

No. 1-12-0475

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).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES B. SAVAGE,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellant,) Cook County
)
 v.)
) No. 09 L 009120
)
 DAVIS McGRATH, LLC, GERALD J.)
 MANNIX, JULIA D. MANNIX, P.C. and JULIA)
 D. MANNIX,) Honorable
) Joan Powell,
) Judge Presiding.
 Defendants-Appellees.)

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Previously pled counts not included in an amended complaint are forfeited for review by this court. Collateral estoppel bars further litigation of fraud claims against attorneys representing the executor and trustee in a probate action where similar claims were previously raised against the estate's representative. Filing a notice of appeal while a motion is pending in the trial court divests the court of jurisdiction to rule on the motion. Dismissal of amended complaint affirmed.

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¶ 2 Plaintiff James B. Savage brought this case against defendants-attorneys Davis McGrath LLC, Gerald J. Mannix, Julia D. Mannix, P.C. and Julia D. Mannix (collectively, defendants). Savage's sister, Elizabeth Savage, served as executor of their mother's estate and trustee of her revocable trust. In her capacity as executor and trustee, Elizabeth retained defendants as counsel to aid in the administration of the estate and trust. Savage asserts that defendants: (1) assisted Elizabeth in mishandling the administration of the trust; (2) misrepresented to him that distributions from the trust were proper; and (3) misrepresented that Elizabeth was faithfully fulfilling her fiduciary duties. On appeal, Savage claims the trial court erred in dismissing the following counts raised in the complaint and amended complaint: (1) aiding and abetting a breach of fiduciary duty; (2) fraud; and (3) intentional interference with expected inheritance. Savage also claims that the trial court erred in striking his request for punitive damages because that relief may be granted when an attorney engages in fraudulent conduct. Savage further contends that the trial court erred in denying, on jurisdictional grounds, his motion for leave to file a second amended complaint. Lastly, Savage argues that dismissal pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) was improper because defendants requested the trial court to adjudicate factual matters asserted in his amended complaint. For the reasons that follow, we affirm.¹

¹ Savage's reply brief was due on November 7, 2013, but no brief has been filed to date.

¶ 3

BACKGROUND

¶ 4 This case arises out of a protracted probate action concerning the administration and distribution of the estate and revocable trust of Savage's mother, Ruthanne Savage. To fully understand the issues presented on appeal, background information regarding the probate of Ruthanne's estate is necessary.

¶ 5 From October 20, 1999 to May 27, 2009, Elizabeth served as executor of Ruthanne's estate and successor trustee of her revocable trust. Attorney Mary Long drafted the testamentary documents on Ruthanne's behalf and served as counsel for the estate following her death.² On December 10, 2002, Gerald Mannix of Davis, Mannix & McGrath filed an appearance as additional counsel for the estate in the probate action. On or about March 9, 2005, Julia Mannix of Julia D. Mannix, P.C. also began serving as counsel for the estate in the probate action.

¶ 6 Ruthanne's trust consisted primarily of real estate located in Skokie and Florida. The trust provided that those assets should be distributed in the following manner:

"(b) to my daughter, ELIZABETH A. SAVAGE, if then living, my real estate located at 4963 Elm Street, Skokie, IL 60067;

(c) to my son, JAMES BARCLAY SAVAGE, if then living, a sum equal to the following:

(I) One hundred (100%) percent of the appraised value of my real estate located at 4963 Elm Street, Skokie, IL, 60067.

² Long is not a party to this appeal.

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(II) Twenty-five (25%) percent of the appraised value of my real estate and its furnishings located at 12390 Kelly Sands Way, Fort Meyers, FL, 33908."

According to the trust, the appraised value for those bequests "shall be determined by obtaining two appraisals prepared by appraisers selected by ELIZABETH A. SAVAGE and JAMES BARCLAY [sic] and the appraised value shall be determined by the mean between the two appraisals." The remainder of the Ruthanne's trust was to be distributed to Savage and Elizabeth, if living, in equal shares.

