit took any negative action with respect to its relationship with Bowman Heintz as a result of receiving the unsolicited copies of the complaint.
>
> For these reasons, Associates' motion for summary judgment on Bowman Heintz' remaining tortious interference with contract claim should be **GRANTED**.

Appellant's App. at 77-78. Bowman Heintz filed a Notice of Appeal, but the parties stipulated to the dismissal of the appeal on January 27, 2005.

On December 13, 2001, Bowman Heintz filed a complaint ("BH Lawsuit") in Lake County Superior Court against Borns and Spangler Jennings, alleging interference with business relationships, interference with contractual relationships and defamation based on Borns supposedly mailing copies of the Complaint to Bowman Heintz clients. On May 9, 2008, Borns filed a motion for summary judgment, contending that the doctrine of collateral

[3] Section A.1 analyzed whether Borns was an agent of Associates based on actual, apparent or inherent (subdivisions of a, b, c) authority to support the claim of libel.

estoppel barred the BH Lawsuit because Bowman Heintz was relitigating its counterclaims presented in the Associates Lawsuit. The trial court granted the motion. This appeal ensued.

Discussion and Decision

I. Standard of Review

We review a summary judgment order *de novo*. Tri-Etch, Inc. v. Cincinnati Ins. Co., 909 N.E.2d 997, 1001 (Ind. 2009). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). In making this determination, we consider only those portions of the pleadings, depositions, and other matters specifically designated to the trial court by the parties for the purposes of the motion. Ind. Trial Rule 56(C), (H). We accept as true those facts alleged by the non-moving party, which are supported by affidavit or other evidence. Id. While the rationale of the trial court is helpful in reviewing the grant of summary judgment, such order may be sustained on any theory or basis supported by the designated materials. Warren v. IOOF Cemetery, 901 N.E.2d 615, 618 (Ind. Ct. App. 2009), trans. denied.

II. Analysis

Bowman Heintz argues that the trial court erred in granting summary judgment on the basis of res judicata, specifically collateral estoppel.[4] We first note that the claims brought by

[4] Although the order of the trial court and the arguments of Bowman Heintz utilize the term collateral estoppel, both recite and analyze the facts of the case according to the four prong test for claim preclusion. Based on this misapplication, Bowman Heintz emphasizes that Borns and Spangler Jennings were not parties to the Associates Lawsuit nor were they privies of one of the parties. Thus, while relevant in a different context, the identity of the party and its privities are of no moment when collateral estoppel is used *defensively*. See Sullivan v. Am. Cas. Co. of Reading, Pa., 605 N.E.2d 134, 137-39 (Ind. 1992).

Bowman Heintz in this state court action were not compulsory counterclaims in the Associates Lawsuit because Borns and Spangler Jennings were not necessary parties to the original lawsuit. See Indiana Trial Rule 13(A).[5] New Albany Residential, Inc. v. Hupp, 872 N.E.2d 627, 630 (Ind. Ct. App. 2007) (Indiana Trial Rule 13(A) only applies to opposing parties.). Thus, even though the facts used to support these claims are strikingly similar to those asserted in the Associates Lawsuit, these claims are not foreclosed by Indiana Trial Rule 13(A), which governs compulsory counterclaims. See Broadhurst v. Moenning, 633 N.E.2d 326, 333 (Ind. Ct. App. 1994) (Claim against bank vice president for potential liability for tortious interference with contract was not a compulsory counterclaim in prior foreclosure action because bank vice president was not a party to the foreclosure action.). We therefore turn our attention to determining whether collateral estoppel bars the claims asserted by Bowman Heintz.

The doctrine of res judicata is comprised of two distinct components, claim preclusion[6] and issue preclusion. Dawson v. Estate of Ott, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003). Issue preclusion, commonly known as collateral estoppel bars subsequent

[5] "A pleading shall 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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." (emphasis added)

[6] Claim preclusion applies when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim, as opposed to just a fact or issue, between the same parties. Dawson v. Estate of Ott, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003). Claim preclusion requires the satisfaction of the following: (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. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied.

litigation of a fact or issue that 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), trans. denied. Even if the two actions rest on different claims, the former adjudication will be conclusive in the subsequent action only as to those issues that were actually litigated and determined. Id. "Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument." Afolabi v. Atl. Mortgage & Inv. Corp., 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006). Application of collateral estoppel in a particular case is governed by the following analysis: (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 1183.

When our Indiana Supreme Court adopted the current modern rule for collateral estoppel, it dispensed with the requirement of mutuality of estoppel and identity of parties for defensive collateral estoppel. Sullivan v. Am. Cas. Co. of Reading, Pa., 605 N.E.2d 134, 139 (Ind. 1992). Therefore, a non-party to the first action, such as Borns and Spangler Jennings, may defensively raise collateral estoppel in a subsequent case. Eichenberger v. Eichenberger, 743 N.E.2d 370, 375 (Ind. Ct. App. 2001).

