

IN THE COURT OF APPEALS OF IOWA

No. 1-395 / 10-1676
Filed September 8, 2011

**PEOPLE'S BANK, TRUSTEE OF
THE DOROTHY DRIESEN TRUST
DATED JULY 23, 2002,**
Plaintiff-Appellee,

vs.

JAY DRIESEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Lyon County, David A. Lester,
Judge.

Jay Driesen appeals the district court's grant of summary judgment in
favor of People's Bank. **AFFIRMED.**

Matthew D. Gardner, West Des Moines, for appellant.

Michael J. Jacobsma of Jacobsma & Clabaugh, P.L.C., Sioux Center, for
appellee.

Heard by Eisenhauer, P.J., and Doyle and Tabor, JJ.

TABOR, J.

This is the second appeal in which we have considered the Dorothy Driesen Trust. Dorothy executed a revocable trust in July 2002 that provided for each of her three adult children: Ruth Kooima, Merlyn Driesen, and Jay Driesen. In this case, Jay argues that his mother amended the trust in September 2002 to make it irrevocable. The question today is whether the doctrine of claim preclusion bars Jay from litigating that claim. Because the same parties are involved in the second lawsuit as the first and because the issue of revocability could have been adjudicated in the prior action, we agree with the district court that Jay's current claim is precluded. We also find that a nunc pro tunc order was the proper method to strike the word "irrevocable" from a prior order and that the district court had authority to reconsider its partial summary-judgment ruling.

I. Background Facts and Proceedings

As the current trustee, People's Bank of Rock Valley (the Bank) argues the doctrine of res judicata bars us from considering Jay's assertion that the trust is irrevocable. Accordingly, it is necessary to discuss the two separate lawsuits involving the trust.

A. Trust Creation, Amendments, and Transactions

On July 23, 2002, Dorothy executed a revocable trust, designating herself as trustee and her son, Jay, as successor trustee. The trust named each of Dorothy's three adult children—Jay, Merlyn, and Ruth—as beneficiaries. Subsequently, Dorothy signed a September 2002 amendment, purporting to make the trust irrevocable. On October 4, 2007, Dorothy executed another

amendment to her trust, which named People's Bank as trustee and changed the distribution provisions, removing Jay as a beneficiary.

On December 11, 2007, Jay transferred real estate owned by the trust to Little Big Horn Investments L.L.C., a limited liability company he had created and incorporated in the state of Nevada. He did so without Dorothy's knowledge or consent. Jay also took trust funds to pay his own, personal legal fees.

B. Driesen I: The August 4, 2008 Lawsuit

On August 20, 2007, Ruth instituted two actions in Sioux County: the first sought an involuntary guardianship for Dorothy and the second sought to remove Dorothy as trustee and to appoint a substitute trustee. On January 10, 2008, Dorothy filed a petition in Lyon County seeking to quiet title to the land Jay had conveyed to Little Big Horn Investments.

On February 18, 2008, the district court consolidated the three pending actions. The first lawsuit involving the trust resolved these three actions, which the court referred to as "The Guardianship Proceeding," "The Trust Proceeding," and "The Lyon County Proceeding." They were tried on March 27, 2008, in Sioux County district court. The district court filed its ruling on August 4, 2008. People's Bank asserts this ruling precludes Jay from litigating the claim that the trust is irrevocable.

In that lawsuit, the court determined the terms of the trust and upheld the validity of the October 2007 amendment, concluding Dorothy had sufficient capacity to amend her trust on that date. The court gave effect to the amendment by removing Jay and Dorothy as trustees and appointing People's

Bank as trustee; and also, by removing Jay entirely as a beneficiary of the trust. The court ruled, in material part, that “[t]he Dorothy Driesen Trust . . . is a valid revocable trust” and “[t]he amendment . . . executed on October 4, 2007 was a validly executed amendment to the Dorothy Driesen Trust.” In reaching its conclusion, the district court never mentioned the September 2002 amendment that purportedly made the trust irrevocable, though that amendment was received into evidence.¹

Jay appealed the district court’s ruling, arguing the court erred in ruling the trust was revocable because the September 2002 amendment changed the character of the trust to irrevocable. Dorothy argued Jay failed to preserve that issue for review.

On May 29, 2009, we issued an opinion affirming the district court and concluding Jay had not preserved his argument that the trust was irrevocable. *In re Guardianship of Driesen*, No. 08-1311 (Iowa Ct. App. May 29, 2009). We stated that “[a]lthough the [September 2002] amendment was introduced into evidence, the district court did not make any mention of this amendment either in its findings of fact nor in its ruling,” and Jay did not file a motion requesting a ruling on the revocability issue. We concluded that “[w]ith no such motion and ruling, the issue [was] not preserved for our review.” (Citation omitted.)

