No. 123937

In the

Supreme Court of Illinois

GERALD E. WARD, Individually and as Administrator
of the Estate of Clarence R. Ward, Deceased,

Plaintiff-Appellee,

v.

DECATUR MEMORIAL HOSPITAL,
an Illinois not-for-profit,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois,
Fourth Judicial District, No. 4-17-0573.
There Heard on Appeal from the Circuit Court of Sixth Judicial Circuit,
Macon County, Illinois, No. 2016 L 51.
The Honorable **Thomas E. Little**, Judge Presiding.

AMICUS CURIAE BRIEF OF THE ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

STEPHEN PHALEN
LAW OFFICES OF STEPHEN S. PHALEN LLC
33 North Dearborn Street, Suite 2350
Chicago, Illinois 60602
Telephone: (312) 445-4909
steve@phalenlaw.com

Attorney for Illinois Trial Lawyers Association

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

POINTS AND AUTHORITIES

INTRODUCTION

The Illinois Trial Lawyers Association submits this *amicus curiae* brief in support of the plaintiff-appellee Gerald Ward. The uses and effects of a voluntary dismissal have traditionally caused great concern for Illinois litigants and courts. This court has the opportunity, while affirming the appellate court's opinion in *Ward,* to clarify the effects of a voluntary dismissal. In particular this court can reaffirm *Kahle v. John Deere Company,* 104 Ill.2d 302, 472 N.E.2d 787 (1984), holding that voluntary dismissal does not provide the plaintiff with grounds to appeal. Additionally, this court can clarify the correct and equitable application of the rule against claim splitting. This court's guidance will benefit many Illinois litigants, their counsel and the judiciary This *amicus* brief is intended to offer a larger perspective on these issues and their significance that may not be described in detail by the parties' briefs.

ARGUMENT

I. Voluntary Dismissals Are Not Final Orders

The correct relationship between 735 ILCS 5/2-1009 (the voluntary dismissal statue), 735 ILCS 5/13-217 (the refiling statute), the doctrine of *res judicata* and the rule against claim splitting has been the subject of much litigation. "Notwithstanding the seemingly simple use of this important procedural device, the uses and effects of voluntary dismissal have traditionally caused great concern in our courts." *Saddle Signs Inc., v. Adrian,* 272 Ill.App.3d 132 at 136, 650 N.E.2d 245 at 247 (3rd Dist. 1995).

Further guidance from this court on these issues will benefit the judiciary and litigants. Affirming the appellate court's decision in *Ward* offers an opportunity to provide this guidance.

This court can resolve these issues by reaffirming that a plaintiff may not appeal his own voluntary dismissal. In *Kahle v. John Deere Company,* 104 Ill.2d 302, 472 N.E. 2d 787 (1984) this court ruled a voluntary dismissal order "cannot be appealed by the plaintiff since he requested the order" and is "protected from prejudice by the statute of limitations which gives him the absolute right to refile the case within one year of the voluntary dismissal without prejudice." *Kahle,* 104 Ill.2d at 304-305, 472 N.E.2d at 788. In 1995, the Third District noted:

> "*Kahle* did not go so far as to make voluntary dismissals the jurisdictional basis from which non appealable judgments could be appealed. *Rather the court made it abundantly clear that the only proper subject on appeal was the propriety of granting a voluntary dismissal*."*Saddle Signs Inc.,* 272 Ill.App.3d at 790, 650 N.E.2d at 248. (emphasis supplied).

However several subsequent cases, *Rein v. David A. Noyes & Company,* 172 Ill. 2d 325, 665 N.E.2d 1199 (1996), *Dubina v. Mesirow Realty Development,* 178 Ill.2d 496, 687 N.E.2d 871 (1997) and, *Hudson v. City Of Chicago,* 228 Ill.2d 462, 899 N.E.2d 210 (2008) hold that following a voluntary dismissal without prejudice all prior final orders become appealable by the *plaintiff*. This expansion of *Kahle* overlooks the actual ruling and reasoning for it. A voluntary dismissal cannot provide plaintiff with a basis to appeal because he requested the order and has the absolute right to refile. Plaintiff is not

prejudiced by inability to appeal. He can continue to pursue to his *original* case by refiling.

The voluntary dismissal order should not lead to a right or an obligation for the plaintiff to appeal. As this court recognized in *Rein,* allowing a plaintiff to appeal after a voluntary dismissal is problematic, leading to premature appeals of orders which did not finally fix the parties' rights and to splitting of claims into different actions and different courts. *Rein,*172 Ill.2d at 340-343, 665 N.E.2d at 1207 (1996). This problem is the result of the decision that a voluntary dismissal makes all final prior orders appealable by the *plaintiff.* To preserve the right to voluntarily dismiss and refile, plaintiffs now actually *must* hope to split their claims. Plaintiffs must attempt to appeal prior final orders, leaving behind unajudicated claims, which if resolved on refiling could moot the need to appeal.

