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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL ROCAP, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-0508-CV-811  
 )  
KATHY MONEY and ROSEMARY TALSKY, )  
 )  
Appellees-Plaintiffs. )

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APPEAL FROM THE COURT MARION SUPERIOR COURT  
The Honorable Cale J. Bradford, Special Judge  
Cause No. 49D01-0410-CT-1876

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August 23, 2006

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Michael Rocap (“Rocap”) brings this interlocutory appeal, arguing that the Marion Superior Court erred when it denied his motion to dismiss a complaint filed against him by Kathy Money (“Money”) and Rosemary Talsky (“Talsky”). Rocap raises the following restated issues:

- I. Whether the doctrine of law of the case precludes Money and Talsky from relitigating their claims as a declaratory judgment action;
- II. Whether the doctrine of res judicata precludes Money and Talsky from relitigating their claims as a declaratory judgment action; and,
- III. Whether Money and Talsky’s declaratory judgment action is time-barred.

Concluding that neither the doctrine of law of the case nor the doctrine of res judicata precludes this declaratory judgment action, and that it is not time-barred, we affirm.

### **Facts and Procedural History**

Rosemary Kiley (“Rosemary”), the mother of Money, Talsky, and Daniel Kiley (“Daniel”), died testate on February 4, 1993. Following her death, Rosemary’s children appeared to amicably settle her estate.<sup>1</sup> However, on December 10, 1996, Money and Talsky filed a complaint against Daniel alleging that as executor of Rosemary’s estate, he commingled assets and improperly or inadequately disclosed information relating to the settlement of the estate.

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<sup>1</sup> Pursuant to the will, Daniel was to receive the balance of a certificate of deposit (remaining after burial expenses) and all of Rosemary’s shares of common stock in the family business, Superior Cartage Company, Inc. (“Superior Cartage”). The sisters were to receive the residue of the estate, which amounted to approximately \$200,000 at the time of their mother’s death. Believing that the specific bequests to Daniel no longer existed, Money and Talsky entered into a settlement agreement in which they agreed to divide the residue equally between themselves and their brother.

On October 9, 1997, Money and Talsky filed an amended complaint, adding James Rocap, Jr. (“James”) and Michael Rocap (“Rocap”) as defendants in a second count.<sup>2</sup> The amended complaint read, in relevant part, as follows:

Count I

COME NOW the Plaintiffs, Rosemary Talsky and Kathy Money, by counsel, and for their cause of action against the Defendant, Daniel D. Kiley, allege and say:

\* \* \*

3. That as part of the administration of the estate of Rosemary E. Kiley, [Money, Talsky, and Daniel] entered into a Settlement Agreement, a copy of which is attached to this Complaint and designated “Exhibit A.” This Agreement called for these parties to divide the balance of this estate equally. This settlement was predicated upon the assumption that the stock which the decedent owned in Superior Cartage Company, Inc. had been sold prior to the decedent’s death.

4. [Daniel] executed an Affidavit, a copy of which is attached to this Complaint and designated “Exhibit B,” alleging that the decedent’s stock in Superior Cartage Company, Inc. was sold January 1, 1990. The Plaintiffs have recently discovered a 1991 Federal Tax Return which states that Rosemary E. Kiley was charged with a dividend in excess of \$65,000.00 for the taxable year 1991 on stock owned by her in Superior Cartage Company, Inc. In April 1997, [Daniel] produced a stock certificate alleging that the stock of Rosemary E. Kiley was sold on January 5, 1992.

\* \* \*

Count II

COME NOW the Plaintiffs and for their Amended Second Count of Complaint allege and say as follows:

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<sup>2</sup> James was the long-time attorney for the family and Superior Cartage. Rocap, James’s son, had been employed by Superior Cartage since around 1980. By the late 1980s, Daniel and Rosemary were the only remaining shareholders of Superior Cartage. Around 1990, Rocap entered into a partnership with Daniel to run the business. At some point thereafter, Rocap acquired Rosemary’s shares of stock in the business.

1. That [James] acted as their attorney at various times throughout their lifetime and was in a fiduciary relationship with them at all times alleged in this complaint.