Jay next attacked the validity of Dorothy’s October 2007 amendment to the trust, arguing it was not validly executed because she was incompetent. Our

¹ The court also set aside the real estate conveyance from the trust to Little Big Horn Investments L.L.C., quieted title to the property in the trust, established a guardianship for Dorothy, and appointed Ruth as guardian.

analysis assumed the trust was revocable, by stating “[i]n order to modify a *revocable* trust, a person must be competent.” (Emphasis added). We held the amendment was valid, reasoning that “the medical evidence supported Dorothy’s competency to amend the trust on October 4, 2007.”

C. *Driesen II: The Present Lawsuit*

On January 12, 2009, the Bank, as trustee, sued Jay in Lyon County. The Bank asked the court to “declare that any property held in the name of Little Bighorn Investments, LLC is the lawful property of the Dorothy Driesen Trust and that People’s Bank is the duly appointed manager of Little Bighorn Investments, LLC.” The Bank also sought to recover funds Jay had wrongfully appropriated from the trust and damages.²

Judgment on the Pleadings—Count I. After Jay filed an answer, People’s Bank moved for judgment on the pleadings with respect to its first claim, which the Lyon County district court granted on May 1, 2009, in a ruling that stated “the Dorothy Driesen Irrevocable Trust own[ed] the property held in the name of Little Big Horn Investments LLC.”

The Bank’s Motion for Partial Summary Judgment—Count II. People’s Bank moved for partial summary judgment on November 20, 2009, asking the court to enter judgment against Jay for misappropriating trust funds. The Bank explained that the motion was for partial summary judgment because Jay had not answered interrogatories and, as a result, it was not certain that the

² The Bank argued Jay improperly used trust funds to pay his personal legal fees and transferred trust funds to Little Big Horn Investments L.L.C.

amount requested was the full amount of trust property Jay had wrongfully disposed of.

On February 4, 2010, the Lyon County district court denied the Bank's motion for partial summary judgment, concluding a genuine issue of material fact existed regarding the validity of the September 2002 amendment that purported to make the trust irrevocable. In reaching its conclusion, the court discussed two rulings: Judge Neary's August 2008 Sioux County ruling that stated the trust was "a valid revocable trust," and Judge Scott's May 1, 2009 Lyon County ruling that granted the Bank judgment on the pleadings and referred to the trust as the "Dorothy Driesen Irrevocable Trust." With respect to the later ruling, the court concluded the reference to the "Dorothy Driesen Irrevocable Trust" "clearly carrie[d] with it an inference that an irrevocable trust . . . exists . . . [and] the related inference that the September 27, 2002 amendment . . . is valid." The court stated that the "May 1, 2009 ruling has never been amended, appealed, or vacated. Thus . . . it stands as the law of this case."

Order Nunc Pro Tunc. On February 12, 2010, People's Bank asked Judge Scott to enter an order nunc pro tunc concerning his May 1, 2009 ruling that stated, "the Dorothy Driesen Irrevocable Trust owns the property held in the name of Little Bighorn Investments, LLC." The Bank requested that a portion of the May 1, 2009 ruling be corrected to state

"the Court . . . finds the Dorothy Driesen Trust owns the property held in the name of Little Bighorn Investments LLC" and omit any reference to whether said trust is revocable or irrevocable . . . so as to clarify that Judge Scott's intent was NOT to determine the revocability of said trust.

On February 17, 2010, Judge Scott granted the motion for order nunc pro tunc, concluding the ruling “dated May 1, 2009, contain[ed] a clerical error [and] should be corrected.” The order amended the May 1, 2009 ruling to “omit any reference to whether the Trust is revocable or irrevocable.”

Rule 1.904(2) Motions and Orders. On February 9, 2010, the Bank filed a motion under Iowa Rule of Civil Procedure 1.904(2) requesting the court modify its ruling denying partial summary judgment. The Bank asserted, in pertinent part, that (1) Jay’s irrevocability claim was barred by the doctrine of res judicata and was an impermissible collateral attack on the 2008 ruling that stated the trust was “a valid revocable trust”; and (2) the revocable status of the trust was not an issue when Judge Scott granted the Bank judgment on the pleadings and his use of the word “irrevocable” was “simply superfluous.”

