

2013 IL App (2d) 121162-U  
No. 2-12-1162  
Order filed May 1, 2013

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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TOWNSHIP of SHABBONA and GENE	)	Appeal from the Circuit Court
LARSON, Road Commissioner for	)	of DeKalb County.
Shabbona Township,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 12-MR-87
	)	
JEREMY ROLLER and CATHERINE	)	
ROLLER,	)	
	)	
Defendants-Appellants	)	
	)	
(Sawong Sukboriboon Saowapak Sukboriboon,	)	Honorable
Matthew E. Scarbrough, Kari E. Scarbrough,	)	Kurt Klein,
Defendants).	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Zenoff and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* Plaintiffs' declaratory judgment action was barred by *res judicata* because the same issue had been fully litigated to final judgment in defendants' earlier action to quiet title. In spite of this, the trial court correctly denied defendants' motion to dismiss under the Citizen Participation Act (735 ILCS 110/1 *et seq.* (West 2010)).

¶ 2 Defendants, Jeremy Roller and Catherine Roller, appeal the judgment of the circuit court of DeKalb County denying their motion to dismiss the declaratory judgment action of plaintiffs, the Township of Shabbona and Gene Larson, as Road Commissioner for Shabbona Township, seeking to determine that plaintiffs have rights to a 66-foot right-of-way for a public road comprising roughly 50 feet of defendants' front yard. Defendants moved to dismiss plaintiffs' action under the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2010)), arguing that, in their quiet-title action, plaintiffs had prevailed by raising the affirmative defenses of common-law dedication and prescriptive easement. In plaintiffs' declaratory judgment action, they sought to relitigate the issue of common-law dedication. The trial court denied the motion to dismiss. On appeal, defendants argue that, by raising precisely the same issue, common-law dedication, plaintiffs' action should be barred by principles of *res judicata* or collateral estoppel. We agree but we affirm the trial court's judgment on defendants' motion to dismiss pursuant to the Act and remand the cause for further proceedings consistent with our judgment.

¶ 3 While the instant case has not been before us before, the parties and the issue come before us for the second time. We recap the earlier action to provide context for this case and its arguments.

¶ 4 On July 5, 2007, defendants filed a quiet title action seeking to confirm their exclusive title to property commonly known as 6845 Clapsaddle Road (the subject property). Among the defendants in the quiet title action were Shabbona Township and Gene Larson, in his capacity as Road Commissioner for the township. We will refer to Larson and the township as plaintiffs in light of their position in the instant case. Plaintiffs filed an answer to defendants' quiet title action. Plaintiffs also asserted five affirmative defenses, including, pertinently, common-law dedication of

a portion of the subject property for a public roadway and the existence of a prescriptive easement over a portion of the subject property.

¶ 5 In May 2008, plaintiffs moved for summary judgment in the quiet-title action based, in part, on the affirmative defenses of common-law dedication and prescriptive easement. In November 2008, the trial court granted summary judgment in favor of plaintiffs, holding that they had established that a portion of the subject property had been properly dedicated as a public roadway. Based on the holding that plaintiffs had established a common-law dedication of a portion of the subject property, the trial court expressly made no rulings on any of the other grounds advanced by plaintiffs in their motion for summary judgment. Defendants filed a motion to reconsider. On September 14, 2009, the trial court denied the motion to reconsider, but changed its rationale. In denying the motion to reconsider, the trial court now held that plaintiffs had established a prescriptive easement and repudiated its ruling on common-law dedication. The trial court further expressly left the determination of the size and boundaries of the prescriptive easement for another day.

¶ 6 Defendants filed a motion to clarify the trial court's ruling. On November 13, 2009, the trial court heard the motion, and on November 16, 2009, the trial court ruled. The trial court held that, after reviewing the matter, it was required to correct its November 2008 ruling based on common-law dedication. The trial court, after prompting by plaintiffs, held that it was reversing the grant of summary judgment based on common-law dedication and, instead, was granting summary judgment based on finding the existence of a prescriptive easement over a portion of the subject property. The trial court further vacated the November 2008 order and continued the matter for the purpose of determining the dimensions and location of the easement on the subject property. Ultimately, the

trial court ordered that the easement would be coextensive with the gravel path on defendants' property and instructed plaintiffs to set the width of the easement by taking the average width of the gravel, which varied between 12 and 14 feet.

¶ 7 Plaintiffs appealed the trial court's ruling, disappointed that the width of the easement for the roadway was not set at 66 feet (which would have overlapped onto the neighbors' property by about 15 feet and would nevertheless have been problematic, as the neighbors were not parties to the quiet-title action). *Roller v. Larson*, No. 2-09-1286 (October 20, 2010) (unpublished order under Supreme Court Rule 23). On appeal, plaintiffs sought to reverse the trial court's judgment on the prescriptive easement and restore the judgment on the common-law dedication. The court held that it lacked jurisdiction because plaintiffs had not sought affirmative relief and had been successful in defeating defendants' claim. In other words, there was no jurisdiction because plaintiffs won in the trial court and, because they did not raise a claim of their own, they could not challenge their victory in the quiet-title action because the trial court had accepted one of plaintiffs' arguments, just not the one plaintiffs wanted.

¶ 8 On June 5, 2012, plaintiffs filed the instant declaratory action against defendants and four parties who are not party to this appeal: Sawong and Saowapak Sukboriboon and Matthew and Kari Scarbrough. In the current action, plaintiffs seek a declaration that, via common-law dedication, the township has acquired a 66-foot wide dedicated right-of-way for a public road running mainly through defendants' front yard. The portion of defendants' property under dispute appears to be the same in both the quiet-title action and declaratory judgment.

