2022 IL App (5th) 200331-U

NO. 5-20-0331

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RANDY HINDMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 16-L-255
	)	
MAQBOOL AHMAD,	)	Honorable
	)	Jeffrey A. Goffinet,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Boie and Justice Wharton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly found that the transactional test did not preclude the plaintiff from bringing his personal claim for medical negligence relating to injuries he sustained following medical treatment performed by the defendant after he participated in *qui tam* litigation based on the defendant allegedly submitting fraudulent medical claims to the government for payment.

¶ 2 This cause comes before this court as an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017). On January 15, 2010, the plaintiff, Randy Hindman, originally filed a complaint (Hindman I) against the defendant, Dr. Maqbool Ahmad, based on medical negligence and violations of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2008)).

Thereafter, the trial court involuntarily dismissed with prejudice the allegations concerning the Consumer Fraud Act, and the plaintiff voluntarily dismissed, without prejudice, the remaining medical negligence allegations. On March 21, 2014, the plaintiff, along with others, filed a multicount *qui tam* action (Hindman Federal) against the defendant in federal court but then later voluntarily dismissed that action without prejudice.

¶ 3 On December 15, 2016, the plaintiff refiled his medical negligence allegations (Hindman II) against the defendant in the state trial court. On September 6, 2017, the court dismissed the action based on *res judicata*. However, this dismissal was reversed by this court on September 13, 2018, and the matter was remanded to the trial court to consider the defendant's alternative argument that the plaintiff's complaint should be dismissed based on the one refiling rule set out in section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2016)).[1] See *Hindman v. Ahmad*, 2018 IL App (5th) 170391-U. On remand, the trial court considered the defendant's alternative argument, and denied his motion to dismiss on that basis, finding that the transactional test did not require dismissal for violating the one refiling rule. The court also certified the following question for permissive interlocutory review: "Did the trial court err in declining to grant Defendant's Motion to Dismiss based on a violation of the 'single refiling rule?' "

[1]Although section 13-217 of the Code was amended effective March 1995, the public act that made that amendment was later held to be unconstitutional in its entirety by the Illinois Supreme Court in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 378 (1997). Therefore, the version that is currently in effect is the same version that was in effect prior to the March 1995 amendment. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (2008).

¶ 4 After this court initially denied the defendant's petition for leave to appeal pursuant to Rule 308, the defendant filed a subsequent petition for leave to appeal with the Illinois Supreme Court. The supreme court denied the defendant's petition but entered a supervisory order instructing this court to vacate its denial of the petition for leave to appeal, allow the application for leave to appeal, and address the certified question. Accordingly, we now issue this order answering the certified question in the negative and affirming the trial court's denial of the defendant's motion to dismiss.

¶ 5 I. BACKGROUND

¶ 6 A. Hindman I

¶ 7 The defendant is an ophthalmologist, who provided treatment to the plaintiff from January to June 2008 through Marion Eye Center in Williamson County. On January 15, 2010, the plaintiff filed his original two-count complaint against the defendant. Count I sought recovery for medical negligence which allegedly occurred during the course of that medical treatment. Specifically, the plaintiff asserted that the defendant improperly diagnosed him with proliferative diabetic retinopathy (PDR) and clinically significant macular edema (CSME) in both eyes and failed to diagnose him with a retinal detachment of the right eye. From January through June 2008, the defendant performed several laser eye surgeries and intravitreal Kenalog injections that the plaintiff claimed were medically unnecessary. As a result of the alleged unnecessary surgeries, and the delay in treatment for the retinal detachment, the plaintiff suffered significant permanent vision loss in his right eye, retinal damage, optic nerve damage, and extraocular muscle damage. Count II of the plaintiff's complaint sought recovery for violations of the Consumer Fraud Act based

on deceptive advertising in connection with two cataract surgeries performed on December 27, 2007, and January 3, 2008, prior to the PDR and CSME diagnoses. In that count, the plaintiff asserted that the defendant falsely marketed the procedures as requiring "no shot, no stitch, no patch," which involved the use of topical anesthesia instead of anesthesia requiring a shot, resulting in less or no pain and decreased recovery time. Although the defendant agreed to perform the advertised procedure because the plaintiff was diabetic and sensitive to pain, during both cataract procedures, the plaintiff was given a series of anesthesia shots and was required to wear eye patches following the surgeries. Consequently, the plaintiff was injured and experienced pain and suffering from the surgeries.