2. [James, Rocap, and Daniel] participated in a scheme or plan to transfer the shares of stock owned by the mother of the Plaintiffs, Rosemary E. Kiley, in Superior Cartage, Inc., to [Rocap]. This scheme or plan was executed by fraud, forgery, or at a time when Rosemary Kiley was mentally incompetent.

3. [James], at a time when he was acting as attorney for [Money and Talsky], and in fiduciary relationship with them, prepared documents transferring title to shares of stock owned by Rosemary Kiley, mother of the Plaintiffs, in Superior Cartage, Inc., to his own son, [Rocap].

4. [Daniel], acting through his attorney, [James], and [Rocap], acting through his attorney and father, [James], and the Defendant [James] while acting as the attorney for the Plaintiffs represented that the stock in Superior Cartage, Inc., owned by Rosemary Kiley was transferred to [Rocap] in January, 1990 at a time when it had little or no value. The Defendants represented to the Plaintiffs that [Rocap] paid something of value for the shares of stock owned by Rosemary E. Kiley in Superior Cartage, Inc., when in fact, he paid nothing of value.

5. On February 3, 1993, [Money and Talsky] were entitled to the balance of the estate of Rosemary Kiley in the approximate amount of \$200,000.00. [Daniel and James] acting in concert and through misrepresentations induced [Money and Talsky] to enter into "Exhibit A" which divided the balance of their mother's estate equally with their brother, and Defendant herein, [Daniel].

6. As a result of the conduct alleged herein, [Rocap] holds 37 ½% of the shares of the stock of Superior Cartage, Inc., as trustee for the benefit of those entitled to share in the estate of Rosemary Kiley pursuant to the terms of "Exhibit A."

WHEREFORE, the Plaintiffs pray for judgment against the Defendants in an amount that will adequately compensate them for their damage and loss and for judgment against [Rocap] that he holds 37 ½% of the shares of Superior Cartage, Inc., as trustee for those entitled to share in the estate of Rosemary Kiley pursuant to the terms of "Exhibit A," the return of those shares or the value thereof, and for all other relief just and proper in the premises.

Appellant's App. pp. 61-64.

In 1999, both James and Rocap filed motions for summary judgment, each alleging that there was no evidence that they acted fraudulently or forged Rosemary's signature. The trial court denied James's motion on December 2, 1999. The trial court, however, granted Rocap's motion for summary judgment on August 22, 2000. Money and Talsky appealed the grant of summary judgment.

In an unpublished memorandum decision, another panel of this court affirmed the trial court's grant of summary judgment in favor of Rocap. See Money v. Rocap, No. 49A02-0012-CV-802 (Ind. Ct. App. July 31, 2001), trans. denied (hereinafter referred to as "*Rocap I*"). There, the court explained, in relevant part:

In this case, Money and Talsky sued [Rocap] after learning that he had acquired from their mother, [Rosemary], numerous shares of stock in a family-owned corporation for which he had worked for many years. The trial court granted [Rocap's] motion for summary judgment, and Money and Talsky appeal, arguing that a genuine issue of fact exists concerning whether [Rocap] obtained the stock by fraudulent means. We need not, however, address the substance of their arguments on appeal because their complaint fails to state a claim upon which relief can be granted. See Indiana Trial Rules 8(A) and 12(B)(6).

In their complaint, Money and Talsky allege that [Rocap] participated in a "scheme or plan" to transfer shares of stock from [Rosemary] to [Rocap] by means of "fraud, forgery, or at a time when [Rosemary] was mentally incompetent." Trial Rule 9(B) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred." Money and Talsky's general averment, above, does not meet this requirement, and nowhere else in their complaint to they specifically allege what, if any, representations [Rocap] made on which they relied to their detriment. See Browning v. Walters, 616 N.E.2d 1040, 1047 (Ind. Ct. App. 1993) (concluding that complaint did not state cause of action for common-law fraud where plaintiff did not specifically alleged what representations defendant made on which plaintiff relied to his detriment). Further, to the extent that Money and Talsky attempt to allege, through the use of the terms "scheme or plan," that [Rocap] was involved in a conspiracy to illegally acquire stock owned by

[Rosemary], Indiana does not recognize civil conspiracy as an independent cause of action. See Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1234 (Ind. 1994).