¶ 9 On July 23, 2012, defendants filed a motion to dismiss. Defendants contended that the declaratory action was barred by *res judicata* or collateral estoppel. In addition, defendants sought

to dismiss the declaratory action under section 15 of the Act (735 ILCS 110/15 (West 2010)). Plaintiffs responded that, because they had only put forth an argument and not a cause of action in the quiet-title action, as evidenced by the appellate court's dismissal for lack of jurisdiction, the defenses of *res judicata* and collateral estoppel did not apply. Regarding the Act, plaintiffs argued defendants' reasoning failed because plaintiffs' claim concerning common-law dedication was not barred by *res judicata* or collateral estoppel, so it was not a meritless claim subject to the strictures of the Act. Defendants replied that an improper purpose could be inferred under the Act because the common-law dedication claim was obviously barred by the prior judgment. Defendants also argued that the fact that the quiet-title action had been concluded did not disturb their argument under the Act.

¶ 10 On September 25, 2012, the trial court denied defendants' motion to dismiss in its entirety. The court reasoned that, in view of the appellate court's opinion in the quiet-title case, holding that plaintiffs had not asserted a cause of action, *res judicata* and collateral estoppel did not bar the instant case; because the common-law dedication was not meritless, the dismissal under the Act was no longer available.

¶ 11 On October 25, 2012, defendants filed a petition for leave to appeal under the Act and a motion seeking certification for interlocutory appeal of the order. On December 13, 2012, the trial court denied defendants' request for certification. This court granted defendants leave to appeal the portion of the trial court's judgment based on the Act.

¶ 12 Defendants' appeal presents a recursive argument. Defendants contend the trial court erred in dismissing their claim under the Act because plaintiffs were clearly and obviously precluded from relitigating the issue of their rights in defendant's property as a result of the outcome of the quiet-title

action. Defendants also contend that the Act conferred jurisdiction for this interlocutory appeal because it could be inferred that plaintiffs acted with an improper purpose because their declaratory action was meritless because it was clearly precluded due to the outcome of the quiet-title action.

¶ 13 In order to unpack the arguments presented on appeal, we are presented with almost a chicken and egg problem. Generally, we consider our jurisdiction first, because, without jurisdiction, we cannot consider an appeal. *Mund v. Brown*, 393 Ill. App. 3d 994, 996 (2009). However, to determine whether we have jurisdiction, we must determine whether plaintiffs' claims are barred by *res judicata* or collateral estoppel, because defendants' claim under the Act is valid only if plaintiffs' declaratory action was obviously meritless due to the operation of *res judicata* or collateral estoppel. Because of the centrality of the preclusion issue to this case, we begin our analysis there. If plaintiffs have not been precluded from relitigating their rights in defendants' property by *res judicata* or collateral estoppel, then our analysis may end there. If preclusion applies, then we must continue to consider the trial court's judgment regarding the Act and its effect, if any, on our jurisdiction.

¶ 14 Accordingly, we commence our analysis with the question of whether *res judicata* or collateral estoppel applies to bar plaintiffs' declaratory action. The posture of this question arises from the denial of a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). A section 2-619 motion to dismiss admits the legal sufficiency of a complaint but asserts an affirmative defense or other affirmative matter that avoids or defeats the claim. *Carr v. Koch*, 2012 IL 113414, ¶ 27. We review *de novo* the trial court's judgment on a motion to dismiss under section 2-619. *Id.*

¶ 15 The primary area of contention centers on the preclusive effect of the judgment in the quiet-title action. Defendants argue that the application of either *res judicata* or collateral estoppel serves

to preclude plaintiffs' claim in the instant case for a common-law dedication of a public roadway across a portion of defendants' property. *Res judicata* is a doctrine that promotes judicial efficiency and protects litigants by avoiding repetitive litigation and protecting a party from having to bear the unjust burden of relitigating essentially the same case. *Ross Advertising, Inc. v. Heartland Bank & Trust Co.*, 2012 IL App (3d) 110200, ¶ 29. The doctrine of *res judicata* provides that final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent cause of action between the same parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). "When *res judicata* applies, it bars all matters that were offered to sustain or defeat a claim in the first action, as well as all matters that could have been offered." *Ross Advertising*, 2012 IL App (3d) 110200, ¶ 30. In particular, the doctrine of *res judicata* "bars a claim based on facts that would have constituted a counterclaim in the earlier action" where the success of the claim in the later action would impair or nullify rights established in the first action. *Id.* To apply *res judicata*, three requirements must be met: (1) there was a final judgment on the merits by a court of competent jurisdiction; (2) there is an identity of parties or their privies; and (3) there is an identity of cause of action. *Id.* at ¶ 31.

¶ 16 Similar to *res judicata*, collateral estoppel, also known as issue preclusion, is an equitable doctrine promoting fairness and judicial economy by preventing the relitigation of factual or legal issues that have already been resolved in an earlier action. *Id.* at ¶ 42. Again, similarly to *res judicata*, the doctrine of collateral estoppel applies when a legal or factual issue was actually litigated and determined by a valid and final judgment, and the determination on the issue was essential to the judgment. *Id.* In such a case, the determination is conclusive in a later action between the parties, whether on the same or a different claim. *Id.* In order to apply the doctrine of collateral

estoppel, three requirements must be met: (1) there is an identity of issues between the earlier action and the current action; (2) there was a final judgment on the merits in the earlier action; and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the earlier action.