¶ 8 On November 16, 2011, the trial court entered an order dismissing, with prejudice, the statutory consumer fraud allegations, concluding that the Consumer Fraud Act did not apply to actions grounded in medical negligence. The plaintiff did not appeal this ruling. On May 31, 2016, the plaintiff voluntarily dismissed the remaining medical negligence allegations, without prejudice.

¶ 9 B. Hindman Federal

¶ 10 While Hindman I was pending, on March 21, 2014, the plaintiff, along with two other patients, participated as a relator in a multicount *qui tam* action filed in the United States District Court for the Southern District of Illinois against the defendant and Marion Eye Center, Ltd. pursuant to federal statute under the False Claims Act (31 U.S.C. § 3729 *et seq.* (2012)) and the Illinois False Claims Act (740 ILCS 175/1 *et seq.* (West 2012)). *Qui tam* actions are derivative actions brought by a taxpayer on behalf of a governmental

unit to enforce a cause of action belonging to that governmental unit. *State ex rel. Hurst v. Fanatics, Inc.*, 2021 IL App (1st) 192159, ¶ 7; *United States ex rel. Charte v. American Tutor, Inc.*, 934 F.3d 346, 351 (3d Cir. 2019). The federal False Claims Act permits private persons to file a *qui tam* action against, and recover damages on behalf of, the United States from any person who, *inter alia*, knowingly presents, or causes to be presented, to an employee of the United States Government, a false or fraudulent claim for payment or approval. 31 U.S.C. §§ 3729(a)(1)(A), 3730(b) (2012); *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1307 (11th Cir. 2002). Similarly, the Illinois False Claims Act imposes civil liability upon any person who knowingly presents, or causes to be presented, to a State employee, a false or fraudulent claim for payment or approval. 740 ILCS 175/3(a)(1) (West 2012); *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 504 (2005). The Illinois False Claims Act also contains an enforcement provision allowing a claim to be raised on the State's behalf by a private person in a *qui tam* action. 740 ILCS 175/4(b)(1) (West 2012); *Scachitti*, 215 Ill. 2d at 505.

¶ 11 The Illinois False Claims Act mirrors the federal False Claims Act. *People ex rel. Lindblom v. Sears Brands, LLC*, 2019 IL App (1st) 180588, ¶ 29. Once a relator files a civil false claims action, the government has 60 days, plus reasonable extensions, to decide whether to participate. 31 U.S.C. § 3730(b)(2) (2012); 740 ILCS 175/4(b)(2) (West 2012). If the government intervenes in the action, it has the primary responsibility for prosecuting the action, and it is not bound by any act of the private person. 31 U.S.C. § 3730(c)(1) (2012); 740 ILCS 175/4(c)(1) (West 2012). If the government elects not to intervene, the

relator plaintiffs may continue to pursue the action on their own behalf and on behalf of the government. *Lindblom*, 2019 IL App (1st) 180588, ¶ 16.

¶ 12 Regardless of whether the government elects to participate in the action, the relator is a party to the *qui tam* suit and is awarded a percentage of the proceeds or settlement if the action results in a recovery. *Id.* ¶ 11. Where the government proceeds with the action, the private person receives at least 15% but not more than 25% of the proceeds of the action or settlement of the claim, depending on the extent that the person substantially contributed to the prosecution of the action. 31 U.S.C. § 3730(d)(1) (2012); 740 ILCS 175/4(d)(1) (West 2012). Where the government declines to intervene, as the government did in Hindman Federal, the private person receives an amount that the trial court decides is reasonable for civil penalty and damages. 31 U.S.C. § 3730(d)(2) (2012); 740 ILCS 175/4(d)(2) (West 2012). The amount will not be less than 25% and not more than 30% of the proceeds of the action or settlement. 31 U.S.C. § 3730(d)(2) (2012); 740 ILCS 175/4(d)(2) (West 2012). Relators can also recover costs associated with bringing the action, including attorney fees. 31 U.S.C. § 3730(d)(2) (2012); 740 ILCS 175/4(d)(2) (West 2012).