Lastly, although Money and Talsky's[sic] complaint states that [Rocap] obtained [Rosemary's] stock certificate through "forgery," it does not allege that [Rocap], intending to defraud, made or uttered the stock certificate so that it purported to have been issued by [Rosemary]. See Ind. Code § 35-43-5-2. Even if their averment were sufficient in this regard, they disavow any attempt to prove that [Rocap] forged [Rosemary's] signature on the stock certificate. In their response to [Rocap's] motion for summary judgment and in their appellate brief, Money and Talsky maintain that, although they allege that the stock certificate was forged, they "have at no time alleged that ... [Rocap] personally forged the stock certificate."

Thus, Money and Talsky have failed to properly plead a plausible theory or basis of recovery upon which relief can be granted. Their complaint fails to state a claim and, hence, is insufficient as a matter of law. There is nothing in the designated material to salvage the complaint. Because we will affirm a trial court's entry of summary judgment if any evidence designated to the trial court supports it, we conclude that the trial court did not err when it granted summary judgment in favor of [Rocap].

Affirmed.

Slip op. at 3-5 (footnotes and citations omitted). Shortly after the memorandum decision was issued in *Rocap I*, James filed a motion for judgment based on law of the case. On November 2, 2001, Money and Talsky filed a motion to amend the complaint "to conform to the evidence discovered during the course of the discovery process in this case." Appellant's App. p. 137. On December 27, 2001, our supreme court denied transfer in *Rocap I*.

Subsequent to the supreme court's denial of transfer, James renewed his motion for judgment based on law of the case on January 7, 2002. Soon thereafter, Daniel filed a motion for partial summary judgment, similarly relying on the law of the case and arguing that *Rocap I* "is dispositive of the fraud, civil conspiracy, and forgery claims that plaintiffs have raised against Dan Kiley." Appellant's App. pp. 137-38. On June 19,

2002, the trial court held a hearing on the pending motions. The trial court denied Money's and Talsky's motion to amend the complaint after hearing arguments from counsel. The trial court further granted Daniel's motion for partial summary judgment and James's motion for judgment based on law of the case.

Money and Talsky appealed the trial court's grant of judgment based on law of the case in favor of James and the trial court's grant of partial summary judgment in favor of Daniel on the fraud, forgery, and civil conspiracy claims. In an unpublished memorandum decision dated November 10, 2003, a separate panel of this court concluded that "the law of the case doctrine does not apply ... the complaint sufficiently states a claim against [James] and Daniel for which relief may be granted." Money v. Rocap, No. 49A05-0207-CV-342 (Ind. Ct. App. November 10, 2003) (hereinafter referred to as "*Rocap II*"). This court observed:

Although the Sisters' complaint against Daniel and [James] stands, we observe that their claims for relief are not as broad as they might expect. The linchpin of the Sisters' case against Daniel and [James] is fraud.

With regard to the alleged forgery, however, we observe that the Sisters cannot recover damages (i.e., recovery of the stock or its value) by establishing that the stock certificate was forged. The Sisters had no ownership interest in the stock at the time of its transfer or as a result of their mother's will, as said stock had been specifically devised to Daniel. We simply cannot envision how the Sisters would have been affected by a forgery of the stock certificate in and of itself. Rather than an independent claim, therefore, the Sisters can rely on evidence of forgery only to the extent that it may bolster their claim of fraud. In the end, if the trier of fact determines that Daniel and/or [James] engaged in fraud, then the Sisters will be entitled to damages resulting from their execution of the settlement agreement.

Slip op. at 8-10 (footnotes omitted).