*Id.*

¶ 17 With these principles in mind, we consider the facts before us. In *Roller*, defendants sought to quiet title to the subject property. Plaintiffs interposed as affirmative defenses both a theory of common-law dedication of a portion of defendants' land as a public roadway and the existence of a prescriptive easement. The trial court granted summary judgment in favor of plaintiffs here, ultimately holding that they were entitled to a prescriptive easement that followed a gravel pathway through the subject property and set at the average width of that pathway. The summary judgment in *Roller* constituted a final judgment in that matter. Plaintiffs appealed, but their appeal was dismissed because plaintiffs had not raised any claim in the action, instead interposing only an affirmative defense that did not seek positive relief. Plaintiffs' appeal in *Roller* was dismissed for lack of jurisdiction.

¶ 18 In the instant case, nearly two years after their appeal was decided, plaintiffs initiated the instant case. In this case, plaintiffs sought, once again, a determination that, via common-law dedication, they were entitled to a roadway across defendants' property and the neighbors' property. With regard to defendants' property, plaintiffs sought to establish the grant of a public roadway easement across defendants' property in precisely the same place as they sought it in the *Roller* action. In addition, however, plaintiffs also sought to determine rights over the Sukboriboons' property adjacent to defendants' property. Further, plaintiffs also asserted that the Scarbroughs, who purchased defendants' property from the Sukboriboons, were properly party defendants in this

action. After purchasing the property from the Sukboriboons, the Scarbroughs were foreclosed and divested of the subject property, which was finally sold from the Sukboriboons to defendants.

¶ 19 Defendants contend that *res judicata* applies, because precisely the same claim, common-law dedication of the same area of the subject property, between the same parties had been previously adjudicated in *Roller*. Plaintiffs disagree, arguing in part, that the addition of the Sukboriboons and Scarbroughs as party defendants destroys the identity of parties, and that the assertion of rights beyond the borders of defendants' land serves to destroy the identity of the actions.

¶ 20 We begin our analysis by looking at defendants' contentions. First, there is clearly an identity of actions (excepting for the moment plaintiffs' claim to a right-of-way of about 15 feet adjacent to the subject property and running across the Sukboriboons' neighboring property—we will discuss the effect of this additional fact momentarily). Under the *River Park* analysis, also known as the transactional test in *res judicata* analysis, we look to see if the two actions “arise from a single group of operative facts, regardless of whether they assert different theories of relief.” *River Park*, 184 Ill. 2d at 311. In *Roller*, plaintiffs claimed the existence of a common-law dedication of a public roadway right-of-way based on the following factual scenario: Originally, the subject property was part of the land owned by the Sukboriboons. The Sukboriboons desired to partition their land, which was at that time zoned A-1, agricultural. The goal of the partition was to sell the subject property with the permission to build a single-family residence on the subject property. In exchange for the grant of a special use to allow the building of a single-family residence, plaintiffs required the Sukboriboons and the purchasers of the subject property, the Scarbroughs, to execute a dedication of the existing roadway. The dedication specified that the roadway was to be 66 feet wide and centered along the already existent gravel road, with roughly 50 feet of the roadway being in the

subject property. The dedication was made and accepted by the township, but plaintiffs failed to have it recorded. Eventually, defendants purchased the subject property with no notice of the 66-foot wide public roadway right-of-way. Thus, plaintiffs here claimed the common-law dedication was satisfied because there was the intent to donate the land, and the acceptance of the township of the dedication. In the instant action, plaintiffs' claim to the public roadway right-of-way is based on exactly the same facts (plus the involvement of the remaining portion of the public roadway right-of-way running across the adjacent 15 feet of the Sukboriboon's land). With regard to plaintiffs and defendants, at least, because the same facts serve as the basis for both actions, there is an identity of cause of action between the *Roller* case and the instant case. See *River Park*, 184 Ill. 2d at 311, 313-14 (same group of operative facts formed the basis for the federal cause of action and the state cause of action). (We will consider the effect of the inclusion of the Sukboriboon's property on this element below.)

¶ 21 Next, the parties are identical in the *Roller* and the instant case (again, excepting the addition of the Sukboriboons for the moment). In *Roller*, the parties were the owners of the subject property and the township and its road commissioner. In this case, the parties are the owners of the subject properties and the township and its road commissioner. With regard to defendants' subject property, the parties are identical; the Sukboriboons have no remaining interest in defendants' subject property. We note that, for purposes of the identical-parties element of *res judicata*, it includes the parties' privies. For purposes of *res judicata*, "privity exists between parties who share a mutual or successive relationship in property rights that were the subject of an earlier action." *Board of Education of Sunset Ridge School District No. 29 v. Village of Northbrook*, 295 Ill. App. 3d 909, 919 (1998). Here, the subject property was owned, in succession, by the Sukboriboons, Scarbroughs, and

defendants. Because there is privity between successive owners of property (*id.*) with regard to their interests in the subject property, the addition of the Sukboriboons and Scarbroughs as parties to the instant case does not destroy the identity of the parties between the *Roller* action and the instant case.

