IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph W. Lewicki, Jr. and Robert A. Lewicki, Appellants	:	
v.	:	
Washington County, Pennsylvania; Washington County Tax Claim Bureau; Francis King; P.S. Hysong and Sean Lewis	:	No. 2371 C.D. 2013
Joseph W. Lewicki, Jr. and Robert A. Lewicki	:	
v.	:	
Washington County, Pennsylvania and Washington County Tax Claim Bureau and Francis King, in his capacity as Treasurer of Washington County, PA and P.S. Hysong and Sean Lewis	:	
Appeal of P.S. Hysong and Sean Lewis	:	No. 48 C.D. 2014
	:	Argued: November 13, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: December 4, 2014

Joseph W. Lewicki, Jr. (Joseph) and Robert A. Lewicki (Robert), brothers, and P.S. Hysong (Hysong) and Sean Lewis (Lewis), filed cross-appeals from an order of the Court of Common Pleas of Washington County (trial court).

The Lewickis' appeal the portion of the trial court's order granting judgment on the pleadings against them on the basis of collateral estoppel and *res judicata*. Hysong and Lewis appeal the portion of the trial court's order which declined to rule on a request for attorneys' fees and costs pursuant to 42 Pa. C.S. §2503. For the following reasons, we affirm.

I.

Following the death of their parents in 1982, Joseph and Robert became joint owners of 48.9 acres of real property situated in Canonsburg, Washington County (County), Pennsylvania. Due to delinquent real-estate taxes for tax year 1999, the Washington County Tax Claim Bureau (Bureau) subjected the property to an upset sale in September 2000 at which Hysong purchased the property. The deed was recorded in her name in January 2001 after which she filed a quiet-title action in the trial court.

Before the trial court, the Lewickis argued that the sale should be voided because they did not receive notice of it until the recording of the deed was published. Specifically, they contended that notices were sent to the property for both brothers via restricted delivery, even though only Robert lived at the property, and that unbeknownst to Joseph, Robert signed for all of the notices. Following a bench trial,[1]

[1] This was the second bench trial in this matter. During the first trial, the Lewickis' then-counsel submitted untimely answers to a set of requests for admissions, which included a series of denials. The trial court deemed the issues to be admitted by virtue of their untimeliness and barred the Lewickis from presenting any evidence. The trial court entered an order in favor of Hysong, following which the Lewickis appealed to this Court. By order dated October 24, 2002, we held that the trial court erred in precluding the Lewickis from adducing evidence on matters not encompassed by the deemed admissions. We then remanded the case to the trial court, which conducted a *de novo* trial pursuant to the consent of the parties.

(Footnote continued on next page…)

Senior Judge John F. Bell found that the Lewickis had actual knowledge of the tax sale, and he entered an order establishing Hysong's fee-simple interest in the property.

(continued…)

During the second bench trial, Senior Judge John F. Bell found that the subject property suffered from delinquent taxes for years 1993 through 1999 and was listed for upset sale in both 1998 and 1999. He determined that in 1998, the property's taxes were paid at the last minute, just before the scheduled upset sale. In 1999, the Lewickis made a partial payment which temporarily removed the property from sale.

Judge Bell further found:

> In March 2000, the Washington County Tax Claim Bureau, although not required by statute, sent "courtesy letters" to the [Lewickis] as a reminder to the [Lewickis] that unless the 1999 balance for back taxes was paid, the property would be sold for taxes. At about the same time of the year, Defendant Joseph Lewicki, Jr. appeared at the tax bureau to pay delinquent taxes on other properties. While there, he learned from the Bureau that the subject property was slated for a September 19, 2000, tax sale. Defendant Joseph did not pay the taxes at that time, but he did return home and discuss the matter with his brother, Defendant Robert Lewicki. Joseph asserts that Robert assured him that he (Robert) would pay the taxes.

(Reproduced Record [R.R.] at 432a.) When the balance remained unpaid, the upset sale was advertised in local newspapers of general circulation and the property was posted.

