Caution: *Res judicata* may bar the refiling of a voluntarily dismissed claim

*By Timothy J. Chorvat and Sara S. Ruff*

In January of this year, the Illinois Supreme Court decided *Hudson v. City of Chicago*, No. 100466, 2008 Ill. LEXIS 12 (Ill. Jan. 25, 2008), rehearing denied April 28, 2008. *Hudson* serves as a lesson to the unwary wishing to voluntarily dismiss and refile their actions under Section 2-1009 of the Illinois Code: know the case law related to *res judicata* or you may find yourself without a remedy.

*Hudson* arose from a deeply unfortunate event. In November 1998, five-year-old George Hudson, Jr., died from acute asthma exacerbation. His mother had called 911 and informed the operator that George Jr. was having breathing problems. The fire truck dispatched in response to the 911 call was not equipped to handle George Jr.'s emergency. A life-support ambulance was not dispatched until 15 minutes after the original 911 call. Plaintiffs claimed that George Jr. died as a result of the delay. *Hudson*, 2008 Ill. LEXIS 12, at *2-3.

George’s parents initially filed a two-count wrongful death complaint against the City of Chicago: Count I alleged negligence and Count II alleged willful and wanton misconduct (*Hudson* I). Defendants moved to dismiss Count I, claiming immunity under 210 ILCS 50/3.150. The circuit court agreed and in October 1999 dismissed the negligence count with prejudice. The action continued with respect to the willful and wanton misconduct claim.

On July 25, 2002, plaintiffs voluntarily dismissed their willful and wanton misconduct claim after their attorney passed away. Plaintiffs refiled their wrongful death action on July 23, 2003, alleging only willful and wanton misconduct (*Hudson* II). Defendants moved to dismiss *Hudson* II, arguing that it was barred by *res judicata*. The circuit court agreed and dismissed the action, and the court of appeals affirmed.

The issue before the Supreme Court of Illinois was whether the involuntary dismissal of the plaintiffs’ negligence claim and the voluntary dismissal of their willful and wanton misconduct claim barred the refiling of their willful and wanton misconduct claim. Defendants argued that the dismissal of the negligence count in *Hudson I* constituted a final adjudication on the merits for purposes of *res judicata*. Defendants contended that *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 665 N.E.2d 1199 (1996), establishes that *res judicata* bars plaintiffs’ willful and wanton misconduct claim. *Hudson*, 2008 Ill. LEXIS 12 at *5.

Plaintiffs argued that the willful and wanton misconduct claim in *Hudson II* was not barred by *res judicata* because there was no final adjudication on the merits of their willful and wanton misconduct claim in *Hudson I*. Id. Plaintiffs argued that *Rein* was distinguishable and represented only a case-specific decision rejecting abusive tactics in litigation. Id. at *18.

The Illinois Supreme Court agreed with defendants and affirmed the decision of the appellate court. The Court found that *Rein* case was controlling so that plaintiffs’ willful and wanton misconduct claim was barred by *res judicata*. Id. at *5. Justice Thomas, joined by justices Freeman, Gorman, and Karmeier, wrote that, “Once the holding of *Rein* is understood, the analysis in the present case becomes an unremarkable exercise.” Id. at *16.

The circumstances and holding in *Rein* are central to the Supreme Court’s decision in *Hudson*. In *Rein*, plaintiffs filed an eight-count complaint based upon fraudulent misrepresentation, including claims for rescission and for common law fraud. *Rein*, 172 Ill.2d at 328, 665 N.E.2d at 1201. The trial court dismissed three of the rescission counts based upon the statute of limitations. Id. at 329, 665 N.E.2d at 1202. After the trial court denied plaintiffs’ request for a Rule 304(a) finding, plaintiffs voluntarily dismissed the remaining counts of their complaint in order to appeal the dismissal of the rescission counts. Id. at 330, 665 N.E.2d at 1202. After the appellate court affirmed the dismissal, plaintiffs refiled their case in *Rein II*, with a complaint that was “virtually identical” to the complaint filed in *Rein*.
The trial court dismissed plaintiffs’ complaint in its entirety based upon res judicata and statute of limitations grounds, and a divided appellate court affirmed. Id. at 332, 665 N.E.2d at 1203.

On the Rein plaintiffs’ appeal, the Illinois Supreme Court reviewed the three res judicata requirements: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. Id. at 335, 665 N.E.2d at 1204, citing Downing v. Chicago Transit Authority, 162 Ill. 2d 70, 73-74, 642 N.E.2d 456 (1994). The Court held that the rescission counts were barred by both res judicata and the statute of limitations. Rein, 172 Ill.2d at 336, 665 N.E.2d at 1205-06. The court then turned to the common law counts and determined that all three of the res judicata requirements were present. With respect to whether there had been an adjudication on the merits of the common law counts, the court held:

Although there was not an adjudication on the merits of the common law counts in Rein I, the concept of res judicata is broader than plaintiffs suggest. If the three elements necessary to invoke res judicata are present, res judicata will bar not only every matter that was actually determined in the first suit, but also every matter that might have been raised and determined in that suit. Therefore, if the three requirements of res judicata are met and the common law counts could have been determined in Rein I, plaintiffs will be barred from litigating the common law counts in Rein II.

Because the common law counts arise out of the same set of operative facts as the rescission counts, plaintiffs could have litigated and resolved these claims in Rein I. Having failed to do so, plaintiffs are barred by the doctrine of res judicata from attempting to raise and litigate them in Rein II, even though there was no adjudication on the merits of these claims in the prior suit.

