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A Final Nail in the Coffin?: The End of Dismissals Under *Hudson v. City of Chicago*

When the Illinois Supreme Court issued its decision in *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008), it was viewed as a powerful tool to seek dismissal of refiled cases when a plaintiff voluntarily dismissed a lawsuit after a substantive ruling on the merits. Over the intervening decade, Illinois courts have eroded the efficacy of the *Hudson* holding, however, and its utility may have ended altogether after the Illinois Supreme Court's recent decision in *Ward v. Decatur Memorial Hospital*, 2019 IL 123937.

Illinois Dismissal Procedure and *Hudson*

Illinois gives plaintiffs a nearly unfettered right to voluntarily dismiss their cases prior to trial under 735 ILCS 5/2-1009. Those plaintiffs can, under 735 ILCS 5/13-217, refile that same case within one year or the expiration of statute of limitations, whichever is longer. In *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 336 (1996), the Illinois Supreme Court held that the right to refile was not absolute when a plaintiff splits claims among multiple actions. The court subsequently characterized the *Rein* holding as standing 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.

The *Hudson* decision reinforced and built on the *Rein* holding. In *Hudson*, the plaintiff filed a complaint for medical malpractice against the City of Chicago premised on negligence and willful and wanton misconduct following the death of a minor. *Id*. at 464-66. The trial court dismissed the negligence count with prejudice due to statutory immunity and the plaintiff voluntarily dismissed the willful and wanton count. *Id*. at 466. The plaintiff then, within one year of the voluntary dismissal, refiled the willful and wanton count. The City successfully moved to dismiss the case based upon *res judicata*. *Id*. Relying on *Rein*, the appellate court affirmed. *Id*.

In affirming the decision of the trial and appellate court, the Illinois Supreme Court in *Hudson* held that a plaintiff cannot split claims and that the three elements of *res judicata*: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of cause of action; and (3) identity of parties or their privies, were met. *Id*. at 473-74, 478. The court found that *res judicata* applies more broadly than only to those claims actually made in the first case that was dismissed, but it also applies to "every matter that might have been raised and determined in that suit." *Id*. at 474.

The Illinois Supreme Court held that none of the exceptions to claim-splitting applied:

> (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) *the court in the first action expressly reserved the plaintiff's right to maintain the second action*; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of

> the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.

Id. at 472-74 (quoting *Rein*, 172 Ill. 2d at 341) (emphasis omitted).

Decisions Since *Hudson*

One of the first cases following *Hudson* that applied its reasoning was *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 485-86 (1st Dist. 2009), *overruled* by *Ward v. Decatur Mem. Hosp.*, 2019 IL 123937, ¶ 57. In *Kiefer*, the court upheld the dismissal of a case filed by a Canadian citizen based upon a product liability theory. *Kiefer*, 394 Ill. App. 3d. at 486. The plaintiff filed his original complaint in Cook County, but it then was transferred to Lake County based upon forum *non conveniens*. *Id.* The Lake County court dismissed the plaintiff's complaint finding that applicable law of British Columbia did not recognize the plaintiff's strict liability cause of action, but other claims remained. *Id*. at 487. After involuntary dismissal of some of the other claims, the defendants answered the plaintiff's fourth amended complaint. *Id*. at 488.

Prior to trial, the plaintiff voluntarily dismissed the remaining negligence claims "without prejudice." *Id*. The plaintiff then refiled the negligence claims in Cook County and the trial court dismissed that second case based upon *Hudson*. *Id*. at 488-89. The Illinois Appellate Court First District upheld the dismissal and found that the plaintiff had engaged in improper claim-splitting; holding that "*res judicata* [cannot] be avoided where a plaintiff has elected to split his claims by filing an amended complaint, and abandons the claims that were the subject of the dismissal order in favor of different claims based on a different theory of liability. . . . [T]his is precisely the type of claim-splitting that *Hudson* and *Rein* seek to prohibit." *Id*. at 498.

Following *Kiefer*, the Illinois Supreme Court issued its ruling in *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶¶ 3-10, which involved multiple claims arising from a business dispute. While the case was pending, one of several counts of the complaint was dismissed with leave to amend, but the plaintiffs never filed an amended complaint. *Richter*, 2016 IL 119518, ¶9. The plaintiffs later voluntarily dismissed their lawsuit without prejudice, and then refiled. *Id*. ¶¶ 10-13. The defendant successfully argued to the trial court that the case should be dismissed based upon *res judicata*. *Id*. ¶¶ 12-13.