Judge Bell held that strict compliance with the notice requirements was not necessary because Robert received actual notice via restricted delivery, and because notice of a tax sale to one co-administrator of the estate owning the property constituted actual notice to both co-administrators under *Stanford-Gale v. Tax Claim Bureau of Susquehanna County*, 816 A.2d 1214, 1217 (Pa. Cmwlth.), *appeal denied*, 828 A.2d 351 (Pa. 2003). He further emphasized that actual notice was provided to Joseph in March 2000 when the Bureau verbally advised him of the impending sale.

The Lewickis appealed to this Court, but we quashed the appeal because they failed to preserve issues for review and denied their motion for rehearing *en banc*, after which our Supreme Court denied their petition for allowance of appeal. *See Hysong v. Lewicki*, 931 A.2d 63 (Pa. Cmwlth.), *appeal denied*, 940 A.2d 367 (Pa. 2007).

Subsequently, in 2010, the Lewickis filed an action in the United States District Court for the Western District of Pennsylvania (federal action) against the County, the Bureau, the County's Treasurer – Francis King (King), Hysong and the Commonwealth of Pennsylvania, asserting that: (1) the sale violated their due process and equal protection rights and was actionable under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments of the U.S. Constitution; and (2) the Commonwealth's disparate redemption laws violated their equal protection rights under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments of the U.S. Constitution as well as the Pennsylvania Constitution.

The district court dismissed the action as time-barred and denied the Lewickis' motion for reconsideration. On appeal, the Third Circuit affirmed dismissal of the action based on the expiration of the statute of limitations, finding that it did not toll since the Lewickis received actual, prior notice of the sale. *See Lewicki v. Washington County*, 431 F. App'x 205 (3d Cir.), *cert. denied*, ___ U.S. ___, 132 S. Ct. 769, 181 L. Ed. 2d 485 (2011), *rehearing denied*, ___ U.S. ___, 132 S. Ct. 1137, 181 L. Ed. 2d 1011 (2012).

In October 2012, the Lewickis filed the instant action against the County, the Bureau, King, Hysong and Lewis[2] (collectively, Defendants), again alleging that the property was unlawfully sold at a tax sale in violation of the Lewickis' due process rights. Specifically, they contended that prior to the sale, Robert sustained severe brain trauma which rendered him mentally impaired and that

[2] In 2007, Hysong conveyed the subject property to herself, to Lewis and to E.D. Lewis by deed recorded March 29, 2007.

although the Bureau had actual knowledge of his impairment and actual knowledge that Joseph lived off-site, the Bureau refused to provide Joseph notice of the impending sale.

In support of their argument, the Lewickis adduced "new evidence," which they argued compelled the trial court to void Judge Bell's prior judgment. First, they pointed to a notice of a proposed termination of a 1993 eminent-domain case which was sent to Joseph at his correct address in 2009. They emphasized that although the 1993 case docket listed Joseph's correct address, Joseph did not receive previous notice of the action. Upon receiving the notice of proposed termination, the Lewickis' counsel asked Robert to provide all documents concerning the property, in response to which Robert supplied the second piece of "new evidence": during the 2006 quiet-title trial, counsel for the Bureau dropped an envelope which Robert picked up, placed in his pocket, and did not show anyone. The envelope is addressed to Joseph and Robert, and markings on it indicate that the U.S. Postal Service made two failed attempts to serve the letter at the subject property, after which the letter was returned to the Bureau on June 18, 2000. As of June 20, 2000, the letter remained unclaimed. A handwritten note on the envelope reads, "11/00 Sale Bidder 9-19-2000." (R.R. at 69a.)

In light of this "new evidence," the Lewickis asserted that the County and Bureau had actual knowledge of Joseph's correct address since 1993 but, nonetheless, directed his notice of the upset sale to the wrong address. The Lewickis

sought a writ of *audita querela*[3] and a writ of *coram nobis*,[4] and again claimed that the sale violated their due process rights.