On February 23, 2010, the district court declined to modify its ruling denying the Bank’s motion for partial summary judgment, relying again on Judge Scott’s May 1, 2009 ruling that referred to the trust as “irrevocable,” despite the nunc pro tunc order removing the word “irrevocable” from that ruling.

On February 26, 2010, People’s Bank filed a second 1.904(2) motion, requesting the court amend its ruling on its first 1.904(2) motion. The Bank pointed out that Judge Scott entered an order nunc pro tunc and amended the ruling “to omit any reference to whether the trust is revocable or irrevocable.”³

³ People’s Bank filed an application for interlocutory appeal challenging “the district court’s Ruling . . . filed February 4, 2010 which overruled Plaintiff’s Motion for Partial Summary Judgment.” The Bank also sought “to appeal the district court’s Ruling . . . which overruled the plaintiff’s Motion Pursuant to Rule 1.904(2).” Our supreme court denied interlocutory appeal.

On May 13, 2010, the district court granted the Bank's motion to modify the initial 1.904(2) ruling and entered partial summary judgment.

Jay's Petition for Declaratory Relief. On November 30, 2009, Jay petitioned for "Declaratory Relief and Statement, Irrevocable Status of the Dorothy Driesen Irrevocable Trust." Jay "prayed that [the] court and jury find . . . [that] Dorothy Driesen's Trust [is] indeed . . . irrevocable" pursuant to the September 2002 amendment.⁴

The Bank's Motion for Summary Judgment on the Entire Case and/or Motion to Strike. On May 21, 2010, the Bank moved for summary judgment on the entire case and/or to strike Jay's filing, which was captioned, "Declaratory Relief and Statement, Irrevocable Status of the Dorothy Driesen Irrevocable Trust."

Ruling On Pending Matters. On September 1, 2010, the court entered a ruling on pending matters that addressed the following motions, among others: (1) Jay's motion to amend the ruling granting the Bank partial summary judgment; (2) the Bank's motion to strike Jay's petition for declaratory relief; and (3) the Bank's alternative motion for summary judgment on the entire case.

In his motion to amend the ruling that granted the Bank partial summary judgment, Jay again argued the trust was irrevocable. The court overruled Jay's motion to amend the May 13, 2010 ruling on partial summary judgment in its entirety. The court concluded that the doctrine of res judicata precluded Jay from litigating the irrevocability claim which, the court found, was raised in the prior

⁴ The petition also sought damages "in the amount of \$1,000,000.00" for Dorothy, Jay, and Merlyn, because People's Bank had "exploit[ed] Dorothy."

Sioux County proceedings. The court concluded the three elements of claim preclusion were present on the facts of this case because

the parties in the first action . . . are the same parties that are involved in the present case [Jay's] claim in the present case that the . . . [t]rust . . . was made irrevocable by the purported amendment dated July 27, 2002, could have been, and in fact was, adjudicated in the consolidated proceedings conducted before Judge Neary [and] "there was a final judgment on the merits in the first action."

With respect to the second element—that the present claim "could have been adjudicated" in the prior 2008 case—the court explained as follows:

Whether the Dorothy Driesen Trust was made irrevocable by the September 27, 2002 amendment was clearly a contested issue in the previous case [and that] fact [was] established not only by [Jay's] testimony in the previous case . . . but also by the exhibits made part of the record . . . in those proceedings.

The court observed that Judge Neary

clearly stated . . . that the . . . [t]rust . . . was a valid revocable trust, and that the amendment executed by [Dorothy] on October 4, 2007, to that trust was a validly-executed amendment. Implicit in these rulings are findings . . . that [Jay's] claim that the trust was irrevocable lacked evidentiary support and legal merit. Perhaps more importantly, [Jay did not take] the steps necessary to request that Judge Neary amend or enlarge his findings and conclusions concerning this claim, and thus lost not only the right to raise the claim on subsequent appeal to the Iowa Supreme Court, but is also now precluded from again raising the same claim in the present proceedings.

The court next addressed the Bank's motion to strike Jay's petition for declaratory relief and alternative motion for summary judgment on the full case. First, the court construed the pleading as a petition for declaratory judgment and, therefore, overruled the Bank's motion to strike. But the court granted the Bank summary judgment. The court explained that Jay's "declaratory relief" pleading

“appear[ed] to request a determination from the jury concerning the construction of the Dorothy Driesen Trust; specifically, whether it is a revocable or irrevocable trust.” In granting summary judgment, the court reiterated that Jay’s claim “concerning the irrevocability of the Dorothy Driesen Trust is . . . precluded under the doctrine of res judicata and claim preclusion.” The court also noted Jay’s pleading was “clearly a collateral attack on the Ruling and Judgment entered by Judge Neary in the underlying consolidated cases.”

