NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

THIRD DIVISION
September 23, 2009

No. 1-08-3105

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MONIQUE GOSS, individually and as special administrator of the Estate of Corey Williams,	)	Appeal from the Circuit Court of Cook County, Illinois
Plaintiff-Appellant,	)	No. 08 L 000016
v.	)	Honorable James D. Egan, Judge Presiding
LARABIDA CHILDREN'S HOSPITAL & RESEARCH CENTER,	)	
Defendant-Appellee.	)	

ORDER

Plaintiff, Monique Goss, individually and as special administrator of the Estate of Corey Williams, deceased, appeals a trial court order dismissing her complaint based on the doctrine of *res judicata*. On appeal, plaintiff contends that the trial court erred in finding that exceptions to the doctrine did not apply. For the reasons that follow, we affirm the trial court's order.

I. BACKGROUND

On May 18, 2006, plaintiff filed a fourth amended complaint (*Goss I*) alleging that Corey Williams was born on December 2, 2000, with spinal muscular atrophy. On December 12, 2002, he was transferred from the University of Chicago Hospital to La Rabida Children's Hospital. La Rabida allowed Corey's tracheotomy tube to become clogged and his ventilator not to function,

causing to experience cardiac arrest on December 27 and 28, 2002. Corey suffered anoxia and brain damage and was in an increased vegetative state from the time of the incident until his death on October 5, 2005. Count I alleged Survival Act (755 ILCS 5/27-6 *et seq.* (West 2006)) damages, and count II alleged loss of consortium on behalf of Monica.

Defendant filed a motion to dismiss count II in *Goss I*. Although defendant's motion to dismiss the fourth amended complaint is not in the record, apparently plaintiff was unable to secure a physician's report causally connecting defendant's negligence with Corey's death, as required by section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 2006)). This prevented her from seeking loss of society damages in a wrongful death claim. Accordingly, defendant argued that Illinois law does not recognize a cause of action by a parent for loss of filial society arising from a nonfatal injury to a child. On July 28, 2006, the trial court dismissed with prejudice count II of *Goss I*. On January 16, 2007, plaintiff voluntarily dismissed her Survival Act claim pursuant to section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2006)). She did not appeal the dismissal with prejudice of count II.

Plaintiff refiled a single-count complaint and, later, an amended complaint, which again alleged survival damages (*Goss II*). Defendant moved to dismiss the refiled complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a) (West 2006)) on the basis that the dismissal with prejudice of plaintiff's loss of consortium claim was a final adjudication on the merits for purposes of *res judicata*; therefore, the refiled survival claim was barred. The trial court dismissed *Goss II* with prejudice, and this appeal followed.

II. ANALYSIS

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the claims. 735 ILCS 5/2-619(a) (West 2006); *Duncan v. Church of the Living God*, 278 Ill. App. 3d 588, 594 (1996). When reviewing a motion to dismiss, this court must accept all well-pled facts as true and view them in the light most favorable to the plaintiff. *Gonnella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003). We may consider all facts presented in the pleadings, affidavits, and depositions found in the record. *Gonnella Baking Co.*, 337 Ill. App. 3d at 388. We will review a trial court's determination of a section 2-619 motion to dismiss *de novo*. *Woods v. Cole*, 181 Ill. 2d 512, 516 (1988).

Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). The doctrine extends not only to what was actually decided in the original action, but also to matters that could have been decided in that suit. *Rein*, 172 Ill. 2d at 334-35. Three requirements must be met for the doctrine of *res judicata* to apply: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; (3) an identity of parties or their privies. *Rein*, 172 Ill. 2d at 335.

Plaintiff does not dispute that the three requirements apply here. First, the dismissal of plaintiff's loss of consortium count with prejudice was a final judgment on the merits. Supreme

Court Rule 273 provides that "[u]nless the order of dismissal or a statute of this State otherwise provides, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication on the merits." 134 Ill. 2d R. 273. Accordingly, the involuntary dismissal of plaintiff's loss of consortium claim in *Goss I* constituted an adjudication on the merits for *res judicata* purposes. *Rein*, 172 Ill. 2d at 335-36.

Second, there was an identity of causes of action between *Goss I* and *Goss II*. *Rein* ruled that to determine whether there is an identity of causes of action between the first and second suits, "we must look to the facts that give rise to [plaintiff's] right to relief, not simply to the facts [that] support the judgment in the first action." *Rein*, 172 Ill. 2d at 338-39. We recently noted in *Lane v. Kalcheim*, No. 1-08-2119 (August 19, 2009),[1] that our supreme court has adopted the "transactional test," under which separate claims will be considered the same cause of action for *res judicata* purposes if they arise from a single group of operative facts, regardless of whether different theories of relief are asserted. *Lane*, slip op. at 9-10, citing *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). "The transactional test allows claims to be considered part of the same cause of action 'even if there is not a substantial overlap of evidence, so long as they arise from the same transaction.' " *Lane*, slip op. at 10, quoting *River Park*, 184 Ill. 2d at 312. Because the causes of action in *Goss I* and *Goss II* arose from a single group of

---

[1] On September 15, 2009, we granted defendant's motion to cite additional authority, which cited *Lane*; *Doe v. Gleicher*, No. 1-08-2724 (August 19, 2009); and *Kiefer v. Rust-Oleum Corp.*, No. 1-08-2879 (August 24, 2009).

operative facts, namely, defendant's negligent treatment of Corey, we find that the trial court did not err in finding an identity of causes of action. See *Lane*, slip op. at 11.