¶ 22 Turning next to the element of a final judgment on the merits in the earlier action, we see that there is one. Defendants here filed a quiet title action, seeking to extinguish any other party's rights in the subject property. Plaintiffs here filed affirmative defenses including common-law dedication. Subsequently, plaintiffs filed a motion for summary judgment which, ultimately, was granted on the ground of a prescriptive easement. Plaintiffs' subsequent appeal was dismissed for lack of jurisdiction, because plaintiffs had not sought affirmative relief through a counterclaim and had prevailed in the case below. A final judgment is "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit." (Emphasis omitted.) *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 47, quoting *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). The grant of summary judgment in the quiet-title action determined all the issues presented by the parties and finally and absolutely fixed the rights between plaintiffs and defendants regarding the subject property. This is further confirmed in *Roller*, No. 2-09-1286, slip op. at 10, which discussed the basis for its jurisdiction:

"Although the trial court issued Rule 304(a) language in its order granting a prescriptive easement, Rule 304(a) is inapplicable to confer jurisdiction here. Rule 304(a) provides that, where multiple claims for relief are pending and judgment is entered on one or more but fewer than all claims, the claim upon which judgment was rendered may be appealed if the trial court makes an express finding that there are no just reasons for delaying an appeal on that claim. [Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)]. Thus, Rule 304(a) applies to final

judgments that do not dispose of the entire proceeding. In contrast, here, *both parties agree* that no claims remain pending and that summary judgment *disposed of the entire case*. As such, jurisdiction is more appropriately asserted under Supreme Court Rule 301, which provides that every *final judgment* is appealable as of right. [Ill. S. Ct. R. 301 (eff. Feb. 1, 1994)].” (Emphases added.)

Thus, the parties agreed and the court impliedly found that there was a final order on the merits in *Roller*.

¶ 23 We see, then, without yet considering the addition of the Sukboriboons’ land, that the elements of *res judicata* appear to be satisfied. There was a final judgment in the quiet-title action that determined the parties’ rights relative to the subject property. The causes of action in the quiet-title case and this case arise out of the same operative facts; indeed, precisely the same claim was advanced and rejected in *Roller* as has been advanced here. Finally, the parties are identical or else are in privity, for purposes of *res judicata*, with defendants.

¶ 24 Finally, we must consider the effect on *res judicata* of adding the portion of the Sukboriboons’ property to the scope of the instant case. We believe that there is no effect on the identity of actions caused by adding the Sukboriboons’ property. The quiet-title action in *Roller* was limited to the subject property. Plaintiffs’ argument in *Roller* was likewise limited to the subject property, even though, in that case and on the same group of facts present in *Roller* and here, plaintiffs arguably could have established a claim for common-law dedication that extended into the Sukboriboons’ property, had the Sukboriboons been parties in that suit. From defendants’ or plaintiffs’ point of view, the same facts existed during the quiet-title action as exist now in this case.

The addition of the Sukboriboons' property implicates convenience or efficiency in trying the matter, but not the creation or discovery of new facts that change the action.

¶ 25 An example of new facts that could arise to disturb the application of *res judicata* is given in *City of Chicago v. Midland Smelting Co.*, 385 Ill. App. 3d 945, 960 (2008). There, the defendant attempted to employ *res judicata* to bar successive condemnation actions. *Id.* The first condemnation sought to acquire the entire parcel; the second sought only half of the parcel; the first condemnation was instituted under a different ordinance than the second; the court concluded that the factual circumstances differed and illustrated the difficulty in applying *res judicata* in successive eminent domain proceedings against the same parcel of land. *Id.* at 959-60. Here, while new land has been added (ostensibly constituting a new fact), the circumstances giving rise to the claim of common-law dedication remain the same and do not change with the addition of the Sukboriboons' property. Further we can see that, had plaintiffs filed a counterclaim in the quiet-title action, the Sukboriboons' property could have been added just as easily there as it was here, and the circumstances underpinning the claim of common-law dedication would not have changed or been changed.

¶ 26 Alternatively, if the addition of the new parties and new land were held to destroy the identity elements of *res judicata* (identity of actions and identity of parties), then plaintiffs' claim would still be barred by application of the doctrine of collateral estoppel. For collateral estoppel to apply there must be a final judgment on the merits in the previous adjudication, identity of issues in the two cases, and the party against whom the estoppel is sought must have been a party, or be in privity with a party, to the previous adjudication. *Ross Advertising*, 2012 IL App (3d) 110200, ¶ 42. The requirements are fulfilled in this case. The common-law-dedication issue here is identical to the

common-law-dedication in the *Roller* case. Plaintiffs had pleaded exactly the same claim, only in this case they are seeking affirmative relief; in *Roller*, the claim was raised to prevent defendants from succeeding in their quiet-claim action. The *Roller* matter, as has been seen above, resulted in a final judgment on the merits. The trial court initially accepted the common-law dedication affirmative defense, but later, it repudiated its ruling, rejected and vacated the common-law dedication rationale, and decided the case on the grounds that plaintiffs had established the existence of a prescriptive easement. In spite of plaintiffs' contentions which we shall address below, we determine that the trial court rendered a final judgment on the merits. Finally, plaintiffs here were parties to the *Roller* action. Because the requirements are fulfilled, we determine that, even if *res judicata* does not apply, the doctrine of collateral estoppel is fulfilled, and plaintiffs should have been precluded from instituting their declaratory action in this case.