¶ 7 On February 2, 2004, Savage filed a petition for reformation and construction of trust contesting distributions Elizabeth made from Ruthanne's trust, which Savage asserted were made for her benefit and to his detriment. Savage asserted that the trust should be reformed because it did not reflect his mother's intent that Elizabeth would own the real estate and Savage would receive other assets equal in value to the appraised value of the real estate. In the petition, Savage included an allegation that Gerald, who subsequently replaced Long as attorney for the estate, sent him a highly redacted copy of a letter dated June 15, 1999, that Ruthanne sent to Long detailing her intentions regarding the distribution of her estate and trust. Savage claimed that Gerald sent the redacted letter in an attempt "to hide from [Savage] the fact that Long had properly adjusted the distribution related to the Illinois home but had failed to do so with respect to the Florida home." Savage also alleged that Elizabeth failed to discharge her fiduciary duty faithfully and, instead, advocated her own interests at his expense. Savage asserted that Elizabeth's actions were not taken in good faith and violated her duties as executor and trustee to treat beneficiaries fairly and equitably.

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¶ 8 On May 27, 2005, Savage filed a motion for summary judgment asserting that the Skokie and Florida properties should be distributed based on the properties' values on the date of distribution and not the date of Ruthanne's death. On that same day, Elizabeth filed a motion for summary judgment alleging that the trust's unambiguous language precluded reformation of the trust. The trial court granted Elizabeth's motion for summary judgment on the basis that the trust language was clear and without ambiguity rendering reformation of the trust inappropriate. The trial court denied Savage's summary judgment motion finding that the trust's clear language indicated that the trust assets should be valued using the date of death appraised value. Savage appealed the trial court's summary judgment rulings.

¶ 9 In an unpublished decision (*In re: Estate of Ruthanne Savage*, No. 1-05-3214, February 16, 2007), this court remanded the cause for further proceedings to determine the proper distribution of the trust assets. Subsequently, the trial court entered an order: (1) denying Savage's request to reform the trust; (2) imposed a date of death valuation for trust distributions; and (3) determined that Savage's distribution relating to the Florida property equaled 25% of the appraised value.

¶ 10 On September 11, 2007, Savage filed a petition to remove Elizabeth as executor and trustee asserting that she: (1) breached her fiduciary duty; (2) breach her duty to deal impartially with all beneficiaries; (3) engaged in self-dealing; (4) mismanaged investments; and (5) failed to provide an accounting. Savage also requested Elizabeth to reimburse the estate for the following amounts: (1) \$90,000 paid for attorney fees; (2) \$36,471 paid for the mortgage on the Florida property; and (3) \$50,000 paid as a distribution to herself. Savage also requested the trial court

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to impose a surcharge against Elizabeth based on the breach of her fiduciary duties. On September 27, 2007, the trial court ordered Elizabeth to make a \$36,499.46 distribution to Savage as compensation for the distribution she previously made to her benefit.

¶ 11 On May 27, 2009, the trial court held a hearing regarding Savage's petition to remove Elizabeth as executor and trustee. During the hearing, Savage's counsel argued that: (1) Elizabeth failed to meet her burden of proof as executor demonstrating that her fiduciary duties were fulfilled; (2) the evidence showed a pattern of Elizabeth favoring her own interests over those of Savage; (3) Elizabeth engaged in self-dealing by making distributions from the trust to herself without concurrently making commensurate distributions to Savage; (4) Elizabeth transferred the Skokie property to herself in August of 2001, but did not make an equivalent distribution to Savage until March of 2004; (5) Elizabeth made a \$50,000 distribution to herself without making an equivalent distribution to Savage until approximately 3½ years later; (6) Elizabeth made a distribution to herself to pay off the mortgage on the Florida property without making an equivalent distribution to Savage for approximately 3½ years; (7) Elizabeth sold stock and mutual funds that resulted in a loss of income exceeding \$240,000; (8) Elizabeth failed to provide a full and proper accounting; and (9) Elizabeth's reliance on the advice of counsel and/or a stockbroker did not justify her conduct.