Id. at 337-39, 665 N.E.2d at 1205-1206 (internal citations omitted).

The Rein court stressed the policy against claim-splitting, explaining that res judicata prohibits a party from seeking relief based upon issues that could have been resolved in a previous action in order to prevent parties from splitting their claims into multiple actions. Id. at 339-42, 665 N.E.2d at 1206-1208. The court reviewed each of the claim-splitting exceptions listed in Section 26(1) of the Restatement 2d of Judgments (1982) (parties agree to let plaintiff split his claim; case involves a recurrent wrong, etc.) and found that none of them applied. Id. at 341, 665 N.E.2d at 1207.

The court then addressed plaintiffs’ claim that Sections 2-1009 and 13-217 of the Illinois Code of Civil Procedure gave them an absolute right to refile the voluntarily dismissed counts within one year or within the remaining period of limitations. Id. at 342-43, 665 N.E.2d at 1208. Although the court acknowledged plaintiffs’ rights under those sections, it held that these “legislatively created rights” did not “automatically immunize” plaintiffs against the res judicata defense. Id. at 342-43, 665 N.E.2d at 1208.

Finally, the court provided two policy justifications for following Rein and applying res judicata principles in Hudson. First, the Rein rule prevents a party from filing an action with multiple claims, dismissing some claims, obtaining a final judgment on the remaining claims and, if unsuccessful on the counts not dismissed, refile all previously dismissed claims. Second, the rule prevents plaintiffs from using voluntary dismissals to circumvent the trial court’s refusal of a Rule 304(a) certification (which is exactly what had happened in Rein). Id. at 343, 665 N.E.2d at 1208.

The Hudson court summarized Rein’s holding as: “[A] plaintiff who splits his claims by voluntarily dismissing and refileing 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, 2008 Ill. LEXIS 12 at *16. The Hudson court then applied the reasoning of Rein and reached the same result: res judicata barred plaintiffs from refileing their willful and wanton misconduct claim. Id. at *16-28. In an amicus brief, the Illinois Trial Lawyers Association (ITLA) argued against the application of the Rein case in Hudson. ITLA argued that Rein was right for the wrong reason; namely, that Rein was intended only to prevent attorneys from using voluntary dismissals to avoid the trial court’s denial of a Rule 304(a) motion. Id. at *28-29. ITLA further argued that interpreting Rein in that limited fashion would accord with separation of powers principles and would preserve the right to refile provided by the legislature in Section 2-1009. Id. at *28.

Addressing the ITLA arguments, the Supreme Court held that Rein was not intended to address only the Rule 304(a) problem. The Court concluded that limiting Rein would fail to address the problem of the plaintiff who files multiple claims, dismisses some, and then refiles them after he is unsuccessful on his original claims. Id. at *29-30. Further, the court held that Rein recognizes the right to refile under 2-1009 but simply holds that any refiling is subject to the defense of res judicata.

Id. at *30-31.

Justice Kilbride dissented strongly in Hudson, joined by Justice Fitzgerald. In Justice Kilbride’s view, neither res judicata nor the rule against claim-splitting bars a plaintiff from refileing a claim if the previous dismissal was without prejudice. Id. at 34. Justice Kilbride concluded that Rein should be limited or overruled because it has proven unworkable and because the decision was based upon public policy concerns rather than sound legal principles. Id. at 35. “Once the faulty underpinnings of Rein are understood, the foundation of Rein’s rationale crumbles.” Id.

Justice Kilbride contended that Rein’s first error was in misinterpreting Illinois Supreme Court Rule 273, which states that, under certain circumstances, an involuntary dismissal “operates as an adjudication upon the merits.” Justice Kilbride stated that an adjudication upon the merits is not necessarily a “final” judgment on the merits which is required before res judicata will apply. Id. at *36. He concluded that the involuntary dismissal of the rescission counts in Rein I was unquestionably an adjudication on the merits, but it was not a “final” judgment as required by Rule 273. Id. at 37-38.

Justice Kilbride also wrote that, because the voluntary dismissal was not a final, appealable order, the court in Rein I had no jurisdiction to hear the initial appeal. Id. at 39-43. He contended that the court should clarify that a plaintiff’s voluntary dismissal is not
a jurisdictional basis for appeal. Id. at 45. He went on to conclude, “I would not, therefore, rely on Rein’s res judicata analysis since the appeal in Rein I was improper.” Id. at 49. Finally, Justice Kilbride believed that “res judicata is simply inapplicable to voluntarily dismissed claims.” Id. at 50.2

The main lesson to be learned from Hudson is that Rein’s strict res judicata ruling applies even when a plaintiff’s voluntary dismissal is not undertaken to circumvent a court’s ruling on a 304(a) certification. “An attorney’s subjective motivation in taking a voluntary dismissal is not part of the res judicata analysis.” Hudson, 2008 Ill. LEXIS 12 at *24. That Rein was reaffirmed in the face of Justice Kilbride’s dissent and in light of the sympathetic facts of Hudson indicates that the strict res judicata rule is here to stay. As always, attorneys must be vigilant: before you voluntarily dismiss any action, it is critical to verify that res judicata will not prevent you from refiling.

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2. Justice Kilbride also filed a dissent upon Denial of Rehearing which was added to the Hudson opinion on April 23, 2008. In that dissent Justice Kilbride again reiterated his view that Hudson was incorrectly decided because of its reliance upon Rein. See Hudson opinion including Dissent Upon Denial of Rehearing, available at <http://www.state.il.us/court/Opinions/SupremeCourt/2008/January/100466.pdf>.