¶ 27 Plaintiffs argue that the trial court's rejection of one argument in favor of another in the grant of a summary judgment is not itself a final judgment. In support of this argument, plaintiffs cite to *Roller*. However, as indicated above, *Roller* determined that the judgment in the trial court was, in fact, a final judgment. *Roller*, 2-09-1286, slip op. at 10. *Roller* offers no support for plaintiffs' nonfinal-order argument. Plaintiffs also cite to *Wilson v. Edward Hospital*, 2012 IL 112898, to support their nonfinal-order argument. Specifically, plaintiffs claims that *Wilson* held "that a theory of recovery is not a cause of action; there, the granting of a partial summary judgment was not a final order for *res judicata* purposes." Plaintiffs are correct that *Wilson* held that "a theory of recovery is not a cause of action" (*id.* at ¶ 25), but they misapprehend the context. First, in *Wilson*, the plaintiffs advanced but a single cause of action, albeit under multiple theories. The grant of partial summary judgment there was necessarily nonfinal, because there was only a single claim, and the

partial summary judgment did not entirely dispose of it. *Id.* at ¶ 26. Indeed, the court noted that, in *Wilson*, the “trial court’s grant of partial summary judgment did not dispose of the rights of the parties on a separate branch of the controversy,” thereby rendering the grant of partial summary judgment nonfinal for purposes of *res judicata*. *Id.* Here, by contrast, the summary judgment granted by the trial court, in addition to being agreed to be final by the parties (*Roller*, No. 2-09-1286, slip op. at 10), decided all of the issues in controversy and established the rights of the parties. *Hernandez*, 2012 IL 113054, ¶ 47. It is precisely because the trial court’s grant of summary judgment in the quiet-title action “disposed of a separate branch of the controversy [(indeed the entire tree)]” (*Wilson*, 2012 IL 112898, ¶ 24), that the order was final. *Wilson*, too, fails to support plaintiffs’ nonfinal-order argument.

¶ 28 Plaintiffs argue that we should be hesitant to apply *res judicata* in this case. Plaintiffs argue that they did not get to litigate the common-law dedication theory as an affirmative claim in the quiet-title action, and the bar of estoppel is being applied to the claim only because it might have been raised as a counterclaim in the quiet-title action. We disagree. Factually, plaintiffs presented the same uncontested facts in support of their affirmative defense that they present here to support their cause of action. Thus, we cannot find that they did not have an opportunity to litigate their claim in the earlier case.

¶ 29 Legally, plaintiffs attempt to support their argument with citation to *Carey v. Neal, Cortina & Associates*, 216 Ill. App. 3d 51, 63 (1991). *Carey* is distinguishable on at least two grounds. First, in *Carey*, the counterclaim brought as a claim in the second suit was actually never asserted in any fashion in the first suit. *Id.* at 60. Here, by contrast, plaintiffs raised their claim of common-law dedication in the first, quiet-title action as well as in the later action. Second, the first suit in *Carey*

was a foreclosure of property, seeking to adjudicate land rights; the second suit was an action in fraud and did not seek to affect any land rights. *Id.* at 60. Here, both actions seek to affect or determine the parties' rights in defendants' property. Thus, *Carey* is factually distinguishable.

¶ 30 Further, *Carey*'s rationale actually supports the application of *res judicata* or collateral estoppel. The *Carey* court recognized that that the failure to raise a counterclaim in an earlier case could risk preclusion if the second suit threatened to nullify the first suit's judgment or impair the rights established in the first suit. *Id.* at 57, 58-59. Here, plaintiffs contested the land-rights associated with defendants' property in the quiet-title action. In the instant case, plaintiffs, unhappy with how those rights were determined in the previous action, again seek a determination of the parties' rights, one which, if successful, would at least impair the rights established in the quiet-title action. Thus, whereas in *Carey*, the first case involved land rights, and the second case involved a tort claim, here, both actions involve fixing the parties' rights in defendants' property. *Carey*, therefore, is distinguishable and does not help plaintiffs' argument.

¶ 31 Plaintiffs also argue that *res judicata* should not be a mechanically applied rule, especially where doing so would result in an unfair and unjust outcome. In support of this contention, plaintiffs cite to *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887 (2009). *Piagentini* is distinguishable. In that case, the plaintiff had portions of the complaint's allegations dismissed; no count or counts of the complaint was dismissed. Thereafter, plaintiff voluntarily dismissed the complaint and refiled. There was no *res judicata* problem because there had been no final order. *Id.* at 893. As a result, it would have been unfair and unjust to apply *res judicata*. Here, by contrast, the quiet-title action ended in a final order, and plaintiffs had raised and litigated the common-law dedication claim. With *Piagentini* distinguished, we reject plaintiff's contention.

¶ 32 Plaintiffs argue that *res judicata* should not apply because the land involved in the quiet-title action is not the same as the land involved in the instant case. We have analyzed this argument above, concluding that, even so, this fact does not disturb the application of *res judicata*, and even if it does, collateral estoppel is still proper. In making this argument, however, we perceive that plaintiffs are trying to contend that the identity-of-actions element of *res judicata* is not met. Plaintiffs attempt to frame the actions in a manner so as to create a difference between them. Plaintiffs argue that the quiet-title action was not concerned with defining plaintiffs' rights in defendants' land, but in extinguishing them. While this is true, plaintiffs ignore what actually occurred in the quiet-title case, namely, a final judgment which established a prescriptive easement in their favor across defendants' property. Plaintiffs thus conflate what defendants sought to achieve with what actually resulted from the quiet-title action. We reject this view. Instead, the quiet-title action achieved a resolution regarding the parties', plaintiffs' and defendants', rights in the subject property. In the instant action, on the other hand, plaintiffs are seeking to adjust or change the rights previously established. In addition, in the instant case, plaintiffs seek to establish heretofore undefined rights in neighboring property, but those rights are distinct from, and have no effect upon, the rights already established in defendants' property. Thus, the addition of the Sukboriboons' property to this suit has no effect vis-a-vis defendants' property. As we noted above, we do not believe that the addition of the Sukboriboons' property to this action has any impact on the preclusive effect of the judgment in the quiet-title action.