¶ 13 Here, in Hindman Federal, the plaintiff, along with two other relators, alleged that the defendant knowingly submitted false claims to Medicare and Illinois Medicaid during the period of March 24, 2004, to June 2014 to induce the government to make payments to him to which he was not entitled. The complaint contained the following allegations: the defendant was a participating provider with both Medicare and Medicaid during the relevant time period; to be a participating provider, he agreed to follow all applicable rules

and regulations and to not knowingly submit false or fraudulent claims for payment; from at least March 24, 2014, to June 2014, when submitting claims for payment, he certified that the medical services and consultations were medically necessary; since at least March 24, 2004, he performed medically unnecessary procedures and consultations with the purpose of receiving payments from Medicare and Medicaid; during that time period, he falsified medical records to provide support for those services and submitted false claims in violation of the applicable rules and regulations and his certification that he was entitled to payment for submitted services; and, as a result of his submission of false claims, he received monies from Medicaid and Medicare to which he was not entitled. On June 17, 2015, while Hindman I was pending, the plaintiff and the other relators voluntarily dismissed Hindman Federal without prejudice.

¶ 14 C. Hindman II

¶ 15 On December 15, 2016, nearly 18 months after voluntarily dismissing Hindman Federal, the plaintiff filed the three-count complaint against the defendant that is the subject of this appeal. In the complaint, the plaintiff made similar allegations concerning Consumer Fraud Act violations and of medical negligence as those raised in Hindman I. Specifically, the plaintiff alleges that the defendant performed medically unnecessary laser surgeries on January 18, 2008, February 15, 2008, March 31, 2008, May 23, 2008, and June 13, 2008; from January 2008 to June 2008, the defendant wrongfully diagnosed him with PDR and CSME; and in June 2008, the defendant failed to diagnose him with retinal detachment. Thereafter, the defendant filed a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)), contending that (1) *res judicata* barred the

claims raised in Hindman II based on the trial court's November 16, 2011, dismissal of the Consumer Fraud Act claim in Hindman I, and (2) the voluntary dismissal of Hindman Federal barred Hindman II under the one refiling rule contained in section 13-217 of the Code (*id*. § 13-217).

¶ 16 On September 6, 2017, the trial court granted the defendant's motion to dismiss the plaintiff's complaint based on *res judicata* but did not address the defendant's alternative section 13-217 argument. In making this decision, the court found that there was an identity of cause of action because the Hindman I and Hindman II complaints were nearly identical and referenced the same medical care, the same medical treatment, and involved the same parties over the same time frame. The court also noted that the injury claimed in the Consumer Fraud Act count was virtually identical to the medical negligence count. Because the court found the *res judicata* argument dispositive, it did not address the defendant's one refiling argument.

¶ 17 On September 13, 2018, this court reversed the trial court's dismissal of Hindman II, concluding that the dismissal of the Consumer Fraud Act claim in Hindman I did not bar the medical negligence claims in Hindman II because the claims did not arise from the same set of operative facts. *Hindman*, 2018 IL App (5th) 170391-U. Specifically, this court found that the evidence presented at trial to prove the two claims would be different. This court also found that the time periods between the two claims were distinct. The Consumer Fraud Act claim arose from advertisements leading up to the December 27, 2007, cataract surgery and concluded at the time of the December surgery, while the medical malpractice claim did not arise until after the defendant allegedly misdiagnosed

the plaintiff with PDR in January 2008. This court also distinguished the injuries, *i.e.*, pain and suffering associated with the Consumer Fraud Act claim and retinal detachment and vision loss claimed in the medical negligence claim. This court did not address the defendant's section 13-217 argument and remanded the case to the trial court for consideration of that issue.

¶ 18 Upon remand, on June 12, 2020, the trial court denied the defendant's motion to dismiss on the basis of the one refiling rule, finding that the application of the *res judicata* transactional test adopted by the Illinois Supreme Court in *First Midwest Bank v. Cobo*, 2018 IL 123038, and applied to section 13-217 issues, indicated that the medical negligence allegations of Hindman II were not related to the false claims allegations of Hindman Federal in either operative fact, time frame, or proof. The court found that the operative fact in Hindman Federal was the filing of a false payment request which involved a different time frame and substantially different proof. Thereafter, the court entered an order pursuant to Rule 308, certifying the following question for appellate consideration: "Did the trial court err in declining to grant Defendant's Motion to Dismiss based on a violation of the 'single refiling rule?' "