¶ 12 Julia Mannix, who represented the estate at that time, responded that new counsel instructed Elizabeth that the \$36,000 mortgage payment previously made with trust assets was erroneous, and to correct the error, Elizabeth paid an equivalent distribution to Savage using personal funds. The trial court stated that it was concerned with Elizabeth's management of the

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estate to the extent that she made distributions to herself without making equivalent distributions to James. The trial court ruled that in the best interests of the estate, Elizabeth should be removed as representative and it appointed a special administrator. The trial court granted Savage's request for Elizabeth to pay his attorney fees regarding the removal action, but denied his request to assess a surcharge relating to distributions she previously made. Savage also appealed this ruling.

¶ 13 On September 16, 2010, this court affirmed the trial court's rulings regarding Savage's appeals holding that: (1) distributions from Ruthanne's trust should be valued adopting a date of death valuation; (2) the facts of the case did not support reformation of the trust; (3) the estate should pay the litigation costs associated with defending the trust and testamentary documents; (4) appointment of an independent party to administer Ruthanne's estate was not erroneous; (5) imposing a surcharge upon Elizabeth was not warranted because Savage received comparable distributions from the estate; and (6) an award of prejudgment interest was not warranted because Savage contributed to the estate's protracted administration. *In re: Estate of Ruthanne B. Savage*, Nos. 1-08-1768 and 1-09-1642 (consolidated) (2010) (unpublished order under Supreme Court Rule 23).

¶ 14 On August 3, 2009, while Savage's appeal was still pending, he filed a three-count complaint against defendants that asserted the following claims: (1) aiding and abetting Elizabeth in the breach of her fiduciary duties; (2) fraud; and (3) intentional interference with expected inheritance. In Savage's complaint, he claimed that the following transactions reflected Elizabeth's improper handling of the estate and trust: (1) sale of stock at a loss; (2) transfer of the

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Skokie property to herself; (3) payment of the mortgage on the Florida property with trust assets; (4) additional distributions to herself; (5) no estate accounting; and (6) Elizabeth's use of trust assets to pay for attorney fees in the probate action. On February 9, 2010, defendants filed a combined section 2-619.1 motion to dismiss asserting that the probate court had already addressed and resolved Savage's multiple objections to the administration of the estate and trust.

¶ 15 After the motion was briefed and during the hearing on the motion, the trial court stated "I'm inclined to think that there is enough in the aiding and abetting [] the breach of fiduciary duty count, but I don't think there is enough in the fraud count." The trial court then: (1) granted in part and denied in part defendants' motion to dismiss regarding the counts for aiding and abetting and intentional interference; (2) allowed leave to amend those counts as to the element of damages; (3) granted defendants' motion to dismiss the fraud count and struck that count; (4) allowed leave to amend the fraud count; and (5) struck with prejudice Savage's request for punitive damages. The trial court granted leave to file an amended complaint by August 23, 2010. No amended complaint was filed by that date.

¶ 16 On October 13, 2010, Savage's counsel requested an extension of time to file an amended complaint, which the trial court granted over defendants' objection. The trial court extended the filing date of the amended complaint to October 25, 2010. Savage failed to file the amended complaint by its due date, and requested another extension. The trial court granted Savage an extension to December 13, 2010. Savage again failed to file his amended complaint by the due date.

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¶ 17 On January 10, 2011, defendants filed a section 2-615(d) motion to dismiss requesting the trial court to convert its July 26, 2010 order dismissing Savage's complaint without prejudice to an order dismissing the complaint with prejudice relying on Savage's consistent failure to file an amended complaint. On that same day, Savage filed his response to defendants' motion. In his response, Savage asserted that the trial court's prior ruling: (1) granted defendants' motion to dismiss as to the damage allegations of the aiding and abetting and intentional interference counts; (2) dismissed the fraud count without prejudice and with leave to amend; and (3) allowed the aiding and abetting and intentional interference counts to remain pending except as to the damage allegations. The trial court denied defendants' motion and granted Savage an extension until January 31, 2011, to file an amended complaint. On the due date, Savage filed an amended complaint that included only one count, which was for fraud. On April 11, 2011, defendants filed a section 2-619 motion to dismiss directed to the sole count pled in the amended complaint, asserting that the doctrine of collateral estoppel barred litigation of the issues underlying the fraud claim.