Dismissal, Final Order, and Motions to Amend. On September 16, 2010, the district court entered its “final order,” which granted the Bank’s dismissal request without prejudice and denied two motions filed by Jay.

On September 15 and 16, 2010, Jay filed motions to amend the court’s ruling. These motions appear to challenge both the ruling on pending matters and the earlier ruling granting partial summary judgment. The court overruled the motions on September 17, 2010. Jay filed his notice of appeal on October 15, 2010.

II. Scope and Standard of Review

We review the grant of summary judgment for the correction of errors at law. Iowa R. App. P. 6.907; *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 758 (Iowa 2006). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). A genuine issue of material fact exists if reasonable minds could differ with respect to how the issue should be resolved. *Id.* In determining whether the moving party has

satisfied its burden, we view the record in the light most favorable to the non-moving party. *Eggiman*, 718 N.W.2d at 758.

We also review nunc pro tunc orders for correction of errors at law. *State v. Johnson*, 744 N.W.2d 646, 648 (Iowa 2008).

III. Analysis

A. Timeliness of Appeal

The Bank raises a threshold issue concerning the timeliness of Jay's appeal. While it does not appear Jay's appeal is untimely for the reason cited by the Bank, it is unclear from the record exactly which ruling Jay contests. The Bank argues that Jay challenges the May 13, 2010 partial summary-judgment ruling. Jay's pro se notice of appeal, however, asserts that he challenges "the final order entered in this case on September 16, 2010, and from all adverse rulings and orders inhering therein." The court's September 16, 2010 "final order," however, does not address the dismissal of Jay's application for declaratory relief or the partial summary-judgment ruling, both of which Jay contests on appeal.

After reviewing the record and the arguments before us, we believe Jay's appeal actually takes on the district court's September 1, 2010 decision that dismissed Jay's petition for declaratory relief and sustained the grant of partial summary judgment in favor of the Bank. Specifically, it appears Jay should have specified he was appealing the court's September 17, 2010 order declining to amend its ruling on pending matters because Jay's appeal challenges the court's dismissal of his application for declaratory relief and attacks the court's decision

to sustain partial summary judgment in favor of the Bank; the district court took those contested actions in its September 1, 2010 ruling on pending matters; and the court declined to amend that ruling in its September 17, 2010 ruling.

Assuming Jay's appeal actually arises from the September 17, 2010 order, his appeal is timely; it is also timely from the September 16, 2010 order Jay cites in his pro se notice of appeal. The Bank does not present an argument that we should refrain from reaching the merits of the case based on the uncertainty with respect to which ruling Jay appeals. Rather, the Bank limits its argument to the effect rule 1.904(2) motions would have on an appeal from the May 13, 2010 ruling. Accordingly, we opt to reach the merits of Jay's appeal.

B. Claim Preclusion

Jay first contests the court's decision that claim preclusion bars him from litigating his claim the trust is irrevocable and the court's attendant "dismiss[al] [of his] petition for declaratory relief," entered in the September 1, 2010 ruling. In that ruling,⁵ Judge Lester determined Jay had advanced the revocability claim in the 2008 lawsuit, where he provided testimony on that topic and admitted into evidence copies of the September 2002 amendment that purported to make the trust irrevocable, and the October 2007 amendment that changed the distribution provisions.

⁵ The court reviewed the contents of the Sioux County court files. The ruling explained that it did so because Jay "was unwilling to stipulate that a copy of the September 27, 2002 purported amendment to the Dorothy Driesen Living Trust, which he alleges made the trust irrevocable, was admitted into the record during the proceedings in the three consolidated cases."

Judge Lester ultimately concluded the three elements of claim preclusion were met, stating: (1) “the parties in the first [Sioux County] action . . . are the same parties that are involved in the present case . . . specifically, the Dorothy Driesen Trust and [Jay] were parties in both cases”; (2) Jay’s claim the trust is irrevocable, “could have been, and in fact was, adjudicated in the consolidated proceedings conducted before Judge Neary [in the 2008 lawsuit]”; and (3) “there was a final judgment on the merits in the first action.” The September 1, 2010, ruling found the court’s earlier rulings—that the October 2007 amendment was valid and the trust was “a valid revocable trust”—carried “implicit” “findings . . . that [Jay’s] claim that the trust was irrevocable lacked evidentiary support and legal merit.”