¶ 19 II. ANALYSIS

¶ 20 On appeal, the defendant contends that the trial court erred in denying his motion to dismiss Hindman II where Hindman Federal and Hindman II constituted the same cause of action under the transactional test. Specifically, he argues that, regardless of the fact that the two cases involved different legal theories, the federal *qui tam* claim and the medical negligence claims arose from the same seven-month course of medical treatment, the same

alleged misdiagnoses, and the same allegedly unnecessary medical procedures. In response, the plaintiff agrees that Hindman Federal and Hindman II have some facts concerning his medical treatment in common but argues that they differ in their operative facts, in the time frames involved, and in the proof required to prove the respective claims. The plaintiff also contends that *qui tam* litigation has some procedural differences, and, consequently, the two claims do not form a convenient trial unit.

¶ 21 The scope of review for an interlocutory appeal brought under Rule 308 is limited to the certified questions. *Wisnasky v. CSX Transportation, Inc.*, 2020 IL App (5th) 170418, ¶ 21. When, as here, the trial court has not heard testimony, our standard of review for a permissive interlocutory appeal of a certified question is *de novo*. *Board of Trustees of the Rend Lake Conservancy District v. City of Sesser*, 2011 IL App (5th) 110110, ¶ 10. Also, this court's review of a dismissal under section 2-619 is *de novo*. *Wisnasky*, 2020 IL App (5th) 170418, ¶ 23.

¶ 22 Section 2-1009(a) of the Code allows a plaintiff to dismiss his action without prejudice at any time before a trial or hearing begins. 735 ILCS 5/2-1009(a) (West 2016). Section 13-217, which is known as the single refiling rule, grants a plaintiff the right to refile his complaint within one year after a voluntary dismissal, or within the remaining period of limitations, whichever is greater. *First Midwest Bank*, 2018 IL 123038, ¶ 17. "The purpose of section 13-217 is to facilitate the disposition of cases on the merits and to avoid its frustration upon grounds unrelated to the merits." *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 20. However, section 13-217 was not intended to permit multiple refilings of the same cause of action. *Id.* Our supreme court has interpreted

this provision to allow one, and only one, refiling of a claim. *Id*. A plaintiff who voluntarily dismisses a suit may commence only one refiling of the action regardless of whether it be in state or federal court. See *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 164 (1997) (the federal filing counted as the one permitted refiling of a claim).

¶ 23 After the plaintiff voluntarily dismissed both Hindman I and Hindman Federal, without prejudice, he filed Hindman II. As section 13-217 expressly permits one, and only one, refiling of a claim, the issue here is whether the *qui tam* action filed under the federal and Illinois False Claims Acts in Hindman Federal is considered the same cause of action as the medical negligence claims in Hindman II.

¶ 24 "For the purposes of section 13-217, a complaint is considered to be a refiling of a previously filed complaint if it constitutes the same cause of action under the principles of *res judicata*." *Wells Fargo Bank, N.A.*, 2017 IL App (3d) 150764, ¶ 21. However, this determination does not depend on how plaintiff labels the complaint. *First Midwest Bank*, 2018 IL 123038, ¶ 18. Illinois courts apply the same transactional test that is used for determining *res judicata*. *Id.* Under the transactional test, separate claims are considered the same cause of action if both claims arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Id*. ¶ 19; *Wells Fargo Bank, N.A.*, 2017 IL App (3d) 150764, ¶ 21. In adopting the transactional test, our supreme court has instructed that courts should approach this inquiry pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. *First Midwest Bank*, 2018 IL

123038, ¶ 19. Separate claims can also be considered the same cause of action where a federal complaint realleges state claims raised in an earlier state action but also include additional federal claims that were not premised on the same operative facts as the claims raised in the state action. See *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 221 (1997).

¶ 25 Here, we have found no Illinois court decisions addressing the specific issue of whether a *qui tam* claim can be considered the same cause of action as a personal claim for *res judicata* purposes. However, like the trial court, we will look to federal court precedent for guidance on resolving this issue. In applying the transactional test and determining that the filing of Hindman II did not violate the one refiling rule, the trial court considered *United States ex rel. Laird v. Lockheed Martin Engineering & Science Services Co.*, 336 F.3d 346 (5th Cir. 2003);[2] *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009); and *Cole v. Board of Trustees of the University of Illinois*, 497 F.3d 770 (7th Cir. 2007), all federal cases involving *res judicata* issues raised in *qui tam* actions. The conclusions reached in these federal cases depended on the particular allegations of the asserted claims.