On December 14, 2004, Money and Talsky filed their Third Amended Complaint and again named Rocap as a defendant along with Daniel, James, and Superior Cartage. Appellant's App. pp. 142-60. In Count I, Money and Talsky challenged Rocap's ownership of Superior Cartage stock by requesting a declaratory judgment, such that "[Rosemary's Superior Cartage] Stock was never lawfully transferred to [Rocap]." Appellant's App. p. 152. Pursuant to Indiana Trial Rule 76(C),<sup>3</sup> Rocap filed for an automatic change of judge. Appellant's App. p. 29. In response, Money and Talsky stated that:

[t]he claims made with respect to [Rocap] in the Third Amended Complaint, although in a somewhat different procedural posture through a declaratory judgment action, remain substantively the same. In essence, the Plaintiffs have claimed that [Rocap] wrongfully received Superior [Cartage] stock belonging to Rosemary Kiley, and the Plaintiffs seek to recover said stock or its value from [Rocap]. This was the claim made with respect to [Rocap] through the initial Amended Complaint, and it remains the same claim against [Rocap] in the Third Amended Complaint.

Appellant's App. p. 163. On February 24, 2005, the court granted Rocap's motion for change of judge pursuant to Rule 76(C). Appellant's App. p. 31.

On March 8, 2005, Rocap moved to dismiss Count I of Money and Talsky's Third Amended Complaint as to him and Superior Cartage for failure to state a claim upon which relief can be granted, pursuant to Indiana Trial Rule 12(B)(6).<sup>4</sup> The court held a hearing on Rocap's motion to dismiss on May 18, 2005. Appellant's App. pp. 340-89. On June 8, 2005, the court denied Rocap's motion to dismiss in an order containing no analysis or reasoning in support of the denial. Appellant's App. p. 43. On July 8, 2005,

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<sup>3</sup> Ind. Trial Rule 76(C) (2006).

<sup>4</sup> Ind. Trial Rule 12(B)(6) (2006).

Rocap filed a motion requesting that the court certify its order for appeal. On July 28, 2005, the court certified its order for interlocutory appeal to this court.

### **Standard of Review**

On appeal, Rocap argues that the trial court erred when it failed to dismiss Count I of Money and Talsky's Third Amended Complaint under Trial Rule 12(B)(6).<sup>5</sup> See Br. of Appellant at 10. The standard of review of a trial court's grant or denial of a motion to dismiss for failure to state a claim is de novo. Sims v. Beamer, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). We do not defer at all to the trial court's decision because deciding a motion to dismiss based upon failure to state a claim involves a pure question of law. Id. That is, it does not require reference to extrinsic evidence, the drawing of inferences therefrom, or the weighing of credibility for its disposition. Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000). The grant or denial of a motion to dismiss turns solely on the legal sufficiency of the claim and does not require determinations of fact. Sims, 757 N.E.2d at 1024.

Because Trial Rule 12(B)(6) motion to dismiss tests the legal sufficiency of a claim, and not the facts supporting it, a complaint may not be dismissed on the basis that it fails to state a claim upon which relief may be granted unless it appears to a certainty, on the face of such complaint, that the complaining party is not entitled to any relief. McQueen v. Fayette County Sch. Corp., 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), trans.

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<sup>5</sup> Indiana Trial Rule 12(B)(6) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion:

\* \* \*

(6) Failure to state a claim upon which relief can be granted, which shall include failure to name the real party in interest under Rule 17[.]

denied. In ruling upon a motion to dismiss for failure to state a claim, the trial court is required to view the complaint in a light most favorable to the non-moving party, with every reasonable inference construed in the non-movant's favor. Id. The trial court may only look to the complaint, and well-pleaded material must be taken as admitted. Id.

### **I. Law of the Case**

At the outset, Rocap contends that the law of the case doctrine applies, preventing Money and Talsky from “re-litigating the same issue they argued on the merits and lost on the merits.” Br. of Appellant at 10. We disagree.

“Under the law of the case doctrine, an appellate court’s determination of a legal issue is binding both on the trial court on remand and on the appellate court in a subsequent appeal, given the same case with substantially the same facts.” Kocher v. Getz, 844 N.E.2d 1026, 1030 (Ind. Ct. App. 2006) (citing Montgomery v. Trisler, 771 N.E.2d 1234, 1238 (Ind. Ct. App. 2002), trans. denied). Issues that are decided directly or implicitly in a prior decision are binding on all subsequent portions of that case. Id. To invoke the law of the case doctrine, the matters decided in the prior appeal clearly must appear to be the only possible construction of an opinion, and questions not conclusively decided in the prior appeal do not become the law of the case. Rosby Corp. v. Townsend, Yosha, Cline & Price, 800 N.E.2d 661, 664 (Ind. Ct. App. 2003), trans. denied.