“The doctrine of *res judicata* embraces the concepts of claim preclusion and issue preclusion.” *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006) (citation omitted). Our supreme court has described claim preclusion as follows:

“The general rule of claim preclusion provides a valid and final judgment on a claim precludes a second action on that claim or any part of it. The rule applies not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but also as to any other admissible matter which could have been offered for that purpose. Claim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated.* It does not, however, apply unless the party against whom preclusion is asserted had a ‘full and fair opportunity’ to litigate the claim or issue in the first action. A second claim is likely to be barred by claim preclusion where the ‘acts complained of, and the recovery demanded are the same or where the same evidence will support both actions.’”

Id. (citations omitted).

The party invoking claim preclusion must show three elements: (1) “the parties in the first and second action were the same,” (2) “the claim in the second suit could have been fully and fairly adjudicated in the prior case,” and (3) “there was a final judgment on the merits in the first action.” *Id.* (citation omitted).

To support his assertion he is not precluded from pursuing his claim that the trust is irrevocable, Jay raises three appellate claims: (1) the parties are not identical, (2) the claims are not the same, and (3) applying claim preclusion to a trust issue violates public policy.

Identical-Party Requirement. Jay asserts the identical-party requirement is not satisfied because (1) “[t]he Trust itself was not a party” in the first lawsuit and a different trustee brought each suit, and (2) all of the parties to the first lawsuit are not also parties in the second lawsuit. With respect to the first ground, Jay argues Ruth was the petitioner in the first lawsuit but People’s Bank, as the court-appointed trustee, was the petitioner in the second lawsuit.

The Bank counters that “the trust, as an entity, was a party in the Sioux County litigation,”⁶ and observes the first lawsuit was captioned “In the Matter of the Dorothy Driesen Trust.” People’s Bank argues the trust is again a party in the present lawsuit, and “People’s Bank is simply the fiduciary that represents the trust.”

⁶ People’s Bank noted that “[t]here was some dispute throughout the trial as to who was the acting trustee, Dorothy or Jay” but, “[r]egardless of who the legitimate trustee was at that time, the trust itself was represented as both Dorothy and Jay appeared at the trial with counsel.”

With respect to the second ground, Jay asserts the parties in the first case were Ruth, Jay, and Dorothy, but the parties in the second action are “Peoples Bank, as the current trustee” and Jay; unlike the first case, Ruth and Dorothy are not parties to this proceeding.

The Bank defends, arguing

[t]here is no requirement that *all* parties to the prior litigation be the same as *all* parties to the second litigation in order that claim preclusion apply. [Rather,] [t]he only requirement is that the party invoking the doctrine and the party against whom the doctrine is invoked be parties in the prior litigation. [And] [t]he only logical conclusion is that both the trust and Jay . . . were parties in both actions.

We conclude the parties in both lawsuits are the same for purposes of claim preclusion. Jay was a party in the first lawsuit—he was a named defendant as a consequence of making an unauthorized conveyance of trust property; and, his removal as trustee was sought and obtained in that case as well.

It is true the trustee was different in the first and second lawsuits. But that fact does not require us to find the parties were different for purposes of claim preclusion because the trustees served to represent the trust—which is the party for purposes of our analysis. See Iowa Code § 633A.4211 (2009) (identifying a trustee’s representative capacity in lawsuits by stating: “A trustee shall take reasonable steps to *enforce claims of the trust*, to defend claims against the trust, and to defend against actions that may result in a loss to the trust.” (emphasis added)). In both cases the trust appeared by the trustee. The trustee did not bring suit to enforce the trustee’s personal claims, but rather to “enforce claims of the trust” against Jay, who had wrongfully taken assets from the trust. *Id.*; see

also §§ 633A.4402(30) (providing that a trustee may “[p]rosecute or defend an action, claim, or proceeding in order to protect trust property); 633A.6202(2)(a), (c), (j) (providing that a “trustee or beneficiary of a trust may petition the court concerning the internal affairs of the trust,” which include proceedings to “[c]onstrue and determine the terms of the trust,” “[d]etermine the validity of a trust provision,” and “[a]ppoint or remove a trustee”).