¶ 26 In *Laird*, the United States Court of Appeals for the Fifth Circuit found that *res judicata* did not preclude a federal *qui tam* action brought by a relator who had previously pursued an unsuccessful state court claim for wrongful discharge in an at-will employment state. *Laird*, 336 F.3d at 359-60. Although the court acknowledged that there

[2]*Laird* was overruled by *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), on the issue of the definition of "information" for purposes of the public disclosure/original source jurisdictional bar for *qui tam* actions based on the federal False Claims Act. However, the court's application of the transactional test on the *res judicata* issue remains in effect.

was factual overlap between the state law claim and the *qui tam* action, it found that the wrongful termination claim brought by the employee in his individual capacity in the first action, and the federal False Claims Act claims subsequently brought by him in his capacity as a relator on behalf of the United States, would not form a convenient trial unit for purposes of claim preclusion under Texas law.[3] *Id*. at 359.

¶ 27 In making this decision, the Court of Appeals noted that the subject matter of the two suits differed. *Id.* The state court suit revolved around the central question of whether a certain exception to Texas's doctrine of at-will employment should be extended to the employee's situation. *Id*. In contrast, the *qui tam* action involved the origin, formation, and terms of a contract entered into between the employer and the government, and whether the employer intended to submit false or fraudulent reports to the government in violation of that contract. *Id*. The court found that the evidence regarding the employer's intent to defraud the government would not have been helpful to the state tort action. *Id*. The court also found that the remedies sought and the measure of recovery for the employee were completely different. *Id*. In the state tort action, the employee sought general damages, lost wages, mental anguish, and exemplary damages, all in his personal capacity, while in the *qui tam* action, the employee, as a relator, sought set statutory penalties under the

[3]Although this case was based on Texas law, the Texas state law on the transactional test is virtually identical to Illinois state law. Like the Illinois Supreme Court, Texas state courts follow the modern transactional test set forth in the Restatement (Second) of Judgments, under which the critical issue in determining whether the two actions arise out of the same subject matter is whether they are based on the same nucleus of operative fact, and the factors to be considered are whether the alleged facts are related in time, space, origin, or motivation; whether the causes of action form a convenient trial unit; and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage. *Laird*, 336 F.3d at 359.

federal False Claims Act and prejudgment and postjudgment interest. *Id*. Evidence relating to the employee's job performance record, qualifications, future earning capacity, and personal damages had absolutely nothing to do with the proof necessary for the false claims or for the damages sought. *Id*. The court also noted that in *qui tam* actions, the largest portion of any recovery (at least 70%) went to the government, not the employee. *Id*. Finally, the court found that the employee's motivation in bringing his wrongful discharge suit was different from his motivation for bringing a *qui tam* suit. *Id*. at 359-60. In the wrongful termination suit, the employee wished to be compensated or made whole following what he saw was a wrongful discharge that was personal. *Id*. at 360. In the *qui tam* action, he sued to recover from his employer on behalf of the government and in the name of the government for alleged fraud based on the employer's false submissions. *Id*. Thus, the court stated as follows:

> "[W]e do not see convenience in trying the two cases together, especially given the procedural requirements related to filing a *qui tam* case under seal in order to give the government an opportunity to intervene, 31 U.S.C. § 3730(b)(1), and the likely continued involvement of the government in the *qui tam* suit." *Id*.

Thus, the court found that the federal False Claims Act action and the state tort claim could not be naturally grouped. *Id.*

¶ 28 Conversely, in *Cole*, the United States Court of Appeals for the Seventh Circuit found that the settlement of a civil rights action for employment discrimination precluded the subsequently filed *qui tam* False Claims Act action because they arose from the same operative facts. *Cole*, 497 F.3d at 775. There, the court found that both complaints alleged the same series of events, *i.e.*, defendant pharmacy submitted false claims to obtain

payment from both the federal and state governments, and plaintiff suffered discrimination and retaliatory actions after complaining about these practices. *Id.* at 774.