¶ 18 On June 28, 2011, the trial court held a hearing on defendants' motion to dismiss. Counsel for Savage failed to appear at the hearing. Despite the absence of plaintiff's counsel, the record reflects that the trial court considered substantively the arguments advanced by defendants in support of their motion. During the hearing, the trial court noted that the probate court had already ruled on a number of the issues that Savage raised against defendants, including Elizabeth's self-dealing and reimbursing the trust. Finding that the resolution of the issues in the probate litigation barred Savage from proceeding with his fraud claim against the attorneys, the

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trial court granted defendants' section 2-619 motion to dismiss the amended complaint with prejudice.

¶ 19 On July 28, 2011, Savage filed a motion to vacate the dismissal order alleging that: (1) that the trial court dismissed the aiding and abetting and intentional interference counts as to the damage allegations only and not on the merits of the claims, which meant those counts were still pending and (2) if Savage erroneously failed to include the aiding and abetting and intentional interference counts in the amended complaint, then the result was a dismissal for want of prosecution and not a dismissal with prejudice. On January 5, 2012, the trial court denied Savage's motion to vacate the June 28, 2011 dismissal order. On February 6, 2012, the last possible day before the January 5, 2012 order became final, Savage filed an emergency motion for leave to file a second amended complaint, *instanter*, which included counts for aiding and abetting breach of fiduciary duty and interference with testamentary expectancy. The trial court entered an order setting the matter for a hearing on March 20, 2012. On the same day, Savage also filed a notice of appeal seeking review of the following orders:

"(I) The July 26, 2010, order granting in part and denying in part defendants' motion to dismiss as to counts I and III of the complaint and striking count II of the complaint;

(II) The June 28, 2011, Order granting the motion to dismiss the First Amended Complaint with prejudice;

(III) The February 6, 2012, Order entering and continuing Plaintiff's Amended Emergency Motion for Leave to file the Second Amended Complaint."

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On June 6, 2012, the trial court entered an order denying Savage's emergency motion finding that it lacked jurisdiction following his filing of a notice of appeal.

¶ 20

ANALYSIS

¶ 21 A. Pleading over the Aiding and Abetting and Intentional Interference Counts

¶ 22 Savage first claims that the trial court erred in dismissing the aiding and abetting and intentional interference counts because the trial court recognized that "there is enough there" regarding his pleading of those counts. Savage also claims that those counts were not dismissed because the trial court ruled that the motion to dismiss was granted in part and denied in part. Savage denies that he abandoned those counts by not referring to or incorporating them in his amended complaint because he followed the trial court's directive to modify the fraud count, which was then the basis for his amended complaint. Whether a plaintiff has preserved for review a dismissed count is a question of law that we review *de novo*. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17.

¶ 23 We find that Savage has forfeited review of the sufficiency of claims not included in his amended pleading. The record reveals that Savage filed a complaint that included three separate counts, but filed an amended complaint that included only one count for fraud. The law affirmatively establishes that counts not included in an amended complaint, or at a minimum referred to in the amended complaint, are forfeited.

¶ 24 Our supreme court's decision in *Foxcroft Townhome Owners Association v. Hoffman Rosner Corporation*, 96 Ill. 2d 150 (1983), is instructive. The relevant issue in *Foxcroft* was whether the plaintiffs forfeited their right to object to the trial court's rulings on the original

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complaint by filing an amended complaint that failed to restate or incorporate by reference two counts that were pled in the original complaint. *Id.* at 153. The *Foxcroft* court acknowledged the well-established principle "that a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints." *Id.* at 153. *Foxcroft* held that an amended complaint that fails to refer to or adopt a prior pleading generally causes the earlier pleading to cease being part of the record effectively being abandoned and withdrawn. *Id.* at 154; *Bonhomme*, 2012 IL 112393, ¶ 17.