With respect to the second ground, claim preclusion jurisprudence does not require that *all* parties to the prior litigation be the same as *all* parties to the second litigation. See *Dreyfus v. First Nat’l Bank*, 424 F.2d 1171, 1175-76 (7th Cir. 1970) (“[I]t is no objection that the former action included parties not joined in the present action, or vice versa, so long as the judgment was rendered on the merits, the cause of action was the same and the party against whom the doctrine is asserted was a party to the former litigation.”). Claim preclusion only requires that the party invoking the doctrine and the party against whom the doctrine is invoked be parties in the prior litigation. Because the parties in the second action were also parties in the first action, we conclude the identical-party requirement is satisfied.

Same-Claim Requirement. As an initial matter, the claim purportedly barred by prior litigation is Jay’s claim that the trust is irrevocable. Jay argues the first and second lawsuits “do not represent the same claim.” He contends the first lawsuit addressed only the capacity, misconduct, and ultimate removal of then-trustees Dorothy and Jay, and the appointment of People’s Bank as a replacement trustee. In contrast, he asserts, the sole issue in this proceeding is

whether the September 2002 amendment—purporting to make the trust irrevocable—is valid. He argues “the parties in Driesen I did not seek to determine the validity of the Amendment as it was not properly before the court.”

The Bank counters that Jay’s “argument completely ignores the evidence admitted . . . in the Sioux County litigation and ignores the plain language of [the] ruling” on August 4, 2008. The Bank points out the September 2002 amendment allegedly making the trust irrevocable was received into evidence and made part of the permanent court record, and that “Judge Neary ruled that the Dorothy Driesen Trust was a valid revocable trust and that the October 4, 2007 amendment was a validly executed amendment.”

We conclude the second claim-preclusion requirement—that the claim in the second suit could have been fully and fairly adjudicated in the prior case—is satisfied here. Jay’s argument that the first lawsuit was not specifically aimed at determining the validity of the 2002 amendment overlooks a key element of claim preclusion: “*Claim preclusion . . . may foreclose litigation of matters that have never been litigated.*” *Spiker*, 708 N.W.2d at 353 (citation omitted). That is, the doctrine prevents a party from re-litigating claims that “could have been” adjudicated in the prior case. *Id.* Because the first lawsuit determined the validity of the later 2007 amendment, and because the validity of that amendment would depend, in part, on the validity of the earlier 2002 amendment

that purportedly made the trust irrevocable,⁷ Jay's present claim that the trust is irrevocable could have been fully and fairly adjudicated in the prior case.

Further, Jay's argument that the trust is irrevocable "might have [been] interposed . . . in the first action" as a defense to the validity and enforcement of the 2007 amendment that adversely affected Jay by removing him as a beneficiary and trustee. See *id.* at 354 (citation omitted). The defensive nature of Jay's repeated claims the 2002 amendment made the trust irrevocable may be gleaned from the fact that if the trust was irrevocable, Dorothy could not have removed Jay as a beneficiary and trustee by unilaterally executing the 2007 amendment. That is, the irrevocable nature of the trust would have prevented the 2008 court from giving effect to the 2007 amendment unless the requirements for modifying an irrevocable trust, articulated in our trust code, were satisfied. The defensive nature of Jay's claim that the trust is irrevocable further persuades us his claim is barred by the 2008 litigation because under the doctrine of claim preclusion, "[t]he general rule is that '[w]hen a valid and final . . . judgment is rendered . . . the defendant cannot avail himself of the defenses he might have interposed, or did interpose, in the first action,' in a subsequent action." *Id.* (concluding parties could not litigate constitutionality in second lawsuit because they could have litigated in the first, though they did not).

Moreover, not only could Jay have raised the revocability claim during the 2008 proceeding, but he in fact did. Jay submitted into evidence the amendment

⁷ Under Iowa Code section 633A.2203(1), the dispositive provisions of an irrevocable trust may be "modified by the court with the consent of all of the beneficiaries if continuance of the trust on the same or different terms is not necessary to carry out a material purpose."

purporting to make the trust irrevocable and provided testimony on his irrevocability claim. The court then entered a ruling calling the instrument a valid, “revocable trust.”

Consequently, we conclude the second element of claim preclusion is satisfied. Jay does not challenge the third element—that there was a valid final judgment on the merits in the first action.

Public-Policy Argument. Jay next argues the second element of the claim-preclusion doctrine—that the claim in the second action “could have” been fully and fairly adjudicated in the prior case—offends public policy when claim preclusion is applied in lawsuits involving trusts.⁸ Jay specifically asserts

[t]he resulting policy message [from the court’s decision to dismiss his claim for declaratory relief based on the doctrine of claim preclusion] is that whenever there is any matter involving the trustees of a trust that requires court involvement, any and all potential matters related in any fashion to the trust, transaction in the trust, or amendment to the trust, are required to be thoroughly investigated and exhausted and brought before the court even if only a singular, simple matter is brought before the court. . . . As a result, a party is potentially forever foreclosed from seeking redress of any extraneous matter involving the trust, or amendment to the trust. Such a policy of application of claim preclusion in the administration of trusts should not be permitted as a matter of public policy.