Defendants filed preliminary objections on the basis of *res judicata*. The trial court sustained the preliminary objections with regard to the quiet-title action brought against Hysong, but overruled the preliminary objections in all other respects, stating that the County, the Bureau, King and Lewis were not parties to that action. It further explained that although the claims against the County, the Bureau and King may be barred by collateral estoppel with respect to the federal action, neither the complaint nor the exhibits attached to the pleadings mentioned the federal action and, therefore, there was not yet any competent evidence of record upon which to base such a finding. As such, the County, the Bureau and King filed an answer with a counterclaim for attorneys' fees and costs pursuant to 42 Pa. C.S. §2503,[5] as did Hysong and Lewis with regard to the remaining counts.

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[3] "*Audita querela* is defined as '[a] writ available to a judgment debtor who seeks a rehearing of a matter on grounds of newly discovered evidence or newly existing legal defenses.'" *Ettelman v. Department of Transportation, Bureau of Driver Licensing*, 92 A.3d 1259, 1261 n.2 (Pa. Cmwlth. 2014) (quoting Black's Law Dictionary 150 (9th ed. 2009)).

[4] A writ of error *coram nobis* is an extraordinary remedy whose "purpose…is to correct errors of fact only, and its function is to bring before the court rendering the judgment matters of fact which if known at the time the judgment was rendered, would have prevented its rendition." *Commonwealth v. Mangini*, 386 A.2d 482, 490 (Pa. 1978) (quoting another source) (internal quotation marks omitted).

[5] Counsel fees may be awarded "as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." 42 Pa. C.S. §2503(7).

Subsequently, the County, the Bureau, and King filed a motion for judgment on the pleadings, in which Hysong and Lewis joined, arguing that the Lewickis' "new evidence" was not newly discovered and that regardless, the action was barred by the doctrines of *res judicata* and collateral estoppel and by the statute of limitations.[6] The trial court agreed, finding that the claims against all Defendants were barred by the doctrine of collateral estoppel with respect to the prior quiet-title action and that additionally, the claim against Hysong and Lewis was barred by the doctrine of *res judicata*.[7]

In its opinion, the trial court elucidated:

> In essence, Plaintiffs are dissatisfied with Judge Bell's 2006 ruling and now bring a collateral attack on the same allegedly on newly-discovered evidence. However, there exists no authority for this Court to overturn Judge Bell's ruling and the time for an appeal from that decision has long since passed. Thus, this Court's grant of judgment on the pleadings was proper pursuant to the doctrines of collateral estoppel and res judicata.

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[6] The motion also asserted a claim against the Lewickis for attorneys' fees and costs incurred in defending against their complaint and petitions.

[7] In its Pennsylvania Rule of Appellate Procedure 1925(a) opinion, the trial court explained that its decision was not precluded by its prior ruling on the Defendants' preliminary objections:

> Although this Court's February 12, 2013 ruling appears at first blush to preclude a holding that the identity of the cause of action factor is satisfied, it was in fact only premature at that stage. As the pleadings have now closed, and after argument on the motions for judgment on the pleadings by the parties, the true nature of Plaintiffs' present claims has been revealed.

(Certified Record [C.R.], 3/5/14 Trial Court Opinion at 6.)

(C.R., 3/5/14 Trial Court Opinion at 2.)

Although its order was silent on the issue of attorneys' fees, the trial court stated in its opinion that the Defendants failed to present a motion or to schedule a hearing on their request for attorneys' fees under Washington County Local Rule 200.6,[8] and because no evidentiary record existed upon which a ruling could be made, the trial court's order was appropriate. The Lewickis and Hysong and Lewis filed notices of appeal, and this cross-appeal followed.[9]

II.

A.

Initially, the Lewickis contend that the trial court erred in applying the doctrines of *res judicata* and collateral estoppel because Judge Bell's 2006 decision

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[8] Local Rule 200.6 provides that all pre-trial motions in assigned cases shall be disposed of as follows: "In contested matters, the moving party shall so furnish a copy of the motion and any order to all other parties or counsel at least three days in advance of the presentation together with notice of when the presentation is to occur." L.R. 200.6(d). Further, the "Filing of Motions" explanatory comment states:

> Washington County Court of Common Pleas operates on an individual calendar system. This means that each Judge maintains his own calendar and schedules his own cases. Filing a motion or petition with the Prothonotary does not trigger scheduling. In order to have an issue decided, the issue must be presented to the appropriate Judge.

L.R. 200.6, explanatory comment (filing of motions).