¶ 29 However, after *Cole*, the United States Court of Appeals for the Seventh Circuit in *Lusby* determined that a *qui tam* action was not precluded by the resolution of personal employment litigation when those claims did not make a convenient trial unit. *Lusby*, 570 F.3d at 852. In making this decision, the court first noted that, although the government was not a party to a *qui tam* action unless it intervened, it was nonetheless a real party in interest in that its financial interests were at stake. *Id.* Thus, the court found that it would be "inappropriate to snuff out that federal interest just because a potential relator thoughtlessly omitted a *qui tam* claim from a personal suit." *Id.*

¶ 30 Second, the *Lusby* court found that *qui tam* litigation was "subject to requirements that ma[d]e combining it with a personal damages suit awkward." *Id.* Specifically, the court noted that *qui tam* proceedings begin *in camera* and are not served on defendant until the government decides whether to intervene while a personal suit filed in federal court must be served on defendant within 120 days. *Id.* Also, if the government decides to intervene, it could settle or dismiss the action notwithstanding the relator's objection. *Id.* Regardless of whether the government intervened, the relator could not dismiss the suit without the permission of the government and the court. *Id.* Thus, the court noted that the *qui tam* procedural differences reflected a need to protect the government's interests. *Id.* In contrast, in a personal employment suit, the aggrieved employee is in charge and may pursue, settle, or dismiss the litigation, and plaintiff's errors affect only himself. *Id.* The

aggrieved employee could represent himself in the personal litigation, but a relator in a *qui tam* action could proceed only through counsel. *Id*.

¶ 31 In summation, the *Lusby* court stated as follows:

> "The procedural differences between personal and *qui tam* litigation are so great that it is often impractical to pursue both claims in one suit—and sometimes impossible, as when the United States takes more than 120 days to decide whether to intervene, or the plaintiff wants to proceed *pro se*. As the fifth circuit put it in *Laird*, 336 F.3d at 360, 'we do not see convenience in trying the two [claims] together'. If joined in a single complaint, they often should be severed under Fed.R.Civ.P. 20(b). And a conclusion that the personal and representative actions ought to be conducted separately means that a voluntary decision to file separate suits, as Lusby did, should be respected. Claim preclusion is, after all, a doctrine that has the effect of compelling joinder. A conclusion that joinder usually is not sensible implies a lack of preclusion with respect to claims omitted from the first suit." (Emphasis omitted.) *Id.* at 852-53.

Regarding the *Cole* decision, the court stated as follows:

> "This conclusion does not technically overrule *Cole*, which considered only whether a personal and a *qui tam* claim arise from the same transaction. But as a practical matter our decision means that the outcome of a private employment suit never precludes a *qui tam* action (or a False Claims Act suit directly by the United States)." *Id.* at 853.

¶ 32 Subsequently, in *Shurick v. Boeing Co.*, the United States Court of Appeals for the Eleventh Circuit determined that the dismissal of a *qui tam* claim precluded a personal state law whistleblower claim for retaliatory discharge where the retaliatory discharge claim arose directly from the submission of the false claims to the government. *Shurick v. Boeing Co.*, 623 F.3d 1114, 1116-18 (11th Cir. 2010). There, the court noted that, although the whistleblower claim arose under Florida law instead of the federal False Claims Act, the differences between the two claims were merely cosmetic. *Id*. at 1117. The court found

that the two lawsuits shared precisely the same common nucleus of operative fact in that the employee discovered the illegal conduct and that discovery led to his discharge. *Id.*

¶ 33 Here, we first acknowledge that the complaints filed in Hindman Federal and Hindman II recite some of the same facts relating to the plaintiff's medical treatment. However, following the reasoning of *Laird* and *Lusby*, we find that the operative facts of the *qui tam* action where the plaintiff participated as a relator and those of his personal medical negligence action are not related in time, space, origin, or motivation and would not form a convenient trial unit.

¶ 34 First, the operative facts are not related in time, space, or origin. To state a cause of action under either the federal False Claims Act or the Illinois False Claims Act, a plaintiff must state facts showing defendant (1) made a claim, (2) to the government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the government. *Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001), *abrogated on other grounds by Universal Health Services, Inc. v. United States*, 579 U.S. 176 (2016). The submission of the claim is the "*sine qua non* of a False Claims Act violation." *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002). In contrast, to prevail on a medical negligence claim, plaintiff must establish: (1) the standard of care against which the medical professional's conduct is to be measured, (2) a negligent failure by the medical professional to comply with that standard of care, and (3) that the medical professional's negligent conduct proximately caused plaintiff's injuries. *Gulino v. Zurawski*, 2015 IL App (1st) 131587, ¶ 60.