Reaffirming that a plaintiff cannot appeal from a voluntary dismissal will streamline litigation and eliminate confusion for litigants. Plaintiffs would not feel obligated to attempt to appeal after their own voluntary dismissals. They would instead just refile. Piecemeal and unnecessary appeals would be avoided. Previously pending, unajudicated claims would be refiled and not be delayed pending resolution of appeals. Plaintiffs who bring *all* of their claims in their original action would be able to exercise their right to a voluntary dismissal and refile without seeking defendant's permission.

Reaffirming *Kahle* would not harm defendants. Defendants may appeal if the trial court grants an untimely voluntary dismissal. Defendants required to litigate a refiled case, may seek appropriate costs and seek enforcement of prior discovery rulings at the

court's discretion. *Scattered Corp. v. Midwest Cleaning Corp.* 299 Ill.App. 3d 653, 702 N.E.2d 167 (1st Dist. 1998). Further, defendants are protected from *new* claims properly barred by *res judicata.* Defendants will be defending pre-existing *refiled* claims.

Reaffirming the decision in *Kahle* would not allow plaintiff's to engage in unfair claim splitting. The rule against claim splitting prohibits the prosecution of claims in a new action which could have been brought in a earlier action involving the same parties and facts as the new action. *LaSalle National Bank v. County Board Of School Trustees,* 61 Ill.2d 524, 337 N.E.2d 19 (1975). In *LaSalle,* this court determined claim splitting barred former owners of property lost to government condemnation from instituting a new action alleging *new* objections to not raised in the first action. The owners' action was described by this court as a "collateral attack" of the prior final condemnation judgment. *LaSalle,* 61 Ill.2d at 528-529, 337 N.E.2d at 21-22. *LaSalle* relied on *Harvey v. Aurora and Geneva Ry Co.,* 186 Ill, 283,294, 57 N.E. 857,862 (1900).

> * * * The previous decisions of the court concerning the right to take the property of the plaintiffs in error *settled every question* which might have been raised and *every objection* that might have been made whether raised and made or not. The doctrine of Res judicata embraces not only what has been actually determined in the former suit, but extends to any matter which might have been raised and determined in it. *LaSalle* 61 Ill.2d at 530, 337 N.E.2d at 22. (Emphasis supplied).

The result in *LaSalle Bank* was correct and equitable. Owners lost their property to government condemnation. They were given a forum in which to object and present any and all allegations they desired. Their property was condemned. The original action settled *every question* which might have been raised. They did not appeal the

condemnation order. Instead the owners brought a new action with new objections, they could have raised in the original condemnation proceeding. This is exactly the type of litigation *res judicata* and the prohibition of claim splitting properly bars - *new claims in a new proceeding.*

In contrast, a plaintiff who refiles following voluntary dismissal did not have settle *every question* in the original action. His voluntarily dismissed claims remain unadjudicated, unsettled, unresolved. He is not making a collateral attack on a final judgment. He is simply proceeding with his unresolved action.

Reaffirmation of *Kahle* and a return to the rule against claim splitting described by *LaSalle* would resolve concerns regarding the effects of voluntary dismissal. Premature appeals by plaintiffs will be avoided. Defendants will be protected from unfair prejudice by their right to appeal from a voluntary dismissal, the statute of limitations, claim splitting's prohibition of new claims, and the remedies available from the trial court in the refiled case.

II. The Appellate Court Correctly Decided Not To Follow *Kiefer.*

In the present case, the appellate court decided to not follow *Kiefer v. Rust-Oleum Corp.,* 394 Ill. App. 3d 485, 916 N.E.2d 22 (1st Dist. 2009). *Ward v. Decatur Memorial Hospital,* 2108 IL App (4th) 170573 ¶53. The appellate court's decision was well reasoned and should be affirmed.

In *Kiefer,* a Canadian citizen brought a strict liability action for injuries suffered in Canada. The defendants moved to dismiss because British Columbia does not recognize

strict liability. This motion was granted, but plaintiff received leave to amend several times. His amended complaints alleged only negligence. As trial approached, plaintiff voluntarily dismissed and then refiled his negligence claims. The refiled action was dismissed on the ground of res judicata. *Kiefer* 394 Ill. App. 3d at 486-488, 916 N.E.2d at 23-26

On appeal, plaintiff Kiefer argued the strict liability dismissal order was not final because he was granted leave to amend and because the dismissal order lacked the words "with prejudice". The First District rejected this argument and found the dismissal order was final because the substance of the order was to finally dismiss plaintiff's legally untenable strict liability claims while allowing amendment to assert negligence. Since Kiefer never appealed this final order, the *Kiefer* court ruled *Hudson* barred the refiled action. *Kiefer* 394 Ill. App. 3d at 494-495, 916 N.E.2d at 26-27, 29-30.