[9] In reviewing a trial court's decision to grant a motion for judgment on the pleadings, we must determine whether the trial court committed an error of law or whether unresolved questions of material fact remain outstanding. Our scope of review is plenary. *Pfister v. City of Philadelphia*, 963 A.2d 593, 597 n.7 (Pa. Cmwlth. 2009).

failed to ensure that the Lewickis were provided the constitutionally required notice, rendering it a nullity and, therefore, subjecting it to collateral attack. The Lewickis emphasize their right to have their day in court and an opportunity to be heard and assert that the trial court failed to address "how a void judgment can be made a valid judgment in contravention to overwhelming authority to the contrary." (Br. for Appellants at 30.)

The Lewickis' argument is based upon the faulty premise that Judge Bell's 2006 judgment denied the brothers an opportunity to be heard in violation of their due process rights and, therefore, is void. In support of this claim, they cite *United States v. One Toshiba Color Television*, 213 F.3d 147, 156 (3d Cir. 2000) (*en banc*), which involved an appeal from a forfeiture proceeding. Finding that the record failed to establish whether the government developed and followed procedures to ensure that claimant received constitutionally adequate notice of the forfeiture, the Third Circuit vacated judgment against the claimant and remanded for further proceedings. *Id.* at 156.

It bears mention that unlike in *One Toshiba Color Television*, this matter is not a direct appeal from a final order addressing whether adequate notice was provided. As such, the Third Circuit's consideration of the issue did not violate the general rule that "[t]he judicial system cannot countenance attempts to extend or renew litigation after a matter has been adjudicated and finally determined by an order no longer subject to reconsideration, reargument or appeal" because "after parties have been afforded an adequate opportunity to present their claims, litigation must come to an end." *Ettelman v. Department of Transportation, Bureau of Driver*

Licensing, 92 A.3d 1259, 1262 (Pa. Cmwlth. 2014) (quoting another source) (internal quotation marks omitted).

Because *One Toshiba Color Television* did not involve the defenses of collateral estoppel or *res judicata*, the Lewickis' reliance on it is misplaced. Indeed, in this case, all direct appeals from the 2006 order were disposed of in 2007 and the order became final. As such, the validity of the underlying judgment can be re-litigated only if the present action is not barred by *res judicata* or collateral estoppel.[10]

Further, to the extent the Lewickis claim that they have been denied their day in court or their opportunity to be heard regarding whether they were provided adequate notice of the tax sale, we reject their argument. While they may disagree with Judge Bell's decision on the merits, they have not and cannot claim that the 2006 proceedings, themselves, were void due to lack of notice. Both of the brothers appeared, participated and were represented by counsel in those proceedings, which culminated in a bench trial, after which they appealed to this Court and sought

[10] Because the 2006 judgment is a final order, it is not enough for the Lewickis merely to argue that it was flawed. Even if this action is not precluded by *res judicata* or collateral estoppel, the Lewickis bear the burden of establishing that they are entitled to the issuance of a writ of *audita querela* or *coram nobis* due to after-discovered evidence. However, the issuance of a writ would not automatically void the judgment. Rather, upon the issuance of a writ, a rehearing would be granted to "supplement the record and inform the conscience of the court." *Commonwealth v. Orsino*, 178 A.2d 843, 845 (Pa. Super. 1962); *see also Ettelman*, 92 A.3d at 1261 n.2. It would not be until those proceedings that the trial court would determine whether the underlying judgment is flawed. Therefore, the Lewickis' current arguments that the 2006 judgment is legally erroneous are misplaced, and we decline to address them.

allocator in our Supreme Court. It is clear that they were provided *ample* opportunity to be heard on the issue of whether the tax sale violated their due process rights.

B.