¶ 35 The operative facts for Hindman Federal revolved around the defendant's submission of false claims in violation of federal and state law and his agreements to follow applicable rules and regulations while participating as a provider for Medicaid and Medicare. In contrast, the operative facts for Hindman II involve the ultimate question of whether the defendant acted negligently in his medical treatment of the plaintiff and, if so, whether the plaintiff sustained personal injury as a result of that negligent medical treatment. The evidence needed to prove the submission of the false claims to the government is different than the proof needed for the medical negligence allegations. To prove the claim in Hindman Federal, it would need to be shown that the defendant submitted false claims to the government by his certification of those claims in compliance with applicable rules and regulations and that he knowingly submitted those false claims. In contrast, to prove the medical negligence allegations, the plaintiff would have to show that the defendant owed him a duty of care in performing the medical treatment, the defendant negligently failed to comply with that standard of care, and the plaintiff suffered damages that were proximately caused by the defendant's negligent conduct. The underlying damages sustained by the plaintiff as a result of medical treatment provided by the defendant would be irrelevant in the *qui tam* action.

¶ 36 Also, the time frame at issue in Hindman Federal goes beyond the limited time frame at issue in Hindman II. The plaintiff in Hindman II complains of negligent medical care by the defendant from January 2008 until June 2008. In Hindman Federal, the plaintiff's allegations concerning the submission of false claims involved the following

time period: March 24, 2004, until June 2014, which was six years after the end of the Hindman II time period.

¶ 37 Second, the underlying motivation for pursuing Hindman Federal and Hindman II is different. In Hindman II, the plaintiff sought damages, on his behalf, for the alleged personal injuries that he suffered as a result of the defendant's medical negligence. His motivation for bringing the suit was a desire to be compensated or made whole for his personal injuries. In contrast, in his capacity as a *qui tam* relator in Hindman Federal, he sought, on behalf of the government, to recover damages sustained by the government as a result of its having paid out monies based on allegedly false claims. The plaintiff, by participating in the suit, was performing a public function in that he sought to expose the defendant's alleged fraud to the government, so the government could recoup the funds fraudulently obtained. Any recovery that is obtained in Hindman Federal comes from monies that the government paid out on any fraudulent claims. Thus, regardless of whether the government chose to intervene, the financial interests at stake in Hindman Federal were the government's interests, and those interests would be represented by the plaintiff. Also, even though the plaintiff could have recovered some award for participating in the suit, the government receives the largest portion of any recovery (at least 70%). The award to the relator "is simply the fee he receives out of the United States' recovery for filing and/or prosecuting a successful action on behalf of the Government." (Emphasis and internal quotation marks omitted.) *Scachitti*, 215 Ill. 2d at 507.

¶ 38 Lastly, the personal injury claims of the relator and *qui tam* litigation are subject to several procedural differences; differences that reflect a need to protect the government's

interests in the *qui tam* litigation. For example, as noted in *Lusby*, a *qui tam* proceeding begins *in camera* and is not served on defendant until the government has decided whether to intervene. If the government decides to intervene in the *qui tam* action, it may settle or dismiss the action over any objections made by the relator. Even if the government chooses not to intervene, the relator cannot dismiss the suit without the permission of the government and the court. Therefore, like *Lusby*, we find that the procedural differences between the personal and the *qui tam* litigations are so great that it is impractical to pursue both claims in one suit. Thus, they do not make a convenient trial unit. In making this decision, we acknowledge the defendant's argument that this case is distinguishable from *Laird* and *Lusby* because the need to protect the United States government's interests is not a concern here since the government is not involved in Hindman II. However, we note, regardless of whether the *qui tam* action was the first filing, like here, or is the cause of action being precluded, like in *Laird* and *Lusby*, the application of the one refiling rule and the transactional test remains the same. Accordingly, based on the above reasoning and after considering the federal precedent, we conclude that the trial court properly found that the transactional test did not preclude the plaintiff from filing a personal claims action against the defendant after pursuing a separate federal *qui tam* action where the two actions did not involve the same set of operative facts.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we answer the trial court's certified question in the negative and affirm its denial of the defendant's motion to dismiss the plaintiff's medical negligence claims.

¶ 41 Certified question answered; judgment affirmed.