The Illinois Appellate Court Fourth District reversed the trial court and held that *res judicata* did not bar the cause of action because the original dismissal order was not a final judgment on the merits. *Richter v. Prairie Farms Dairy, Inc.*, 2015 IL App (4th) 140613, ¶36. The supreme court agreed with the appellate court stating that "[a] dismissal order that grants leave to amend is interlocutory and not final." *Richter*, 2016 IL 119518, ¶¶ 14, 25. The court rejected the concept of an "automatic final judgment" mechanism based upon the ability of a trial court to review, modify, or vacate interlocutory orders and held "where, as in this case, the circuit court dismisses a complaint, and specifies a number of days for filing an amended complaint, the court retains jurisdiction to allow the amended complaint to be filed even after the time period has expired." *Id*. ¶ 28. The court also rejected the argument that plaintiff had split claims because the order of dismissal was not final and the voluntary dismissal is, by its terms, "without prejudice." *Id*. ¶¶ 39-40. Accordingly, the opinions in *Rein* and *Hudson* were not applicable. *Id*. ¶ 40.

Ward v. Decatur Memorial Hospital

In *Ward*, the Illinois Supreme Court was faced with a refiled medical malpractice case. *Ward*, 2019 IL 123937, ¶¶ 3-24. The plaintiff's prior complaint had nine counts, but some claims were dismissed for procedural reasons, such as lack of jurisdiction over "unknown employees" and deficiencies with a Section 2-622 report, among others. *Id*. ¶¶ 5, 9, 11. None of the dismissals were "with prejudice," and the court gave the plaintiff multiple opportunities to replead his allegations—some of which the plaintiff chose not to replead. The plaintiff ultimately was able to plead an adequate claim in the original suit and the matter proceeded. Just before trial, and after an order barring the plaintiff's rebuttal expert, the plaintiff voluntarily dismissed the case without prejudice. *Id*. ¶¶ 25-28.

Within the year allotted by Section 13-217, the plaintiff refiled the case and the trial court ultimately granted summary judgment based upon *res judicata*, relying on *Hudson* and *Rein*. *Id*. ¶¶ 38-39. The Fourth District reversed the grant of summary judgment and determined that "by granting the plaintiff permission to file an amended complaint, the trial court vacates the designation of 'with prejudice' in its dismissal of individual counts of the original complaint." *Id*. ¶ 40. The appellate court further stated, citing to *Bonhomme v. St. James*, 2012 IL 112393, and *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150 (1983), "that the involuntary dismissal of a count that plaintiff afterward abandoned in the amended complaint cannot have *res judicata* effect." *Id*. ¶ 40.

The Illinois Supreme Court granted the plaintiff's petition for leave to appeal and affirmed the judgment of the appellate court. *Id*. ¶ 42. The court began by reaffirming its holding in *Richter* that a dismissal with leave to amend is not a dismissal with prejudice because such an order "neither terminate[s] the litigation nor firmly establish[es] the parties' rights." *Id*. ¶¶ 44-49. Following that discussion, the court overruled *Kiefer*, holding that because the dismissal was with leave to amend, that decision was wrongly decided. *Id*. ¶ 57.

Instructive for the proper understanding of the decision is that the court also rejected the appellate court's count by count analysis and stated "because the trial court always granted leave to amend, the appellate court should have asked whether any order dismissing any of the complaints terminated the litigation and firmly established the parties' rights as to any cause of action." *Id*. ¶¶ 58-61. As a result, there was never any final order for the purposes of *res judicata*. *Id*. ¶ 61, 67 ("[W]e hold that none of the orders dismissing counts of the various complaints in the initial action were final. . . . The lack of finality renders the doctrine of *res judicata* inapplicable.").

Conclusion

Ward is the logical conclusion of the decision in *Richter* that a dismissal with leave to replead is not final. Unfortunately, this line of decisions erodes the prospects for finality that *Hudson* seemed to suggest. There is still an avenue to utilize *Hudson*, but it requires care and attention to detail by defense counsel.

Suppose a situation in which there is dismissal of one count in a multi-count complaint for a "failure to state a cause of action." The order does not say if the dismissal is with or without prejudice. The plaintiff does not request leave to refile that specific count, so the court therefore does not grant or deny leave to amend. Defense counsel does not request Rule 304(a) language stating the ruling is appealable, and the court does not independently include any such language in the order. The case proceeds because there are multiple other counts pending. Eventually the plaintiff voluntary dismisses the case and timely refiles.

In such a circumstance, in the absence of clarification at the time of the dismissal of the single count, it is possible that *res judicata* will not apply upon refiling and the plaintiff may be able to proceed. It may be advisable at the time of dismissal for defense counsel to ask for the dismissal to be with prejudice and confirm that there is no leave to amend the dismissed count. To be sure, these cases present a practical quandary as to what to seek in a dismissal order and what a court may be willing to grant.

Ultimately, *res judicata* issues have tortured civil procedure students and practitioners for as long as there has been civil procedure, and the current state of the case law in Illinois indicates this is likely to continue.

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