Next, the Lewickis contend that the doctrines of *res judicata* and collateral estoppel are inapplicable under *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S. Ct. 1761 (1996), because a fundamental right – due process – is involved. In *Richards*, a class of employees subject to a county occupation tax filed a declaratory action challenging the constitutionality of the statute authorizing the tax under state and federal law. *Id.* at 795, 116 S. Ct. at 1765. The county moved for summary judgment, alleging that the claims were barred by a prior adjudication in which the acting director of finance for the City of Birmingham and Birmingham itself challenged the statute, and the statute was found to be constitutional pursuant to state law. *Id.* The trial court granted summary judgment as to the state constitutional claims, finding that they were barred by the prior litigation. *Id.* On writ of certiorari, the United States Supreme Court reversed, holding that the prior litigation regarding the constitutionality of the tax did not bind different taxpayers as "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.* at 798, 116 S. Ct. at 1766.

Contrary to the Lewickis' assertion, *Richards* does not stand for the proposition that *res judicata* and collateral estoppel are inapplicable where a fundamental right is involved. Rather, *Richards* stands for the well-settled principle that these doctrines generally cannot be asserted against a party who was not involved in the prior litigation or who does not have privity with a party to the prior litigation. *Id.* Such a principle "rests at bottom upon the ground that the party to be affected, or

some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction." *Id.* at 797 n.4, 116 S. Ct. at 1765 n.4. Because the Lewickis seek to challenge a prior ruling to which they were parties and which they had a full opportunity to litigate, the concern articulated in *Richards* is inapplicable here. Indeed, if we adopted the rule proposed by the Lewickis, an unsuccessful complainant in a due process action could repeatedly refile and re-litigate his action *ad nausea*, simply because it involved a fundamental right.

C.

Having determined that the doctrines of collateral estoppel and *res judicata* are not inapplicable for the reasons asserted by the Lewickis, we next turn to whether the elements of these doctrines are satisfied.

> To invoke collateral estoppel, the following elements must be shown:
>
> > 1) the issue decided in the prior case must be identical to the issue in the present case; 2) there was a final judgment on the merits; 3) the issue must be essential to the judgment; 4) the party against whom the estoppel is asserted must have had a full and fair chance to litigate on the merits; and 5) the party against whom the estoppel is asserted must be a party or in privity with a party in the prior case.

Department of Transportation v. Martinelli, 563 A.2d 973, 976 (Pa. Cmwlth. 1989).

With regard to Hysong and Lewis, it is clear that these elements are met. First, the underlying issue which Judge Bell addressed in 2006 and which the Lewickis present now is whether they received constitutionally adequate notice of the

2000 tax sale. Second, Judge Bell issued a final order disposing of the quiet-title action and the Lewickis' defenses thereto on the merits. Third, the issue of adequate notice was essential to the prior judgment as a determination that the required notice was not received would have rendered Hysong's interest in the property void. Fourth, the Lewickis had a full and fair chance to litigate the adequacy of the notice they received in the prior litigation. Although they now claim that they did not then have access to "new evidence" which surfaced in 2009, for the reasons discussed below, we find this argument unavailing. Lastly, the Lewickis were both parties to the quiet-title action. For the same reasons, these elements are also satisfied with regard to the County, the Bureau and King.[11]

D.

The Lewickis further argue that the trial court's order disposing of preliminary objections precluded it from granting Defendants' judgment on the pleadings because the latter motion did not raise new facts or legal issues. In so alleging, the Lewickis rely on the following excerpt:

> Where the motions differ in kind, as preliminary objections differ from motions for judgment on the pleadings, which differ from motions for summary judgment, a judge ruling on a later motion is not precluded from granting relief although another judge has denied an earlier motion. However, a later motion should not be entertained or granted when a motion *of the same kind* has

[11] The Lewickis argue in their reply brief that collateral estoppel is inappropriate with regard to the County, the Bureau and King because the federal action was dismissed based on the statute of limitations and not on its merits. While the trial court's opinion disposing of the Defendants' preliminary objections mentioned that collateral estoppel may be proper based on the federal action, it ultimately granted judgment on the pleadings based on the quiet-title action, not the federal one.

> previously been denied, unless intervening changes in the facts or the law clearly warrant a new look at the question.

Goldey v. Trustees of University of Pennsylvania, 675 A.2d 264, 267 (Pa. 1996).

