No. 123937

IN THE SUPREME COURT OF ILLINOIS

GERALD E. WARD, Individually and as Administrator of the Estate of Clarence R. Ward, Deceased,	) Appeal from the Appellate Court) Illinois, Fourth Judicial District,) No. 4-17-0573
Plaintiff-Appellee,	)
vs.	) There on Appeal from the Circuit) Court of the Sixth Judicial Circuit,) Macon County, Illinois
DECATUR MEMORIAL HOSPITAL, an Illinois not for profit corporation,	) The Honorable Thomas E. Little) Judge Presiding
Defendant-Appellant.	)

REPLY BRIEF OF DEFENDANT-APPELLANT, DECATUR MEMORIAL HOSPITAL, AN ILLINOIS NOT FOR PROFIT CORPORATION

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POINTS AND AUTHORITIES

ARGUMENT

A. Preliminary Matters.

In response to the initial Brief of the Defendant-Appellant, Decatur Memorial Hospital, an Illinois not for profit corporation (the "Hospital"), the Plaintiff-Appellant, Gerald E. Ward, Individually and as Administrator of the Estate of Clarence R. Ward, Deceased ("Ward"), advanced matters that one might deem irreverent when appearing before the Supreme Court of the State of Illinois. Ward voiced accusations directed against an associate circuit court judge nowhere previously mentioned by Ward in appellate proceedings before the Appellate Court of Illinois for the Fourth Judicial District in the case *sub judice,* though raised initially in Ward's responsive brief filed before the Supreme Court of Illinois.

As described in the Hospital's initial brief, filed before the Supreme Court of Illinois on December 31, 2018, Ward first commenced civil litigation against the Hospital (and other named defendants) in proceedings before the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois (the "Circuit Court") filed on December 17, 2009 and assigned Cause No. 2009-L-209 ("*Ward I*") (see A.218)[1]. Ward's initial complaint consisted of nine counts including a survival action count and a wrongful death count directed against the Hospital (*i.e.,* two counts), a family expense claim against the Hospital (one count), a survival action count against a non-entity (one count), a wrongful

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[1] As noted in the Hospital's initial brief, the record on appeal includes one common law volume to which citations are cited as "C_____," and 1 volume of report of proceedings cited as "R_____." The supplement to the record contains supplement to the common law record section and is cited as Sup C._____," and the supplement to the report of proceedings section is cited as "Sup R.____." The Appendix to Petitioner's Appendix to Brief of Defendant-Appellant Decatur Memorial Hospital, is cited herein as A.____."

death claim against a non-entity (one count), a survival count against Hospital "unknown employees" (one count), a wrongful death count against Hospital "unknown employees" (one count) and a family expense count against Hospital "unknown employees." The Circuit Court dismissed eight (8) of nine (9) counts. (A.201-217).

Ward subsequently filed on August 3, 2010 a first amended complaint wherein Ward advanced four (4) counts against the Hospital and a non-entity with two (2) counts of a survival action and a wrongful death directed against the Hospital and similar counts directed against the non-entity. (A.186-200) The Circuit Court dismissed the first amended complaint on October 25, 2010. (A.223-224)

Thirty (30) days thereafter, Ward filed a second amended complaint consisting of four (4) counts described generally as *respondeat superior* claims and institutional negligence claims (A.169-185), and the Circuit Court dismissed Ward's second amended complaint. (A.225-226)

Finally, Ward filed his third amended complaint consisting of two (2) counts advancing *respondeat superior* claims on May 4, 2011 (A.156-168). Following Ward's request to file a fourth amended complaint, the Circuit Court denied Ward's request, and Ward voluntarily dismissed *Ward I* on January 11, 2016 pursuant to 735 ILCS 5/2-1009 (with the Circuit Court's permission) following rulings he determined to be unfavorable. (A.236)

Ward then filed a new complaint in 2016-L-51 ("*Ward II*") on May 16, 2016. Summary Judgment was granted in favor of the Defendant on May 11, 2017 (A.131-132). Thereafter, Ward appealed and the Appellate Court reversed the decision of the Circuit Court. (A.21-35)

Ward presently contends that the Hospital "misdescribes" the reason that he voluntarily dismissed his Third Amended Complaint just prior to trial and that it is not so much that he disagreed with the circuit court judge's rulings, but that he felt the circuit court judge was incompetent to oversee the trial altogether and that the circuit court judge's order compelled Ward to dismiss voluntarily (without prejudice) his pending action following the denial of Ward's motion for leave to file a fourth amended complaint.