The law of the case doctrine is based upon the sound policy that once an issue is litigated and decided, that should be the end of the matter. Moreover, the doctrine “is a discretionary tool by which appellate courts decline to revisit legal issues already

determined on appeal in the same case and on substantially similar facts.” Id. However, “when faced with an apparent conflict between finality and fairness – i.e., the goals fostered by the law of the case – the courts should unhesitatingly choose the latter.” State v. Huffman, 643 N.E.2d 899, 901 (Ind. 1994); see also Wedel v. Am. Elect. Power Serv. Corp., 839 N.E.2d 1236 (Ind. Ct. App. 2005) (noting that the law of the case doctrine is a discretionary rule of practice).

Rocap contends “the record in *Rocap I* establishes that Money and Talsky’s claims were not defeated due to technicality or inartful pleading. They argued their claims on the merits, the trial court sided against them on the merits, and this Court decided their appeal on the merits.” Br. of Appellant at 13. However, a review of *Rocap I* reveals that a separate panel of this court, in limiting its review of the trial court’s grant of Rocap’s motion for summary judgment, did not address the legal issue regarding Rocap’s ownership of the Superior Cartage stock. There, this court expressly stated:

We need not, however, address the substance of [Money and Talsky’s] arguments on appeal because their complaint fails to state a claim upon which relief can be granted. ... In their complaint, Money and Talsky allege that Rocap participated in a “scheme or plan” to transfer shares of stock from Kiley to Rocap by means of “fraud, forgery, or at a time when [Rosemary] was mentally incompetent. ... Trial Rule 9(B) requires that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred.” Money and Talsky’s general averment [] does not meet this requirement, and nowhere else in their complaint do they specifically allege what, if any, representations Rocap made on which they relied to their detriment.

Rocap, 49A02-0012-CV-802 at 3 (internal citations omitted). Therefore, as it relates to his attempt to invoke the law of the case doctrine to bar Money and Talsky’s claims, Rocap’s reliance upon *Rocap I* is unpersuasive.

Rocap further contends that the law of the case doctrine bars Money and Talsky's claims pursuant to this court's opinion in *Rocap II*. See Br. of Appellant at 14. At first glance, this argument appears to be more compelling. However, the law of the case doctrine does not apply and Rocap's argument is once again unpersuasive.

In *Rocap II*, this court expressly stated that the "dispositive issue for review is whether [Money and Talsky's] complaint fails to state a claim upon which relief can be granted." Slip op. at 2. Moreover, this court concluded that "the law of the case doctrine does not apply here and the complaint sufficiently states a claim against [James] and Daniel for which relief may be granted." Id. at 7. Specifically, Rocap directs our attention to the following language from this court's decision:

With regard to the alleged forgery, however, we observe that [Money and Talsky] cannot recover damages (i.e., recovery of the stock or its value) by establishing that the stock certificate was forged. [Money and Talsky] had no ownership interest in the stock at the time of its transfer or as a result of their mother's will, as said stock had been specifically devised to Daniel. We simply cannot envision how [Money and Talsky] would have been affected by a forgery of the stock certificate in and of itself. Rather than an independent claim, therefore, [Money and Talsky] can rely on evidence of forgery only to the extent that it may bolster their claim of fraud.

Rocap, 49A05-0207-CV-342 at 9.

Rocap ignores the fact that, in *Rocap II*, this court did not decide the legal issue regarding Rocap's ownership of the Superior Cartage stock. Moreover, this court was not called upon to determine whether Money and Talsky had any claim to either the ownership of the stock or its value. The comments regarding the lack of ownership interest in the stock are merely dicta, failing to give rise to the application of the law of the case doctrine. Money and Talsky's claim rests in the allegation that James, Rocap,

and Daniel participated in a fraudulent scheme or plan to transfer Rosemary's shares of stock to Rocap, thereby impacting Money and Talsky's share of their mother's estate. Rocap's reliance upon this court's decision in *Rocap II* as an attempt to invoke the law of the case doctrine is unpersuasive.