In *Ward* the appellate court found this result to be inconsistent with the binding authority of *Foxcroft v. Townhome Owner's Ass'n v. Hoffman Rosner Corp,* 96 Ill. 2d 150, 449 N.E.2d 125 (1983) and refused to follow *Kiefer. Ward* 2108 IL App (4th) 170573 ¶ 53. *Foxcroft* holds when the trial court dismisses a complaint and grants leave to file an amended complaint, plaintiff will be deemed to have abandoned and withdrawn any counts from the prior complaint that are omitted from the amended pleading. The reviewing court will decline to address the merits of those abandoned counts. "Where an amendment is complete in itself and does not refer to or adopt the prior pleading the earlier pleading ceases to be part of the record for most purposes being in effect abandoned or withdrawn." *Foxcroft,* 96 Ill. 2d at 154, 449 N.E.2d at 127. Significantly,

when the court gives leave to amend, the plaintiff not only *may* but, on pain of waiver or forfeiture but *must* replead the dismissed counts even if the court dismissed those counts with prejudice. The waiver principle applies whether or not the dismissal was with prejudice. *Bonhomme v. St. James,* 2012 IL 112393 ¶ 19, 970 N.E.2d 1 (2012).

Based on *Foxcroft,* the appellate court determined contrary to *Kiefer,* that when leave to amend is granted the trial court effectively vacates a dismissal without prejudice. Having given permission to file an amended complaint, the court cannot require the plaintiff to omit dismissed claims from the new complaint because the plaintiff has the right to preserve the dismissed counts for review. *Ward* 2108 IL App (4th) 170573, ¶ 51.

Citing *Ritcher v. Prairie Farms Dairy Inc.,* 2016 IL 119518, 53 N.E.3d 1 (20160, the appellate court further ruled "It follows that, regardless of whether the dismissal order purports to dismiss certain counts 'with prejudice' '[a] dismissal order that grants leave to amend is interlocutory and not final'". *Ward* ¶51. The appellate court also recognized that since plaintiff Ward did not replead his dismissed counts, those claims were waived and forfeited. *Ward* 2108 IL App (4th) 170573,¶52. Therefore, there was no final order and without a final judgment on the merits there can be no *res judicata.*

"In sum the binding authority of *Bonhome* and *Foxcroft* compels us to respectfully disagree with *Kiefer's* application of *Hudson". Ward* 2108 IL App (4th) 170573, ¶ 53. This well reasoned analysis of *Kiefer* is supported by this court's decisions in *Foxcroft, Bonhomme and Richter*. The appellate court's refusal to follow *Kiefer* is properly affirmed.

III. Orders Granting Ward Leave To Amend Were Not "Final" Orders

A. Final Orders Terminate Litigation

In plaintiff Ward's original action, the trial court did not enter a final order terminating the litigation *and* absolutely fixing the parties' rights and responsibilities. Instead, in response to defendant's serial motions to dismiss, the trial dismissed but also granted leave to amend. The parties were at issue and litigating plaintiff's third amended complaint when Ward exercised his statutory right to a 735 ILCS 5/2-1009 voluntary dismissal. *Ward,* 2018 IL App (4th) 170573, ¶¶ 4-26.

An order that dismisses all or part of a complaint, but grants the plaintiff leave to amend is not "final" because the order does not terminate the litigation between parties. A dismissal with leave to amend is consequently without prejudice. *Richter,* 2016 IL 119518 ¶ 25, 53 N.E.3d at 9, 420 Ill.Dec. at 878. (2016).

In *Ritcher,* plaintiffs filed a three count complaint seeking damages for improper termination of a business relationship. Defendant moved to dismiss all three counts with prejudice. The trial court refused to dismiss count I, and dismissed counts II and III with leave to amend. Plaintiffs never amended and the case preceded on plaintiff' sole remaining count I. *Richter,* 2016 IL 119518, ¶¶ 7-9, 53 N.E.3d at 7.

The Richters subsequently voluntarily dismissed and refiled their case. Defendants moved to dismiss the refiled case with prejudice. The trial court granted this motion based on *res judicata* and the statute of limitations. Plaintiffs appealed. The

appellate court reversed. This court accepted defendant's appeal. *Richter,* 2016 IL 119518 ¶¶ 10-15, 53 N.E.3d at 7.