B. An Involuntary Dismissal Under Section 2-619 Constitutes an Adjudication On the Merits For Purposes of *Res Judicata.*

Res judicata bars subsequent action if (1) a final judgment on the merits was rendered by a court of competent jurisdiction, (2) there is an identify of the parties or their privies, and (3) there is an identity of a cause of action. *Matejczyk v. City of Chicago,* 397 Ill. App. 3d 1, 3 (2009). The only requirement at issue in this case is the first – whether there has been a final judgment on the merits.

Illinois Supreme Court Rule 273 provides:

> "Unless the order or a statute of this State otherwise specifies, 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 upon the merits." Ill. S. Ct. R. 273 (eff. July 1, 1967).

In *DeLuna v. Treister,* 185 Ill. 2d 565 (1999), the Court explained that Rule 273 is intended to curb the number of times a plaintiff can resurrect a dismissed action. *Id.* at 575. The Illinois Supreme Court has specifically held that a dismissal for failure to

comply with section 2-622 is an "adjudication on the merits" for purposes of *res judicata*. *Id.* at 575. See also *Sherrod v. Ramaswamy,* 314 Ill.App.3d 357, 732 N.E.2d 87 (2000) (holding that a dismissal based on the Illinois statutory physician's report requirement under section 2-622 operates as an adjudication on the merits under Supreme Court Rule 273).

During the pendency of *Ward I*, the Hospital filed multiple motions to dismiss pursuant to 735 ILCS 5/2-619 and 735 ILCS 5/2-622. On or about May 7, 2010, the Hospital filed its Combined Motion to Dismiss Pursuant to 735 ILCS 5/2-619.1. In its Motion, and among other arguments, the Hospital specifically states that Plaintiff's attorney failed to file a report that complies with 735 ILCS 5/2-622(a)(1). On July 6, 2010, the Court entered an order granting the Hospital's Motion to Dismiss. In its order, the court struck counts 7, 8, and 9 because they were legally untenable and could not have been replead properly. Count 2 was dismissed due the deficient 2-622 report and the remaining counts were dismissed for reasons not excepted by Supreme Court Rule 273.

Without rehashing the vast history of this case in detail, Ward had multiple counts of his filed complaints involuntarily dismissed during the pendency of the 2009 case that were not excepted by Supreme Court Rule 273 and which resulted in final adjudication of the merits thereby triggering *res judicata*. Notably, in his Complaint, three counts were stricken and could not be repled. Two counts were dismissed without prejudice and Plaintiff was given 28 days to replead *if* Plaintiff could establish a legal basis for including them (he did not and the counts were abandoned at the time the First Amended Complaint was filed without mention or other preservation of the counts). In the First

Amended Complaint, Counts III and IV were dismissed and could not be repled. Two counts related to Institutional Negligence were dismissed in the Second Amended Complaint and effectively abandoned at the time the Third Amended Complaint was filed without mention or other preservation of those two counts.

C. Ward Continues to Ignore or Otherwise Overlook the Options He Had to Protect Himself From a *Res Judicata* Defense

Ward's Complaint, First Amended Complaint, and Second Amended Complaint were all met with involuntary dismissals of certain counts. Some counts were dismissed with leave to replead and some were dismissed or stricken effectively with prejudice. "Our supreme court has held, that following entry of an order dismissing a complaint, if a party files an amended complaint that is complete in itself and does not refer to or adopt the prior pleading, the party has waived any challenge to the order dismissing the prior complaint." *Gaylor v. Campion Curran Rausch Gummerson and Dunlop P.C.,* 2012 IL App (2d) 110718, 980 N.E.2d 215, 366 Ill. Dec. 415, citing *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.,* 96 Ill.2d 150, 154-55, 70 Ill.Dec. 251, 449 N.E.2d 125 (1983). In circumstances where the court has dismissed prior counts and given a plaintiff leave to amend the *Gaylor* court provides direction as to what a plaintiff must do to preserve the counts for appeal and to prevent a finding of adjudication on the merits:

> "First, a party can stand on the dismissed counts, take a voluntary dismissal of any remaining counts, and argue the matter at the appellate level;
>
> Second, a party can file an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts… A 'simple paragraph or footnote'is sufficient for this purpose.

> Third, a party can perfect an appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed counts."

Id. at 425.

The court specifically says that a "simple paragraph or footnote" is sufficient for the preservation and that repleading the involuntarily dismissed counts is not required. The effect of failing to preserve the involuntarily dismissed counts of Ward's previous complaints through one of these methods is that the involuntary dismissals became final and appealable at the time Ward voluntarily dismissed his Third Amended Complaint on the eve of trial.

D. Orders Granting Ward Leave to Amend Became "Final" Orders When Amended Complaints Were Filed That Abandoned Previously Pled and Involuntarily Dismissed Claims.