¶ 33 Indeed, plaintiffs' argument seems to attempt to invoke a situation like that in *Midland Smelting*. Plaintiffs argue that defendants' complaint concerns only a single fact, namely the existence of the gravel roadway running through their property. Plaintiffs argue that the instant

action, by contrast, “is built upon distinct facts which support its differentiated cause of action, including the separate land, the actions of different individuals, and the unique nature of its separate cause of action.” This conception harks back to *Midland Smelting*, which determined that *res judicata* was not applicable to successive eminent domain actions due to the differences in the land sought to be condemned and the different ordinances supporting the condemnation. *Midland Smelting*, 385 Ill. App. 3d at 959-60. Tellingly, however, plaintiffs do not elaborate on their “distinct facts” to attempt to demonstrate a closer analogy with cases like *Midland Smelting*. Even had plaintiffs tried to draw a closer analogy, we have distinguished *Midland Smelting*, in which the new facts affected the core group of operative facts by expressly changing the circumstances of the eminent domain action, and this case, in which the new facts remained peripheral to the core group of operative facts and did not affect the circumstances on which the two actions were based.

¶ 34 Plaintiffs raise the interesting point that an adjudication on the merits of their common-law dedication claim was not necessary in the context of rendering a decision in the quiet-title action. This is true. However, an examination of the record belies the contention that the claim was not adjudicated. In the quiet-title action, plaintiffs set forth the uncontested facts supporting their claim, argued their claim fully, and the trial court rendered a decision based on the evidence and argument submitted by the parties. Thus, whether or not consideration and adjudication of the claim of common-law dedication was necessary in the context of the quiet-title action, it was actually raised, actually and fully considered, and finally disposed.

¶ 35 Plaintiffs next argue that a “tangential ruling” in a related but separate cause of action does not give rise to preclusion under the doctrine of *res judicata*. In support, plaintiffs cite first to *Gurga v. Roth*, 2011 IL App (2d) 100444, ¶ 17-20, for the proposition that *res judicata* would not apply to

a subsequent quiet-title action, even though the quiet-title claim could have been raised within the previous probate proceeding. Plaintiffs have, perhaps, literally stated the result of *Gurga*, but they do not state its holding, and their analysis fails to capture the court's reasoning. In *Gurga*, the defendant appeared to acquire title to the house at issue through the estate of the deceased daughter of the parent-owners. *Id.* at ¶ 4. The defendant then moved to evict the plaintiff, another daughter, who alleged that she had moved into the house to care for her elderly parent, in a forcible entry and detainer action. *Id.* at ¶ 5. The plaintiff filed a quiet-title action seeking to assert her ownership interest in the house, claiming it was her parent's intent that she and the deceased daughter receive the ownership of the house after her death. *Id.* The trial court held that *res judicata* applied to bar the plaintiff's claim because it could have been raised in the probate proceeding of the deceased daughter. *Id.* at ¶ 7.

¶ 36 This court held that it would be unfair to apply *res judicata* under the circumstances of the case. First, the plaintiff's claim to an ownership interest in the house did not flow through the estate of the deceased daughter, so there was likely no requirement that the plaintiff had to file a quiet-title action during the probate of the deceased daughter's estate. *Id.* at ¶ 18. Second, and more importantly, at the time the estate was opened, the title to the house was already clouded by the plaintiff's receipt of an apparent ownership interest through the parent-owner, so the defendant, as the executor of the deceased daughter's estate, was the more appropriate party to question the title to the house during the probate proceeding. *Id.* at ¶ 19. If the defendant, as she should have, had filed a quiet-title action in the probate proceeding, and if the plaintiff had failed to participate, then the preclusion of *res judicata* would lie, but because the plaintiff's competing claim of ownership was not through the estate or as an heir of the deceased daughter, it would have been unfair to

preclude the plaintiff's claim because she did not raise it in the probate proceeding when the defendant-executor also failed to raise the question of the house's title in that probate proceeding. *Id.* at ¶ 20.

¶ 37 We find *Gurga* to be distinguishable. First, the facts and rationale of the court do not really support the broad rule plaintiffs purport to derive from the case. Second, because the plaintiff was not obligated to participate in the probate proceeding to determine the issue of title to the house because her claim did not derive through the estate or as an heir to the deceased daughter places *Gurga* on a different footing than this case, in which plaintiffs were obligated to (and did) participate fully in the first action. Additionally, in *Gurga*, the question of title was effectively skipped in the first action; here, by contrast, the issue of plaintiffs' interest in the subject property was squarely raised and addressed in the first action. Finally, here, there is no measure of unfairness arising from the fact that the appropriate party did not raise the issue in question as in *Gurga*; the issue of plaintiff's interest in the subject property was raised and considered in the first action. Thus, *Gurga* is factually distinct and offers little guidance.