¶ 25 The principles articulated in *Foxcroft* were reiterated by the supreme court in *Bonhomme*. *Id.* Similar to the facts presented here, the plaintiff in *Bonhomme* filed amended complaints pleading a single count, but failed to include, incorporate or reference six other counts that were pled in the originally filed complaint. Finding that "the law could not be clearer on this point" (*Id.* ¶ 19), the *Bonhomme* court held that "consistent with nearly 50 years of unbroken jurisprudence from this court, plaintiff has 'in effect abandoned and withdrawn' those six claims, and our consideration of the dismissal of those claims may be at once eliminated from the appeal." *Id.* ¶ 17 (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)).

¶ 26 We see no reason to depart from the long-standing principles articulated by our supreme court in *Foxcroft* and *Bonhomme* and adhere to the rule pronounced in those cases that counts in former complaints not pled or incorporated in an amended complaint are forfeited. Here, Savage filed an amended complaint that include a single count for fraud and failed not only to include the aiding and abetting and intentional interference counts in the amended complaint, but also failed to even refer or incorporate those counts in the pleading. Savage's position that the aiding

and abetting and intentional interference counts remained pending because the order dismissing them granted the motion to dismiss "in part" finds no support in any reported authority.

Consequently, Savage has forfeited review by this court of the sufficiency of those abandoned claims.

¶ 27 B. Fraud Count

¶ 28 Before addressing the merits of Savage's fraud count, we note that defendants again claim that Savage has forfeited review of whether the trial court erred in dismissing that count because he failed to oppose the motion to dismiss, raised no objection to the dismissal of that count until the hearing on the motion to reconsider, and then claimed only that the legal standard for the application of collateral estoppel had changed.

¶ 29 We disagree with defendants that Savage's failure to respond to their motion results in forfeiture of his claim of error because he was not required to formally object or file a memorandum in opposition to the motion to dismiss. *Lang v. Consumers Insurance Service*, 222 Ill. App. 3d 226, 230 (1991). Forfeiture results when a party fails to raise an issue in the trial court given that a party may not raise issues for the first time on appeal. *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534 (1994).

¶ 30 The record reveals that Savage's amended complaint was before the trial court, defendants' motion to dismiss addressed the amended complaint and the trial court heard argument on the motion. Thus, the sufficiency of Savage's fraud claim was presented for the trial court's consideration, even if he did not formally respond to defendants' collateral estoppel argument. Further, since collateral estoppel is an affirmative defense that is waived if not pled

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(*Midwest Physician Group, Ltd., v. Department of Revenue of State of Illinois*, 304 Ill. App. 3d 939, 952 (1999)), defendants, and not Savage, were required to raise that defense in the trial court. Forfeiture does not result merely because Savage did not respond to the collateral estoppel argument raised in defendants' motion to dismiss, especially in light of the fact that it was defendants' burden to raise that affirmative defense and the trial court held a hearing to determine the applicability of collateral estoppel. Accordingly, we will address Savage's claim that the trial court erred in finding that collateral estoppel barred further litigation of the fraud count.

¶ 31 Savage claims that defendants' section 2-619 motion was an inappropriate vehicle to address the viability of the amended complaint because defendants contested certain facts alleged in that pleading, including the capacity in which defendants represented Elizabeth. In particular, Savage claims that because defendants' motion disputed that they represented Elizabeth individually, as opposed to in her capacity as executor and trustee, the motion did not admit all well-pled facts. We disagree.

¶ 32 A dismissal pursuant to section 2-619 "admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter which avoids the legal effect or defeats a plaintiff's claim." 735 ILCS 5/2-619(a)(9)(West 2010); *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). The phrase "affirmative matter" "refers to something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). The doctrine of collateral estoppel is an "affirmative matter" because it operates to bar a legally recognized claim; thus, it is properly asserted in a section 2-619 motion to dismiss. 735 ILCS 5/2-619(a)(4) (2010); *Yorulmazoglu v. Lake Forest*

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Hospital, 359 Ill. App. 3d 554, 558 (2005). Because defendants raised collateral estoppel as the basis for the motion to dismiss, a dismissal under section 2-619 was proper in light of the asserted affirmative defense. Further, the capacity in which defendants represented Elizabeth is irrelevant to the determination of whether collateral estoppel applies.