⁸ He contrasts the application of claim preclusion in the context of trusts with its application in personal injury and breach of contract lawsuits to demonstrate his argument:

Issues involving matters of a trust are unique and distinct from those claims involving a personal injury or a breach of contract, which are typically amenable to the application of the doctrine of claim preclusion. In such instances, the claim or potential claims, is [sic] easily identifiable. With trusts, such claims may not always be as easily identified.

We find no authority that bars a court from applying claim preclusion in trust cases and we are not inclined to create a rule that wholly exempts lawsuits involving trusts from the doctrine of claim preclusion.

Further, even if the 2008 decision erroneously included the term “revocable” in its ruling, that would not change our conclusion because

[t]he res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

Gail v. W. Convenience Stores, 434 N.W.2d 862, 863 (Iowa 1989).

We further agree with the Bank’s argument that Jay’s attempt to litigate the revocability claim in this lawsuit amounts to an impermissible collateral attack on the 2008 judgment. “A judgment may be attacked collaterally only if it was entered without jurisdiction” and Jay does not assert a lack of jurisdiction in the first lawsuit. *Id.* If Jay wanted to challenge the court’s ruling that the trust was revocable, he had to do so in the 2008 case. *See id.* His failure to preserve error on that argument for appeal does not allow him to now collaterally attack the judgment. Finally, because we conclude claim preclusion bars Jay from re-litigating his revocability argument, we do not address issue preclusion.

C. *Nunc Pro Tunc Order*

Jay next challenges the nunc pro tunc order entered by Judge Scott on February 17, 2010, which concluded the ruling “dated May 1, 2009, contain[ed] a clerical error” and amended it to “omit any reference to whether the Trust is revocable or irrevocable.” Jay contends the Bank used an improper method to request the district court strike the word “irrevocable” from its May 1, 2009 ruling.

He argues the Bank's February 12, 2010 motion for order nunc pro tunc was really an untimely rule 1.904(2) motion to amend the May 1, 2009 order. Because the motion was improper, Jay argues, the district court erred in granting it. Accordingly, he claims, the "subsequent rulings . . . [that] relied on the inappropriate Nunc Pro Tunc Order should be reversed."

Jay's reply frames his argument a bit differently. He no longer alleges the motion for order nunc pro tunc should have been disregarded as an untimely rule 1.904(2) motion. Instead, he argues the motion for order nunc pro tunc was itself untimely. He contends that allowing "a court to reach back ten months and determine its intent, following rulings which relied upon the initial ruling, is inappropriate."

A nunc pro tunc order is used to "make the record show truthfully what judgment was actually rendered." *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995) (citation omitted). A court may use a nunc pro tunc order to "make an order conform to the judge's original intent" or to "correct a clerical error," which is "an error 'that is not the result of judicial reasoning and determination.'" *Id.* (citation omitted); see also *Weissenburger v. Iowa Dist. Ct.*, 740 N.W.2d 431, 434 (Iowa 2007). The trial judge's intent is crucial when determining whether "a nunc pro tunc order is appropriate to 'correct' a record." *Freeman*, 541 N.W.2d at 893 (citation omitted). When determining whether an "evident mistake" appropriately corrected by a nunc pro tunc order exists, we look to "the words used by the court in its order, the nature of the alleged error, whether the matter had been previously called to the court's attention and the

length of time passing before the mistake's 'discovery.'" *Graber v. Iowa Dist. Ct.*, 410 N.W.2d 224, 229–30 (Iowa 1987).

A nunc pro tunc order may not be used to correct an error in judicial thinking, as distinguished from a clerical error. *Weissenburger*, 740 N.W.2d at 434.

[I]f the court intended to correct "an error of fact or law in arriving at its judgment, the appropriate remedy would not be by way of a nunc pro tunc order but by way of other available procedures such as a motion under [rule 1.904(2)] . . . or a motion for new trial."

Graber, 410 N.W.2d at 229 (citation omitted).