Based on these facts and circumstances, we conclude that the law of the case doctrine does not apply and cannot serve as grounds to dismiss Money and Talsky's claims against Rocap as articulated in their Third Amended Complaint.

## **II. Res Judicata**

Next, Rocap contends that there "is no question that the trial court erred in failing to hold that the doctrine of res judicata bars Money and Talsky's declaratory judgment claim." Br. of Appellant at 20. We disagree.

As an initial matter, we note that the doctrine of res judicata distinctly differs from the law of the case doctrine, though both are frequently used interchangeably, resulting in confusion. See Seeley v. State, 782 N.E.2d 1052, 1058 n.6 (Ind. Ct. App. 2003). The doctrines of law of the case and res judicata both operate to preclude litigation regarding matters that have already been litigated. Mutchman v. Consolidation Coal Co., 666 N.E.2d 461, 464 (Ind. Ct. App. 1996). As we have already discussed, law of the case provides that an appellate court's determination of a legal issue binds both the trial court and the court on appeal in any subsequent appeal involving the same case and substantially the same facts. See Kocher, 844 N.E.2d at 1030; Cha v. Warnick, 476 N.E.2d 109, 114 (Ind. 1985). Similarly, the doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute. Scott v. Scott, 668

N.E.2d 691, 699 (Ind. Ct. App. 1996). However, *res judicata* casts a wider net and is divided into two branches: claim preclusion and issue preclusion. Eichenberger v. Eichenberger, 743 N.E.2d 370, 374 (Ind. Ct. App. 2001).

Claim preclusion applies where a final judgment on the merits has been rendered which acts as a *complete bar* to a subsequent action on the same issue or claim between the same parties or those in privity. Id. (emphasis added). Issue preclusion, which is commonly referred to as collateral estoppel, bars the subsequent relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent action. Where issue preclusion applies, the previous judgment is conclusive only as to those issues actually litigated and determined therein. Id.

We have already concluded that this court did not decide the legal issue regarding Rocap's ownership of the Superior Cartage stock in a previous litigation (*Rocap I or II*), so issue preclusion is inapplicable. As such, what remains of the doctrine of *res judicata* to bar Money and Talsky's claims is claim preclusion.

The following 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. Small v. Centocor, Inc., 731 N.E.2d 22, 26 (Ind. Ct. App. 2000), trans denied. "A party is not allowed to split a cause of action,

pursuing it in a piecemeal fashion and subjecting a defendant to needless multiple suits.” Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied (citation omitted).

Here, the Marion Superior Court had jurisdiction to hear this controversy between Rocap, Money, and Talsky regarding the issue of Rocap’s ownership of the Superior Cartage stock, an issue that could have been determined in the prior action (*Rocap I*). As such, the second requirement, that the former judgment must have been rendered on the merits, is the only requirement of claim preclusion at issue here. Rocap asserts that the summary judgment affirmed by this court in *Rocap I* precludes Money and Talsky from raising their current claims.

Generally, summary judgment “is a decision on the merits.” Poulard v. Lauth, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003) (citing Foshee v. Shoney’s, Inc., 637 N.E.2d 1277, 1280 (Ind. 1994)). Here, however, summary judgment was granted and subsequently affirmed as a result of Money and Talsky’s failure to properly plead fraud. Where the merits of the claim do not form the basis on which the trial court grants summary judgment, claim preclusion does not accrue. Sees v. Bank One, Ind., 839 N.E.2d 154, 161 n. 6 (Ind. 2005). Those instances, such as the situation here, do not give rise to claim preclusion. In *Rocap I*, this court determined that Money and Talsky failed to establish that Rocap had personally forged Rosemary’s signature on the stock certificates, but did not address the factual circumstances related to the alleged fraud or conspiracy between Rocap, James, and Daniel. Based on these facts and circumstances,

we conclude that the doctrine of res judicata by way of claim preclusion is inapplicable to the issue of Rocap's ownership of the Superior Cartage stock

### **III. Statute of Limitations**

Finally, Rocap argues that Money and Talsky's declaratory judgment action is time-barred. Br. of Appellant at 20. We disagree.