¶ 33 The basis of Savage's fraud count is the allegedly knowingly false representations defendants made that Elizabeth properly handled the administration of their mother's estate and that she fulfilled her fiduciary duties and responsibilities. Savage also claims that defendants knew he would justifiably rely on these representations. Defendants respond that collateral estoppel bars Savage's fraud claim because the trial court previously disposed of his claims during the extensive and protracted litigation involving the administration of his mother's estate.

¶ 34 The equitable doctrine of collateral estoppel applies when in a prior proceeding: (1) an issue was decided that is identical to the one presented in the current action; (2) there was a final judgment on the merits in the prior proceeding; and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior matter. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001). Collateral estoppel, also known as issue preclusion, advances fairness and judicial economy by preventing the litigation of issues previously resolved in an earlier action. *Id.*; *State Building Venture v. O'Donnell*, 239 Ill. 2d 151, 158 (2010). Determining whether collateral estoppel applies is a question of law that we review *de novo*. *O'Donnell*, 239 Ill. 2d 151 at 158.

¶ 35 Savage's fraud claim alleges that defendants: (1) knowingly misrepresented that his mother's estate was being properly administered; (2) aided Elizabeth in improperly performing her fiduciary duties, which consisted of acts of self-dealing; and (3) knowingly permitted

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payment of attorney fees with trust assets. In the amended complaint, Savage identified the following transactions to support his fraud claim against defendants: (1) Elizabeth's transfer of the Skokie property valued at approximately \$247,500 to herself; (2) Elizabeth's distribution of \$49,972 to herself; (3) Elizabeth's distribution of \$36,471 to herself to pay off the mortgage on the Florida property; (4) the sale of stock at a loss of more than \$240,000; and (5) using trust funds to pay attorney fees.

¶ 36 A review of Savage's petition for reformation and construction of trust, his petition to remove Elizabeth as executor and trustee, the trial court's ruling on those pleadings and this court's disposition of Savage's appeal indisputably establishes that collateral estoppel bars his fraud claim. The transactions Savage identified in his amended complaint to establish fraud were previously disposed of by both the trial court and this court. Our order in Savage's prior appeal (*In re: Estate of Ruthanne B. Savage*, Nos. 1-08-1768 and 1-09-1642 (consolidated) (2010) (unpublished order under Supreme Court Rule 23)) reveals that Savage previously filed a petition to remove Elizabeth as executor and trustee claiming that she: (1) breached her fiduciary duty; (2) breached her duty to deal impartially with all beneficiaries; (3) engaged in self-dealing; (4) mismanaged investments; and (5) failed to provide an accounting. Savage supported those allegations with the identical transactions that he is claiming form the basis of his fraud count against defendants consisting primarily of the dealings with the Skokie property, the Florida property, the sale of stock and distributions she made for her benefit, including distributions for the payment of attorney fees. *Id.* This court also previously held that the trial court did not abuse its discretion in denying Savage's request to require Elizabeth to pay a surcharge or pre-judgment interest, which may be imposed as a consequence of a breach of fiduciary duty. *Id.*

¶ 37 Here, the underlying basis of Savage's claims is that Elizabeth breached her fiduciary duties as executor and trustee in handling their mother's estate and trust. Savage does not raise claims in this appeal directly against Elizabeth; instead, he is asserting that the attorneys retained to administer his mother's estate and trust assisted Elizabeth in self-dealing and misrepresented that the estate and trust were properly handled. Regardless of the change in the identity of the parties against whom these claims are directed, the issues of Elizabeth's self-dealing and fulfillment of her fiduciary duties relating to their mother's estate and trust were addressed in the prior litigation and appeal. All of Savage's claims regarding entitlement to further distributions from his mother's estate have been fully and finally resolved. Because it has been determined that Savage is not entitled to further compensation from Elizabeth as a result of her conduct in connection with the administration of Ruthanne's estate, it necessarily follows that claims against Elizabeth's attorneys arising out of the same facts are foreclosed as well. In this case, the elements of collateral estoppel are satisfied because: (1) both the trial court and this court have already ruled upon the propriety of the same fraud claims that he previously raised against Elizabeth, but now raises against defendants; (2) the probate court and this court previously ruled upon the merits of Savage's fraud claims; and (3) Savage was a party in the prior litigation. Consequently, collateral estoppel bars the litigation Savage's fraud claims against defendants.