Third, there was an identity of parties between *Goss I* and *Goss II*, as plaintiff and defendant remained the same for both suits. Consequently, we find that the trial court did not err in finding that *Goss II* was barred by the doctrine of *res judicata*. In *Hudson v. City of Chicago*, 228 Ill. 2d 462, 471-72 (2008), our supreme court stated that "the principle that *res judicata* prohibits a party from seeking relief on the basis of issues that could have been resolved in a previous action serves to prevent parties from splitting their claims into multiple actions."

Under the exceptions to claim-splitting set forth in section 26(1) of the Restatement (Second) of Judgments (1982), the rule against claim-splitting will not bar a second action if, *inter alia*, "the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant had acquiesced therein" or "the court in the first action expressly reserved the plaintiff's right to maintain the second action." *Hudson*, 228 Ill. 2d at 472. Plaintiff argues that because she voluntarily dismissed her Survival Act claim "without prejudice," the second exception to the rule against claim-splitting applies in this case.

Plaintiff relies on the comments to section 26(1) of the Restatement (Second) of Judgments (1982) in support of her argument. In *Hudson*, the court noted that the "comments to section 26 of the Restatement indicate that an example of a court expressly maintaining a plaintiff's right to maintain a section action may be when the court indicates that its judgment is without prejudice to the bringing of a section action." *Hudson*, 228 Ill. 2d at 473 n.2. This comment further references the comments to section 20(1)(b), "which sets forth the unremarkable

proposition that a voluntary dismissal of an *action* is typically without prejudice to the bringing of a second action." (Emphasis in original.) *Hudson*, 228 Ill. 2d at 473 n.2. However, the *Hudson* court, citing *Rein*, specifically stated that the use of "without prejudice" language "is *not* sufficient to protect a plaintiff against the bar of *res judicata* when another part of plaintiff's case has gone to final judgment in a previous action." (Emphasis in original.) *Hudson*, 228 Ill. 2d at 473 n.2.

Plaintiff further relies on sections 2-1009 and 13-217 of the Code of Civil Procedure. Section 2-1009 permits a plaintiff to voluntarily dismiss his case "at any time before trial or hearing begins, upon notice to each party who has appeared." 735 ILCS 5/2-1009 (West 2006). Section 13-217 provides as follows:

> "In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if *** the action is voluntarily dismissed by the plaintiff, *** then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, *** after the action is voluntarily dismissed by the plaintiff." 735 ILCS 5/13-217 (West 1995).[2]

---

[2] This version of section 13-217 preceded the amendments of Public Act 89-7, § 15, eff. March 9, 1995. Our supreme court found Public Act 89-7 unconstitutional in its entirety in *Best v. Taylor Machine Works*, 79 Ill. 2d 367 (1997). Therefore, the version of section 13-217 currently in effect is the version that preceded the amendments of Public Act 89-7. *Hudson*, 228

Plaintiff argues that she had an "absolute right" to refile a complaint within the remaining limitations period.

In *Rein*, the court noted that although the language of these sections appeared to support plaintiff's contention, "we do not believe that these sections should be read to automatically immunize a plaintiff against the bar of *res judicata.*" *Rein*, 172 Ill. 2d at 342.

> "If plaintiffs were permitted to proceed on their common law counts, any plaintiff could file an action with multiple counts, dismiss some but not all of the counts, obtain a final judgment on the undismissed counts, and if successful on the counts not dismissed, refile the previously dismissed counts. Such a practice would impair judicial economy and would effectively defeat the public policy underlying *res judicata*, which is to protect the defendant from harassment and the public from multiple litigation." *Rein*, 172 Ill. 2d at 343.

Hudson reaffirmed this holding when it stated that *Rein* "stands for the proposition that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense." *Hudson*, 228 Ill. 2d at 473.

Plaintiff also contends that the first exception to the rule against claim-splitting applies because defendant did not object to the voluntary dismissal in *Goss I*. However, *Rein* squarely rejected that argument, as well: "[T]he fact that defendant failed to object to plaintiffs' voluntarily dismissing the common law counts cannot be equated with defendants' acquiescing to plaintiffs'

Ill. 2d at 469 n.1.

refiling of these counts. Until plaintiffs attempted to refile the common law counts, no reason existed for defendants to object." *Rein*, 172 Ill. 2d at 342.

Finally, plaintiff argues that claim-splitting did not occur in the instant case because she, unlike the plaintiffs in *Rein*, did not appeal the involuntary dismissal of her loss of consortium claim in *Goss I*. To the contrary, *Rein* did not limit its application to such a limited situation, and cases since *Rein* have found that *res judicata* applied, even though the involuntarily dismissed claim was not appealed. See, e.g., *Hudson*, 228 Ill. 2d 462.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's order dismissing *Goss II* with prejudice.

Affirmed.

Murphy, P.J., with Steele and Coleman, JJ., concurring.