However, Bowman Heintz contends that the Associates Lawsuit did not determine the issue of Borns's personal liability and the attendant vicarious liability of Spangler Jennings. The claims alleged against Borns and Spangler Jennings include defamation, tortious interference with business relationships, and tortious interference with contractual

relationships. Before we reach the collateral estoppel analysis, we note that two of the three claims are not viable. First, because Borns passed away on March 25, 2009, the defamation claim is foreclosed by the Indiana Survival Statute. See Ind. Code § 34-9-3-1(a).[7] Second, a claim for tortious interference with business relationships requires an allegation of illegal conduct on the part of the defendant. Gov't Payment Serv. Inc. v. Ace Bail Bonds, 854 N.E.2d 1205, 1209 (Ind. Ct. App. 2006) (The tort of tortious interference with business relationships requires some independent illegal action), trans. denied. Bowman Heintz fails to make any allegation in its complaint or elsewhere in the record before us of an independent illegal action pursued by Borns or Spangler Jennings to achieve the alleged end. Therefore, the only claim left is that of tortious interference of contractual relationships, which requires proof of (1) existence of a valid and enforceable contract; (2) defendant's knowledge of the existence of that contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) damages resulting from defendant's wrongful inducement of the breach. Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1235 (Ind. 1994).

As mentioned above, Bowman Heintz was not able to add Borns as a counterclaim defendant based on his personal liability under the theory of tortious interference with contractual relationships or the vicarious liability of Spangler Jennings. The basis of the denial to add Borns to the Associates Lawsuit was compliance with the case management

[7] "If an individual who is entitled or liable in a cause of action dies, the cause of action survives and may be brought by or against the representative of the deceased party except for actions for: (1) libel; (2) slander . . ." Ind. Code § 34-9-3-1(a). Libel and slander are species of defamation under Indiana law. Indiana Ins. Co. v. N. Vermillion Cmty. Sch. Corp., 665 N.E.2d 630, 635 (Ind. Ct. App. 1996), trans. denied.

plan, which is required by Federal Rule of Civil Procedure 16(b),[8] the essential purpose of which is to make the judicial process expedient. See Rouse v. Farmers State Bank of Jewell, Iowa, 866 F. Supp. 1191, 1198 (N.D. Iowa 1994).

As previously mentioned, we must determine (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 1183. "Issue preclusion applies only to matters actually litigated and decided, not all matters that could have been decided." Miller Brewing Co. v. Ind. Dep't of State Revenue, 903 N.E.2d 64, 68 (Ind. 2009). The issue must have been one that was necessarily adjudicated in the former lawsuit and subject to appellate review. Id. Generally, facts available at the time of the first suit are foreclosed in a subsequent suit as well as new arguments based on the same legal theory. Id.

The federal court decided the issue of whether the actions of Borns resulted in damages to Bowman Heintz. It concluded there were no damages. This ultimate conclusion was based on the findings that there was no evidence connecting Borns with the Complaints mailed to Chrysler and Sears, who adversely changed their relationship with Bowman, and that the letter Borns mailed to Ford Credit did not cause damages as Ford Credit remained a client of Bowman Heintz. As Borns was the only person specifically alleged to have mailed the Complaints, his conduct and its legal implications were central to the outcome of the

[8] "Scheduling Order. Except in categories of actions exempted by local rule, the district judge- - or a magistrate judge when authorized by locale rule- - must issue a scheduling order." Fed. R. Civ. Pro. 16(b)(1). "Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." Fed. R. Civ. Pro. 16(b)(3)(A).

Associates Lawsuit. Thus, both parties had incentive to vigorously develop evidence and argument as to Borns's involvement in the mailing of the Complaints. Moreover, the evidence required to establish Associates' liability for tortious interference with contractual relationships is the same as that required to prove Borns's individual liability plus the link of agency between Borns and Associates. Therefore, Bowman Heintz had a fair opportunity to litigate the issue of whether Borns's action of mailing a Complaint resulted in damages to it. Furthermore, Bowman Heintz does not offer and we do not find a reason why it would not be otherwise unfair under the circumstances to permit the use of issue preclusion in the current action. As issue preclusion bars the claim of personal liability against Borns, the claim of vicarious liability against Spangler Jennings also fails.

Conclusion

In sum, summary judgment in favor of Borns and Spangler Jennings was appropriate on the claims for defamation and tortious interference with business relationships because they are not viable claims. Finally, summary judgment was appropriate as to the claim for tortious interference with contractual relationships because collateral estoppel bars the claim.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.