¶ 38 In light of our finding that Savage is collaterally estopped to pursue his fraud claim against defendants, we need not address the propriety of the trial court's dismissal of the prayer for punitive damages included with that claim.

¶ 39 C. Motion for leave to file a second amended complaint

¶ 40 Savage claims that the trial court erred in denying his motion for leave to file a second amended complaint, *instanter*, following the court's denial of his motion to vacate the dismissal with prejudice. Savage maintains that he should have been granted leave to plead the aiding and abetting and intentional interference counts in a second amended complaint because those counts were not included in the amended complaint. Savage asserts that none of the three counts in the initial complaint were dismissed with prejudice and only the fraud count was dismissed with prejudice following the trial court's ruling on the amended complaint. Savage maintains that because viable causes of action remained after the trial court's ruling on the initial complaint, he should have been granted leave to file a second amended complaint. Defendants respond that following the filing of Savage's motion of appeal, the trial court lacked jurisdiction to grant Savage's motion for leave to file a second amended complaint. We agree.

¶ 41 On July 28, 2011, Savage filed a motion to vacate the trial court's June 28, 2011 order dismissing his amended complaint with prejudice. The trial court denied that motion on January 5, 2012. On February 6, 2012, the last possible day for appealing the dismissal of his amended complaint, Savage filed an "emergency motion" for leave to file a second amended complaint, *instanter*, which included the previously omitted counts for aiding and abetting and intentional interference. The only basis for presentation of the motion on an emergency basis referenced was Savage's failure to file the motion until the day his notice of appeal was due. In response to that filing, the trial court entered and continued Savage's emergency motion for hearing on March 20, 2012. As noted, on the same day, Savage filed a notice of appeal regarding the trial court's

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ruling: (1) granting in part and dismissing in part the aiding and abetting and intentional interference counts; (2) granting the motion to dismiss the amended complaint with prejudice; and (3) continuing his motion for leave to file a second amended complaint.

¶ 42 Savage's conduct in filing a notice of appeal when his motion for leave to file a second amended complaint was still pending clearly compels the finding that the trial court lacked jurisdiction to rule on his motion. A similar factual scenario was presented in *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 431 (2005), where the plaintiff filed a motion for leave to file an amended complaint, as well as a motion to reconsider, following the trial court's order granting the defendant's motion for summary judgment. *Id.* The trial court denied the motion to reconsider, but did not rule on the motion to amend. *Id.* at 430. While the motion to amend was still pending, the plaintiff filed a notice of appeal seeking review of the trial court's ruling on the motion to reconsider. *Id.* The *Kyles* court relied on this court's decision in *Bachewicz v. American National Bank & Trust Co. of Chicago*, 135 Ill. App. 3d 294, 297-98 (1985), where we explained: "The proper filing of a notice of appeal causes the jurisdiction of the appellate court to attach and deprives the trial court of jurisdiction to modify its judgment or to rule on matters of substance which are the subject of appeal. [Citation.] *** [T]he trial court is restrained from entering any order which would change or modify the judgement or its scope, *and from entering any order which would have the effect of interfering with the review of the judgment.* [Citation.]" (Emphasis in original.) *Id.* at 431.

¶ 43 Relying on the reasoning of *Kyles* and *Bachewicz*, we find that the trial court was divested of jurisdiction to rule on Savage's motion for leave to file a second amended complaint.

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Consequently, this court may only review the trial court's jurisdictional ruling. Because Savage filed a notice of appeal while his motion for leave to file a second amended complaint was still pending, we agree with the trial court that it lacked jurisdiction to rule on Savage's motion for leave to file a second amended complaint.

¶ 44

CONCLUSION

¶ 45 For the reasons stated, we affirm the judgment of the trial court: (1) dismissing Savage's amended complaint pursuant to section 2-619 based on the application of collateral estoppel and (2) denying his motion for leave to file a second amended complaint, *instanter*, which included previously omitted counts, on the basis that the court was divested of jurisdiction.

¶ 46 Affirmed.