Kiefer v. Rust-Oleum Corp., 394 Ill.App.3d 485 (2009) is a case very much on point. Unlike *Hudson* and *Rein, Kiefer* deals with the effect of a court giving a plaintiff leave to amend its complaint. In *Kiefer,* Plaintiff, a resident of British Columbia, filed a complaint against Rust-Oleum for personal injuries he suffered after an aerosol spray paint can exploded striking him in the face. Counts I and II sounded in strict product liability and negligence, respectively. Plaintiff then filed an amended complaint naming an additional defendant, the manufacturer of the can. The amended complaint consisted of two counts both asserting strict product liability against each defendant respectively. Rust-Oleum moved to dismiss the amended complaint because the law of British Columbia, where Plaintiff is a resident and where the incident occurred did not recognize strict product liability law. The court dismissed the amended complaint. The trial judge

asked whether Plaintiff would elect to stand on the dismissed complaint or file an amended complaint. Plaintiff was unsure, so the trial court allowed him 21 days to file a second amended complaint. The written order did not contain the words "with prejudice" or "without prejudice." Plaintiff filed a 2-count second amended complaint asserting negligence against both defendants, respectively, and count headings including "*res ipsa loquitur.*" Plaintiff then filed a third amended complaint omitting "*res ipsa loquitur*" and a fourth amended complaint was filed to correct the pleading deficiencies related to the negligence claim in the third amended complaint. Weeks before trial, plaintiff voluntarily dismissed his negligence claims without prejudice. He then re-filed his negligence claims. Plaintiff argued that the order dismissing his strict product liability claims were not "final" because it granted him "leave to amend" and did not contain the words "with prejudice."

"Orders of the trial court must be interpreted from the entire context in which they were entered, with reference to other parts of the record including the pleadings, motions and issues before the court and the arguments of counsel… Orders must be construed in a reasonable manner so as to give effect to the apparent intention of the trial court… A trial court's description of a final judgment as being "without prejudice" or "with prejudice" is not determinative." *Id.* at 494.

In *Kiefer,* the strict liability claims were adjudicated on the merits and that involuntary dismissal was not based upon lack of jurisdiction, improper venue, or failure to join an indispensable party. Nor was the involuntary dismissal based upon a pleading deficiency that could be cured in an amended complaint. Plaintiff could not plead any set of facts that would allow recovery under the theory of strict product liability. The court

found that "inclusion of the words "leave to amend" and the absence of the words "with prejudice" does not affect the finality of the order with regard to the strict product liability claims as the order was determinative of those claims and those claims because immediately appealable." *Id.* at 495. Plaintiff did not appeal the order involuntarily dismissing the strict liability claims and, as a result, that inaction served to "bar not only every matter that was actually determined in the first suit, but also every matter that might have been raised in determined in that suit." *Id.*

Similarly, in the present case, Ward was given leave to amend after each complaint was dismissed. Ward could have pursued his claims based upon Institutional Negligence, but he allowed the involuntary dismissal to stand and advanced other claims. He effectively pled over his cause of action and in doing so waived any objection to the trail court's ruling on the former complaint, including the involuntary dismissal of his Institutional Negligence cause of action. Absent a specific statement describing the order of dismissal, an involuntary dismissal of an action operates as an adjudication upon the merits. When Ward voluntarily dismissed his third amended complaint, the trial court's rulings became final and appealable.

E. **Ward Is Seeking A "Do Over" With No Consequences Whatsoever**

Ward is arguing that plaintiffs should have carte blanche when it comes to filing amended complaints even if there are multiple complaints dismissed involuntarily. The effect of the argument Ward is making would be that everything that has happened in *Ward I,* specifically the involuntary dismissals, are insignificant and should be treated as if they did not occur at all. Motion practice is used by litigants to shape a case over time. The *Foxcroft* rule promotes "the interest in the efficient and orderly administration of

justice… ensuring that the court and the defendant possess the objective means of knowing with certainty which claims the plaintiff is pursuing." *Gaylor* at 426 (citations omitted). This argument begs that the court shield plaintiffs from the consequences of their own strategic decisions. The reasons that consequences like these exist is to promote fairness and prevent multiple lawsuits against the same defendant alleging the same cause of action and to ensure that appeals are perfected appropriately.

F. **Ward's Claim for Institutional Negligence is a Separate and Distinct Cause of Action from Medical Negligence.**

Ward continues to assert that the only theory of liability asserted in any of Plaintiff's Complaints was medical negligence based on violations of the standard of care by Defendant's nursing staff. (see Ward Response Brief, p. 26). Ward now claims that the amended complaints did not change the theories of liability, but rather focused on identifying the proper parties and the proper measure of damages as information was accumulated. *Id.* Ward has gone to great lengths to sanitize the actual history of this case to such an extent that his statements are on teetering on the edge of veracity.