¶ 38 Next, still under their "tangential ruling" argument, plaintiffs attempt to distinguish *Cooney v. Rossiter*, 2012 IL 113227. Plaintiffs argue that, in *Cooney*, the court held that, between the first federal case and the second state case, the plaintiffs made no factual distinctions. *Id.* at ¶ 23. Plaintiffs argue that here, by contrast, factual distinctions abound. We have thoroughly considered the existence of legitimate distinctions between defendants' quiet-title action and the instant case above, finding that they do not preclude the imposition of a bar on this action via *res judicata* or collateral estoppel. We need not reconsider plaintiffs' points on this issue.

¶ 39 Next, plaintiffs argue that defendants' reliance on their quiet-title action acting as the singular vehicle in which to resolve any and all interests in the subject property stems from a faulty appreciation of the rule that *res judicata* bars claims based on facts that would have constituted a counterclaim or defense in the first action where a successful prosecution of the second action would nullify the first judgment or impair the rights established in the first action. *E.g., Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 92 (2001). Plaintiffs argue that, contrary to the rule given in cases like *Cabrera*, defendants' quiet-title action determined only that defendants "did not have full ownership of the property." Plaintiffs claim that their successful prosecution of the instant case "would neither nullify the earlier judgment ([defendants] still do not have 'quieted title') nor impair the rights established in the earlier action (the Township still has some rights to the road)." We disagree. Plaintiffs may have correctly recited the rule, but they have not correctly apprehended the effect of the ruling in the quiet-title action. There, the trial court determined that plaintiffs' interest in the subject property consisted of a prescriptive easement of about 13 feet in width. Successful prosecution of the instant action would, in fact, change the rights established between the parties. Instead of a prescriptive easement of a certain width with usage limited to historical types and levels, plaintiffs would gain a public roadway of some 50 feet in width across defendants' property. This increase in width and potential usage significantly impairs defendants' rights vis-a-vis the narrower and limited-usage prescriptive easement. Far from defendants misunderstanding the rule recited in cases like *Cabrera*, it is plaintiffs who misunderstand the circumstance of the ruling in the quiet-title action and its effect on this case.

¶ 40 Finally, plaintiffs argue that the general rules that a party should be allowed its day in court, and a party generally retains the choice the bringing a separate action instead of filing a counterclaim,

citing *Carey*, 216 Ill. App. 3d at 56, should prevail. Plaintiffs, however, recognize that the general rule fails when the second suit's claim is identical to one which must have been joined in the first suit as a counterclaim. As we have resolved above, the identity-of-action element is satisfied in this case, and this defeats plaintiffs' argument, which was based only on general principles.

¶ 41 Plaintiffs next turn to arguing against the application of collateral estoppel. Plaintiffs' argument is limited to an assertion that the judgment in the quiet title action was not a final judgment on the merits and was not a proper determination regarding the ultimate issue of establishing the parties' rights in the subject property. We disagree. Above, we considered the final-judgment-on-the-merits issue in our *res judicata* analysis (and, by extension, for purposes of collateral estoppel). Suffice to say that, based in part on plaintiffs' own admission and acquiescence to the fact that the judgment in the quiet-title action was a final judgment in *Roller*, we need not revisit what we have determined previously, and we reject plaintiffs' argument.

¶ 42 We now return to the issue of our jurisdiction. Defendants based their motion to dismiss plaintiffs' declaratory judgment claim on the Act, arguing that the patent lack of merit due to preclusion by an earlier judgment raised the inference that plaintiffs' action was a retaliatory or punitive response to defendants' quiet-title action. Defendants' theory of jurisdiction is vindicated. It has been clearly held that "retaliatory intent may be inferred when a claim lacking merit is filed shortly after the exercise of protected rights." *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 126 (2010). We hold that defendants presented a colorable claim that dismissal was warranted under the Act, and that this was sufficient to confer jurisdiction upon this court. Had defendants been unable to demonstrate that plaintiffs' claims were meritless, then plaintiffs' argument that defendants had invoked the Act simply to bring an unreviewable interlocutory order under appellate review would

would likely prevail. Here, however, the lack of merit to plaintiffs' attempt to relitigate the prior action is clear, apparent, and manifest. Defendants' invocation of the Act, then, appears to be legitimate, regardless of its ultimate success, and does not appear to be only gamesmanship designed to achieve appellate review of an unreviewable interlocutory order. Accordingly, we continue with our review, and turn to the propriety of the trial court's order denying defendants' motion to dismiss under the Act.

¶ 43 Defendants argue that plaintiffs' declaratory action was in response and retaliation to defendants' quiet-title action. Defendants argue that the retaliatory element is proved by the fact that the declaratory action was clearly without merit because it was barred by *res judicata* (or collateral estoppel), leading to a conclusion that it was brought for no proper purpose other than to punish defendants and force them to expend time and treasure litigating a frivolous and meritless claim. Plaintiffs maintain that their declaratory action sought to rectify their error in the quiet-title act of not presenting a counterclaim seeking affirmative relief, and that the action is brought to secure its rights to about 50 feet of defendants' land for a public roadway easement. Defendants point to plaintiffs' admission that they are seeking to vastly increase their rights in defendants' property as also supporting the inference of retaliatory or punitive action, as plaintiffs propose to establish a public roadway at defendants' front door. Defendants equate the vastly greater burden on the subject property resulting from the public roadway easement as compared to the more limited uses and burdens of the prescriptive easement established in the quiet-title action to grossly disproportionate damages in a classic strategic lawsuit against public participation (SLAPP) action.