The revocability of the trust was not called to Judge Scott's attention in the proceeding where he granted the Bank judgment on the pleadings. Rather, the Bank requested the court declare that "any property held by Little Big Horn Investments LLC [was] the sole property" of the trust. Jay's answer admitted that Judge Neary had previously decided the trust owned the property in question and, although his answer referred to the trust as the "Dorothy Driesen Irrevocable Trust," Jay did not argue the issue of revocability. In fact, neither party argued to the court that the trust was either revocable or irrevocable. Accordingly, the court did not analyze whether the trust was revocable or irrevocable and merely stated, "[Jay's] answer admits that the property in question has already been found to be owned by the Dorothy Driesen Irrevocable Trust."

Looking next to the words used by the court in its order nunc pro tunc, Judge Scott stated that his May 1, 2009 ruling that used the term "irrevocable," "contain[ed] a clerical error [and] should be corrected." The order amended the ruling "to omit any reference to whether the Trust is revocable or irrevocable."

We give weight to Judge Scott's explanation that including the term "irrevocable" in the ruling was a clerical error. See *In re Marriage of Bird*, 332 N.W.2d 123, 125 (Iowa Ct. App. 1983) (stating "[i]nterpretation given a decree by the judge who enters the original decree is given weight by this court").

These circumstances persuade us that the order nunc pro tunc was properly used to "make the record show truthfully what judgment was actually rendered." See *Freeman*, 541 N.W.2d at 893 (citation omitted). A review of the court's May 1, 2010 ruling shows that the court's inclusion of the word "irrevocable" was "not the result of judicial reasoning and determination." See *id.* (citation omitted). The fact that ten months passed from the entry of the May 1, 2010 ruling and the nunc pro tunc order does not alter our conclusion. *Id.* ("[T]he power of the court to make a nunc pro tunc order is inherent and is not lost by the mere lapse of time.").

D. The Bank's Second Rule 1.904(2) Motion

Jay also attacks the court's decision to sustain the grant of partial summary judgment. He asks us to reverse that decision, arguing the partial summary judgment was granted in response to an untimely, second rule 1.904(2) motion filed by the Bank. Jay does not challenge the substantive basis for granting partial summary judgment; rather, he challenges the court's authority to reconsider the partial summary judgment.

Jay asserts the Bank's second rule 1.904(2) motion, filed on February 26, 2010, was untimely because it asked the court to amend its February 4, 2010

ruling. He alleges a party has ten days⁹ from a ruling to make a 1.904(2) motion and because the second 1.904(2) motion was filed twenty-two days after the ruling it should not have been considered. Jay also argues that the Bank waived its second 1.904(2) motion when it filed an application for interlocutory appeal on March 24, 2010.

People's Bank counters by arguing that rule 1.904(2) motions cannot be used to challenge partial summary judgment rulings. Rather, the Bank asserts, the motions should be viewed as a common law "motion to reconsider." The Bank contends "[Jay's] argument that [the second 1.904(2) motion] was untimely is without merit as the trial court can at any time correct its own errors while it has jurisdiction over the case and parties." The Bank argues alternatively that its second motion to amend was not untimely because it addressed the court's February 23, 2010 ruling (rather than the February 4, 2010 ruling) declining to modify its denial of partial summary judgment.

Rule 1.904(2) motions are not the appropriate vehicle to attack a partial summary judgment ruling. See Iowa R. Civ. P. 1.981(3) ("If summary judgment is rendered on the *entire* case, rule 1.904(2) shall apply." (emphasis added)). But the district court had the power in this case to correct its partial summary-judgment ruling. Accordingly, we decline to overturn the court's eventual correction of its initial denial of partial summary judgment. As our supreme court has long recognized

⁹ A party now has fifteen days to file such a motion. See Iowa R. Civ. P. 1.1007 (amended August 3, 2010, to provide parties fifteen, rather than ten days, within which to file a motion).

a district court has the power to correct its own perceived errors, “so long as the court has jurisdiction of the case and the parties involved.” Until the district court has rendered a final order or decree, it has the power to correct any of the rulings, orders, or *partial summary judgments* it has entered. In short, a party has no vested interest in an erroneous ruling.

Carroll v. Martir, 610 N.W.2d 850, 857 (Iowa 2000) (emphasis added) (citations omitted).

Here, the district court’s partial summary judgment ruling was not a final order. Nor had the court granted a final order before it corrected its partial summary judgment ruling. Additionally, when the court did correct its partial summary judgment ruling, it had jurisdiction of the case and the parties. Consequently, the court had the power to correct its own perceived error in initially declining to grant partial summary judgment. The fact the Bank unsuccessfully sought an interlocutory appeal does not alter our conclusion.

AFFIRMED.