In *Wilson v. Edward Hospital*, 2012 IL 112898, the plaintiffs brought an action for medical malpractice, alleging that the doctors were negligent and agents of the hospital. The defendant hospital moved for partial summary judgment on the basis that the doctors were neither its actual nor apparent agents. The trial court granted partial summary judgment on the ground that the doctors were not actual agents of the hospital, but it found a question of fact on the issue of whether the doctors were apparent agents of the hospital. As in *Rein* and *Hudson*, the plaintiffs in *Wilson* voluntarily dismissed their complaint and refiled their action one year later. The defendant hospital moved to dismiss on the basis of *res judicata.* The trial court denied the motion to dismiss but

granted the defendant hospital's motion for an order certifying the question of whether actual agency and apparent agency were separate "claims" for purposes of *res judicata.* Relying on *Rein* and *Hudson*, the appellate court answered the certified questions in the affirmative, determining that actual agency and apparent agency were separate claims subject to the bar of *res judicata* and the prohibition of claim-splitting. *Id.* ¶6.

In considering the first requirement of *res judicata,* the Supreme Court analyzed whether the trial court's summary judgment order finding that the defendant doctors were not actual agents of the hospital was a final adjudication on the merits. *Id.* ¶19. The Court noted that an order is final if it either terminates the litigation between the parties on the merits or disposes of the rights of the parties on the entire controversy or a separate branch thereof. *Id.* The Court stated that an order disposes of a separate branch of a controversy when the bases for recovery of the counts which are dismissed are different from those which are left standing. *Id.* ¶21. "This may occur when the grounds for recovery under the various counts arise from different statutes or common law doctrines or when different elements are required to recover under different theories." *Id.* (quoting *Rice v. Burnley*, 230 Ill. App. 3d 987, 991 (1992)). The *Wilson* court further distinguished that between the terms "claim," "cause of action," and "theory of recovery." *Id.* ¶25. While "claim" and "cause of action" were synonymous, a "theory of recovery" was not a cause of action. *Id.* Rather, a single cause of action may give rise to several theories of recovery. *Id.*

In this case, Ward's second amended complaint consisted of four (4) counts described generally as *respondeat superior* claims and institutional negligence claims. Institutional negligence is also known as direct corporate negligence. *Jones v. Chicago*

HMO Ltd. of Illinois, 191 Ill.2d 278, 291 (2000). Institutional negligence is a cause of action independent from the medical malpractice allegations directly involving the care provided to a patient. Illinois first adopted institutional negligence as an independent cause of action against a hospital in *Darling v. Charleston Community Memorial Hospital,* 33 Ill. 2d 326, 211 N.E. 2d 253 (1965). Hospitals have a duty, independent of the duties owed by their physicians and nurses, to assume responsibility for the care of their patients. The hospital's duty involves the hospital's managerial and administrative roles, along with the enforcement of its rules and regulations. *Frigo v. Silver Cross Hosp. and Medical Center,* 377 Ill. App. 3d 43, 876 N.E.2d 697 (1st Dist. 2007). What a hospital must do to satisfy a duty is act as would a "reasonably careful" hospital under circumstances similar to those shown by the evidence. Whether a hospital is reasonably careful may be shown by a wide variety of evidence, including, but not limited to, expert testimony, hospital bylaws, statutes, accreditation standards, custom and community practice. *Darling,* 33 Ill.2d 326 (1965); *Andrew v. Northwestern Memorial Hospital,* 184 Ill. App. 3d 486, 132 Ill. Dec. 707, 540 N.E.2d 447 (1989). An institutional negligence case can be distinguished from a medical malpractice case insofar as different evidence is permitted to establish the liability of the defendant institution and it does not necessarily require expert testimony. See paragraph 6(c) of Count III of Plaintiff's Second Amended Complaint stating Decatur Memorial Hospital "[b]reached its own by-laws, State of Illinois license requirements, accreditation standards and hospital custom by not properly staffing its facility." (A.176)

Clearly, Ward's institutional negligence claim was not based solely on the allegedly negligent acts of the Hospital's nurses.

CONCLUSION

For the foregoing reasons, Defendant-Appellant, DECATUR MEMORIAL HOSPITAL, an Illinois Not For Profit Corporation, respectfully requests that this Court reverse the decision of the Fourth District Appellate Court and affirm that of the Circuit Court for the Sixth Judicial Circuit, Macon County, Illinois.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the 341(d) cover, the Rule 341 (h)(1) statement of points and authorities, the Rule 341 (c) certificate of compliance, and the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 12 pages.

/s/ Michael J. Kehart
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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

The undersigned certifies that the Reply Brief of Defendant-Appellant Decatur Memorial Hospital was filed electronically with the Illinois Supreme Court Clerk's Office on the 19th day of February 2019 and served on counsel of record in the below manner indicated:

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