¶ 44 In determining whether the Act will apply to an action, it is appropriate to consider whether the claim is meritless, whether it seeks grossly overstated damages (*Hytel*, 405 Ill. App. 3d at 126),

and the timing of the institution of the challenged action (*Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 23 (temporal proximity of filing action is relevant to determining whether it is retaliatory)). In addition, there must be no proper purpose demonstrated for the action. In other words, to qualify for the protection of the Act, the challenged suit must be solely based on the claimed protected action. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 45. This means that, if the plaintiff is genuinely seeking relief for damages caused by the defendant's acts, then the lawsuit is not solely based on the defendant's protected rights. *Id.*

¶ 45 Here, plaintiffs filed the instant case more than a year-and-a-half after the quiet-title action had been finally resolved through the appeal. Defendants argue that this represents a fairly short period of time. We disagree. In *Hytel*, for example, the plaintiff, who was found to be retaliating for purposes of the Act, filed its action only four months after the defendant filed her wage claim. *Hytel*, 405 Ill. App. 3d at 115. Defendants offer no other examples of a short amount of time for considering the temporal-proximity issue, and we cannot say that, compared to 4 months, 20 months is an equally small and reasonable amount of time from which we can infer retaliatory intent.

¶ 46 The lack of merit to plaintiffs' claims give rise to the inference of retaliatory or punitive purpose. Plaintiffs have pointed to no cases in which a meritless claim has been interpreted as supporting a nonretaliatory inference. This factor cuts in defendants' favor.

¶ 47 Last, the damages do not appear to be unduly disproportionate. Plaintiffs sought, in the quiet-title action, a determination that they possessed a public roadway easement resulting from common-law dedication. In this case, they seek the same relief. While this case actually supports no relief for plaintiffs due to its lack of merit, plaintiffs have not changed their position from the first case,

and the constancy of the relief sought does not support an inference that plaintiffs were seeking to retaliate against or punish defendants.

¶ 48 We believe that the factors considered above cut against the conclusion that the instant case was filed in response to defendants' quiet title action and carries retaliatory intent. While defendants may have made a sufficient showing that attempting to dismiss this action under the Act was not inappropriate, they have not demonstrated that plaintiffs' claim was filed solely in response to the quiet-title action. Without establishing the element of retaliation for or response to the protected act, defendants cannot dismiss plaintiffs' claim under the Act.

¶ 49 This is not to say that there are not less-than-savory reasons to explain why plaintiffs filed the instant case. For example, the lack of merit strongly supports at least an element of punishing defendants for not acquiescing to plaintiffs' desire to place a public roadway traveling through defendants' property. Further, the fact that plaintiffs instituted this case instead of instituting eminent domain proceedings to obtain the land perhaps indicates that plaintiffs were trying to acquire rights in the subject property for a lesser cost than the fair market value as well as causing defendants to incur more expenses in defending this action.

¶ 50 Defendants rely almost exclusively on the inference raised from the lack of merit of plaintiffs' claim. As we have seen, there are other considerations applicable to a determination of retaliation or in-response-to. Defendants' limitation to the merit factor is ultimately unpersuasive in light of all of the factors.

¶ 51 Defendants contend that the relief sought here supplies reinforcement to conclude that the instant case was filed in retaliation for or in response to the quiet-title action. We disagree. Defendants argue that, because the trial court stated that the relief sought in this case was "dramatic,"

it is grossly disproportionate to the evidence. Defendants' contention is not borne out here. In the quiet-title action, plaintiffs sought a determination that they had rights to the 50 feet of the subject property sought here. Plaintiffs presented the same evidentiary basis in both actions. We do not perceive that plaintiffs have attempted to request relief that is not supported by and suggested by the evidence. Accordingly, we cannot accept defendants' contention regarding damages.

¶ 52 Last, we note the paucity of authority (as well as ideas) to support defendants' argument that dismissal under the Act is proper. While defendants properly invoke lack-of-merit, they do not even attempt to analyze the three factors suggested in *Hytel* and *Ryan*. Defendants' argument here is subject to disposition by Supreme Court Rule 341 (eff. July 1, 2008) (failure to cite pertinent authority results in forfeiture of the argument on appeal). We need not continue along this line of reasoning further, because of our determination that defendants have failed to persuade that the instant case was brought in retaliation for or in response to the quiet-title action. Accordingly, we hold that the the trial court properly denied defendants' motion to dismiss under the Act.

¶ 53 Based on our determination that the motion to dismiss under the Act was property granted, we need not consider defendants' remaining arguments. We also note that plaintiffs, in their response brief, requested the imposition of sanctions pursuant to Supreme Court Rule 375 (eff. Feb. 1, 1994) owing to the contention that defendants' appeal was frivolous. Having determined that defendants were actually correct regarding the application of *res judicata* and collateral estoppel, we decline plaintiffs' request for sanctions. (We note, as well, that an application for sanctions should be presented by motion (Ill. S. Ct. R. 375(b); because plaintiffs did not bring a motion, but presented their request in their brief, we would not deem the issue to be properly before us and would not pass upon it.)

¶ 54 To sum up: defendants are correct in their assertion that *res judicata* and collateral estoppel bar the instant case. The trial court should have granted defendants' motion to dismiss on that basis. Conversely, defendants' motion to dismiss under the Act was properly denied as defendants could not show that this case was brought solely in response to or in retaliation for the quiet-title action. We therefore affirm the trial court's judgment, but we remand the case for further proceedings consistent with this order.

¶ 55 For the foregoing reasons, the judgment of the circuit court of DeKalb County is affirmed and the cause is remanded.

¶ 56 Affirmed and remanded.