Our discussion of the relevant statute of limitations period is restricted to Indiana Code section 34-11-8-1, commonly referred to as the "Journey's Account Statute," which states:

(a) This section applies if a plaintiff commences an action and:

- (1) the plaintiff fails in the action from any cause except negligence in the prosecution of the action;
- (2) the action abates or is defeated by the death of a party; or
- (3) a judgment is arrested or reversed on appeal.

(b) If subsection (a) applies, a new action may be brought not later than the later of:

- (1) three (3) years after the date of the determination under subsection (a); or
- (2) the last date an action could have been commenced under the statute of limitations governing the original action;

and be considered a continuation of the original action commenced by the plaintiff.

Ind. Code § 34-11-8-1 (1999).

In Vesolowski v. Repay, 520 N.E.2d 433 (Ind. 1988), our supreme court explained the underlying purpose of the Journey's Account Statute as follows:

At common law suits often were dismissed on technical grounds. In such cases, the plaintiff could file another writ known as a Journey's Account. The renewal suit was deemed to be a continuation of the first. The time to

bring another suit was computed theoretically with reference to the time required for the plaintiff to journey to where court was held.

Although the common law remedy is no longer recognized, Indiana has created a statutory remedy in its place. . . .

The Journey's Account Statute is designed to ensure that the diligent suitor retains the right to a hearing in court until he receives a judgment on the merits. Its broad and liberal purpose is not to be frittered away by narrow construction.

Id. at 434 (citations omitted). Vesolowski also sets forth three requirements that a plaintiff must satisfy in order to be able to rely on the Journey's Account Statute: (1) the original action must have been timely filed; (2) the decision ending the original action must not have been on the merits; and (3) the conditions set forth in the statute must be met. Id. at 435.

Rocap argues that the Journey's Account Statute does not apply because Money and Talsky "cannot meet the second prong of the *Vesolowski* test." Br. of Appellant at 24. Further, Rocap contends that "[t]hey have already had their day in court and in *Rocap I* received an adverse judgment on the merits of all of their claims against [Rocap]." Id.

Initially, we observe that Money and Talsky filed their Third Amended Complaint within the statute of limitations. Pursuant to the Journey's Account Statute, Money and Talsky could bring a new action against Rocap within three years of the prior determination, and the new action will be considered a continuation of the original.<sup>6</sup> Here, the trial court granted summary judgment in favor of Rocap on August 22, 2000,

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<sup>6</sup> Pursuant to Indiana Code section 34-11-2-7(4), fraud claims must be commenced within six years after the cause of action accrues. As such, Money and Talsky cannot avail themselves of sub-section (b)(2) of the Journey's Account Statute.

and this court affirmed the decision on July 31, 2001. Our supreme court then denied transfer on December 27, 2001. Therefore, Money and Talsky had until December 27, 2004 to file their amended complaint.<sup>7</sup>

As we have already discussed, summary judgment was granted and subsequently affirmed as a result of Money and Talsky's failure to properly plead fraud. Similarly, although the general rule holds that summary judgment is a decision on the merits, there are instances where the merits of the claim do not form the basis on which the trial court grants summary judgment. Sees v. Bank One, Ind., 839 N.E.2d 154, 161 n. 6 (Ind. 2005). In this instance, Money and Talsky's claim of fraud against Rocap was not addressed on the merits. Bearing in mind the rationale behind the Journey's Account Statute, to allow plaintiffs the right to a hearing on the merits, it would be improper to hold that summary judgment, in this instance, satisfies the second prong of the Vesolowski test. Based on these facts and circumstances, we conclude that the Journey's Account Statute applies to Money and Talsky's claims.<sup>8</sup> Therefore, this declaratory judgment action is not time-barred.

### **Conclusion**

We conclude that the doctrines of law of the case and res judicata are inapplicable. Additionally, Money and Talsky's claims are not time-barred. As such, the trial court did not err when it denied Rocap's motion to dismiss.

Affirmed.

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<sup>7</sup> Money and Talsky filed their Third Amended Complaint on December 13, 2004. Appellant's App. pp. 27, 29.

<sup>8</sup> As such, we need not address Rocap's remaining arguments regarding the statute of limitations. See Br. of Appellant at 20-22, 24-26.

FRIEDLANDER, J., and BARNES, J., concur.