This court unanimously ruled since the Richters had been granted leave to amend, there was no final order and *res judicata* did not bar their refiled action. An involuntary dismissal order granting leave to amend is interlocutory and not final. *Richter,* 2016 IL 119518, ¶ 25, 53 N.E.3d at 9. A dismissal granting leave to amend is not "final" because it does not terminate the litigation. A dismissal with leave to amend is consequently without prejudice. *Richter,* 2016 IL 119518, ¶ 27, 53 N.E.3d at 8. Since the *Richter* dismissal order specified plaintiffs had leave to amend, the dismissal order was without prejudice and not an adjudication on the merits. The crucial component of a final order was absent. Therefore, the Richters' refiled action was not barred by *res judicata. Richter* controls the present case and mandates the same result. Therefore the appellate court's decision in *Ward* must be affirmed.

B. Dismissal With Leave To Amend Is Not A Rule 273 Adjudication On The Merits

Illinois Supreme Court 273 describes when an involuntary dismissal is on the merits. "*Unless the order of dismissal or a statute of this State otherwise specifies,* an involuntary dismissal of an action, other than 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. 27, *Richter,* 2016 IL 119518, ¶ 24, 53 N.E.3d at 8. (emphasis original). However, when the plaintiff is granted leave to amend following dismissal, the dismissal is without prejudice and there is no adjudication on the merits. In

Ritcher the involuntary dismissal order expressly granted the Ritchers leave to file an amended complaint within 30 days. "Hence, there was no 'adjudication upon the merits' in *Ritcher I,* because 'the order of dismissal * * * otherwise specifie[d]' that the plaintiffs had leave to file an amended complaint" *Richter,* 2016 IL 119518, ¶ 26, 53 N.E.3d at 9. Since the *Richter* dismissal order *specified* plaintiffs had leave to amend, the dismissal order was without prejudice and not a Rule 273 adjudication on the merits. Therefore, their refiled action was not barred by *res judicata.*

Plaintiff Ward, like the Richters was granted leave to amend following dismissal. Accordingly, the dismissals of Ward's complaints were not Rule 273 adjudications on the merits, and not final orders.

An involuntary dismissal order granting leave to amend is necessarily a dismissal without prejudice. Such an order specifies the case will continue. The parties' rights remain undecided. They will be decided by the new complaint, the original remaining allegations or further motion practice. In the present case, there was no adjudication on the merits. The crucial component of a final order was absent. In *Ward,* the appellate court correctly determined *res judicata* did not bar Ward's refiled case.

III. Ward Waived And Did Not Spilt His Claims

The appellate court correctly distinguished the facts in *Hudson* from the present case. In contrast to *Hudson,* plaintiff Ward was granted leave to amend, a non-final order. "... the trial court gave permission to amend over and over again, all the way to the

third amended complaint - which remained pending and *completely unajudicated* at the time of voluntary dismissal. (Emphasis supplied). *Ward* , 2018 IL App (4th) 170573, ¶ 53

Since Ward did not replead the dismissed claims, those claims were "abandoned", "withdrawn", "waived", "not subject to review" , "cease[d] to be part of the record". *Ward,* 2018 IL App (4th) 170573, ¶ 52. Plaintiff Ward did leave not pending claims behind. He did not split his claims. He had no claims left to split. He had nothing to appeal from the original case. Only his third amended complaint remained, which he was entitled to voluntarily dismiss and refile.

CONCLUSION

For the reasons herein stated *Amicus Curiae* respectfully requests that this Court affirm the Appellate Court and remand this case to the trial court for further proceedings on Ward's third amended complaint.

Respectfully Submitted,

/s/ Stephen S. Phalen
Stephen S. Phalen on behalf of Illinois
Trial Lawyers in support of Plaintiff-Appellee

Stephen S. Phalen
Law Offices of Stephen S. Phalen LLC
33 N. Dearborn St. Chicago, IL 60602
312/445-4909
steve@phalenlaw.com

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 Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11 pages.

/s/ Stephen S. Phalen
Stephen S. Phalen

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

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Plaintiff-Appellee,	)	
v.	)	No. 123937
DECATUR MEMORIAL HOSPITAL,	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on February 6, 2019, there was electronically filed and served upon the Clerk of the above court the *Amicus Curiae* Brief of the Illinois Trial Lawyers Association, and that on the same day, a pdf of same was e-mailed to the following counsel of record:

Randall A. Wolter
rwolter@wbllawyers.com
WOLTER, BEEMAN, LYNCH & LONDRIGAN
1001 South Sixth Street
Springfield, IL 62703

Michael J. Kehart
mjk@kehart.com
James Peckert
jpeckert@kehart.com
Regan Lewis
rlewis@kehart.com
KEHART, PECKERT, WISE, TOTH & LEWIS
132 South Water Street, Suite 200
Post Office Box 869
Decatur, Illinois 62525

Within five days of acceptance by the Court, the undersigned states that he will send to the above court thirteen copies of the Brief bearing the court's file-stamp.

/s/ Stephen Phalen
Stephen Phalen

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.

/s/ Stephen Phalen
Stephen Phalen