This language summarizes the coordinate-jurisdiction rule, which "commands that upon transfer of a matter between trial judges of coordinate jurisdiction, a transferee trial judge may not alter resolution of a legal question previously decided by a transferor trial judge," in the absence of changes in the controlling law or substantial changes in the facts or evidence. *Hunter v. City of Philadelphia*, 80 A.3d 533, 536 (Pa. Cmwlth. 2013).

However, the coordinate-jurisdictional rule is inapplicable here, first, because the trial court's rulings regarding the preliminary objections and the motion for judgment on the pleadings were rendered by the same judge, and second, because the rule does not apply where the motions are of different types. *See id.* at 537–38 (holding that the coordinate-jurisdiction rule did not bar the grant of a non-suit following a different judge's denial of summary judgment); *Garzella v. Borough of Dunmore*, 62 A.3d 486, 497 (Pa. Cmwlth.) ("The rule that one judge should not overrule another on the same court, the coordinate jurisdiction rule, does *not* apply where the motions are of a different type, and does *not* bar a judge on summary judgment from overruling another judge's decision on preliminary objections or judgment on the pleadings, even on an identical legal issue."), *appeal denied*, 72 A.3d 605 (Pa. 2013).

E.

Additionally, the Lewickis argue that the trial court failed to apply the proper standard in granting judgment on the pleadings because it failed to credit the Lewickis' facts regarding the newly discovered evidence. They continue that if construed in the light most favorable to them, their pleadings establish the inadequacy of the pre-tax sale notice.

First, the trial court articulated the appropriate standard to be applied to motions for judgment on the pleadings:

> It is well-settled that a court may consider only the pleadings and documents properly attached thereto. Similar in form to a demurrer, judgment on the pleadings may be granted when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. A court must accept as true all well-pleaded factual allegations, admissions, and any documents attached to the pleadings submitted by the party adverse to the motion.

(C.R., 3/5/14 Trial Court Opinion, at 2) (internal citations omitted.)

Second, it is wholly irrelevant whether the new evidence came to light for the first time in 2009 because, regardless, Judge Bell found that the Lewickis received *actual* notice of the impending sale. The "new evidence" does not in any way impact Judge Bell's finding that in or around March 2000, Joseph received actual, *verbal* notice from the Bureau that the property was slated for an upset sale in September 2000. Further, the Lewickis have admitted that Robert signed for and received all written notices of the sale on behalf of both brothers. *See Adhelm, Inc. v. Schuylkill County Tax Bureau*, 879 A.2d 400, 406 (Pa. Cmwlth.) (holding that

execution of the certified mail receipts demonstrates actual notice upon the signer), *appeal denied*, 890 A.2d 1060 (Pa. 2005). Because both Joseph and Robert received actual notice of the upset sale, strict compliance with the technical requirements of the Real Estate Tax Sale Law[12] is not required. *Id.* ("Where a record owner has received actual notice of the impending sale, strict compliance with Section 602 will be waived."). Further, because both Joseph and Robert received *actual* notice of the sale, we need not address their argument that actual notice to one owner does not constitute actual notice to all owners.

F.

Regarding the trial court's dismissal of the Lewickis' claims for writs of *audita querela* and *coram nobis*, the Lewickis contend that the trial court erred because it "ignored the newly discovered evidence." (Br. for Appellants at 51.) To the contrary, the trial court expressly examined the "new evidence" and found that it was immaterial because it did not impact Judge Bell's determination that Joseph and Robert received actual notice of the upset sale.

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[12] Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. §§5860.101–5860.803. Section 602(e)(1) of the Real Estate Tax Sale Law provides:

> (e) In addition to such publications, similar notice of the sale shall also be given by the bureau as follows:
>
> (1) At least thirty (30) days before the date of the sale, by United States certified mail, restricted delivery, return receipt requested, postage prepaid, to each owner as defined by this act.

72 P.S. § 5860.602(e)(1).

To establish entitlement to a writ of *audita querela* on the basis of newly discovered evidence, a complainant must demonstrate that the evidence: "(1) is new; (2) could not have been obtained at trial in the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purposes of impeachment; and (5) must be likely to compel a different result." *Ettelman v. Department of Transportation, Bureau of Driver Licensing*, 92 A.3d 1259, 1263 (Pa. Cmwlth. 2014) (quoting another source) (internal quotation marks omitted). Likewise, to invoke the writ of *coram nobis*, one must establish: (1) that facts exist extrinsic of the record; (2) that the facts were unknown and unknowable by the exercise of due diligence at the time the judgment was rendered; and (3) if known, the facts would have prevented the judgment in its entirety or in the form rendered. *Commonwealth v. Harris*, 41 A.2d 688, 690 (Pa. 1945).

The Lewickis offer no argument regarding how their pleadings have satisfied these elements, and indeed, we find that they are not satisfied. Even assuming, *arguendo*, that all other elements have been met, for the reasons discussed above, the "new evidence" does not compel a different result, and if known in 2006, would not have prevented the judgment rendered; regardless of it, the Lewickis had actual knowledge of the sale in 2000, thereby removing the need for strict compliance with Section 602(e)(1) of the Real Estate Tax Sale Law, 72 P.S. §5860.602(e)(1). Thus, we find no error in the trial court's grant of judgment on the pleadings regarding the Lewickis' claims for writs of *audita querela* and *coram nobis*.

G.

Finally, the Lewickis assert that Pennsylvania's redemption laws provide for unequal and arbitrary treatment of citizens insofar as the Lewickis have no right

of redemption but those living in other counties and municipalities have such a right. The Lewickis argue that they preserved this issue in their complaint through general averments and by expounding upon it in their brief in opposition to preliminary objections.

The Lewickis' complaint, however, fails to set forth a cause of action challenging the constitutionality of these provisions, and it fails to so much as mention this contention in passing. Moreover, any arguments appearing in their brief in opposition to Defendants' preliminary objections are not properly part of the appellate record and, regardless, cannot set forth a claim not asserted in their complaint. Therefore, this issue is waived. *See* Pa. R.A.P. 302(a); *Rutledge v. Department of Transportation*, 508 A.2d 1306, 1307 (Pa. Cmwlth. 1986) (finding a constitutional issue waived when the appellant first raised the issue through his Pennsylvania Rule of Appellate Procedure 1925(b) statement).

III.

Hysong and Lewis appealed the failure of the trial court to address their purported counsel fee request under 42 Pa. C.S. §2503 in a motion for sanctions that it included within the preliminary objections to the complaint and in their counterclaim because of the repeated lawsuits brought by the Lewickis. The trial court did not address the issue because as it stated in its Opinion of March 5, 2014:

> Defendants base their demand for attorneys' fees on 42 Pa. C.S. § 2503(6), which provides for the awarding of fees when a party has engaged in dilatory, obdurate, or vexatious conduct. A hearing on the issue of attorneys' fees is required before an award. See Wood v. Geisenhemer-Shaulis, 827 A.2d 1204 (Pa. Super. 2003). Though Defendants stated at argument that they would be asking

> this Court to hold a hearing on the issue of attorneys' fees, Defendants failed to present this Court with a motion or petition to schedule one. The Washington County local rules require a motion to petition to be presented to schedule the necessary hearing. It is not the practice of the Court to decide issues not brought before it. Explanatory Comment — Filing of Motions, Motions Chart. Without an evidentiary record to establish the appropriateness or reasonableness of attorneys' fees, this Court was unable to rule on the matter. The Order of December 5, 2013 was, thus, properly silent on the issue of attorneys' fees. (footnote omitted.)

Just because the request is included in a wherefore clause in a pleading and a request is made at argument that they wanted a hearing on counsel fees, the Washington County local rules required that a separate petition be filed to consider those fees. This is understandable given how much "puffery" is associated with those types of requests, not to mention the need for a petition to lay out specific reasons that the litigation was frivolous, the demand and the amount of fees requested and on what basis. Having not filed the required petition, the trial court did not err in not awarding counsel fees.

Accordingly, we affirm the trial court's order granting Defendants' motion for judgment on the pleadings.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Appeal of P.S. Hysong and Sean Lewis	:	No. 48 C.D. 2014

O R D E R

AND NOW, this 4th day of December, 2014, the order of the Court of Common Pleas of Washington County dated December 5, 2013, in the above-captioned matter, is affirmed.

DAN PELLEGRINI, President Judge