Illinois Official Reports

Appellate Court

Trackman v. Michela, 2019 IL App (2d) 190131

Appellate Court Caption	MARK S. TRACKMAN, Plaintiff-Appellant, v. LAUREL S. MICHELA, Defendant-Appellee.
District & No.	Second District No. 2-19-0131
Filed	November 20, 2019
Decision Under Review	Appeal from the Circuit Court of Lake County, No. 18-L-802; the Hon. Luis A. Berrones, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Michael D. Furlong, of Furlong Law L.L.C., of Libertyville, and Roger Goble, of Lake Zurich, for appellant. Howard M. Cohen, of Cohen, Rosenson & Zuckerman, LLC, of Chicago, for appellee.
Panel	JUSTICE HUDSON delivered the judgment of the court, with opinion. Presiding Justice Birkett and Justice Zenoff concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Mark S. Trackman, appeals the dismissal of his complaint against defendant, Laurel S. Michela, on the basis of *res judicata*. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff and defendant are the children of Robert Trackman, who died in 2007, and Marcella Trackman, who died in 2009. In 2013, plaintiff filed his initial complaint against defendant, defendant's children Daniel and Brittani, and his own children Scott and Nicole, all of the children being contingent beneficiaries of an amended trust that Marcella had created in 2007. In 2014, plaintiff filed a three-count fourth amended complaint asserting that (1) defendant tortiously interfered with plaintiff's expectation of an inheritance, (2) defendant exerted undue influence over Marcella, causing her to deprive him of his inheritance, and (3) Marcella lacked testamentary capacity when she amended her trust in 2007. The specific factual allegations of the fourth amended complaint are set out in our order in *Trackman v. Michela*, 2015 IL App (2d) 140985-U. We note here that count III incorporated the facts alleged in counts I and II and alleged further that, by 2007, Marcella was suffering from depression and dementia and did not appreciate the effect of the amendment that she approved.

¶ 4 On defendant's motion, the trial court dismissed all three counts with prejudice, holding that they failed to state a claim upon which relief could be granted (735 ILCS 5/2-615 (West 2012)). On appeal, plaintiff argued that the court erred in dismissing the first two counts, but he conceded the dismissal of the third count. We agreed with him that the first two counts stated causes of action, and we recognized his concession that the third count did not. Therefore, we affirmed the dismissal of the third count, reversed the dismissals of counts I and II, and remanded the cause. *Trackman*, 2015 IL App (2d) 140985-U, ¶ 57.

¶ 5 On remand, on August 19, 2016, plaintiff filed a fifth amended complaint, containing only counts I and II. On December 15, 2017, shortly before the scheduled trial date, plaintiff moved for a voluntary dismissal. See 735 ILCS 5/2-1009 (West 2016). On January 5, 2018, the trial court granted the motion. Its written order stated in part, "The Plaintiff is given leave to dismiss this lawsuit without prejudice and with leave to refile within the time provided by rule." We shall refer to the proceedings through the voluntary dismissal as *Trackman I*.

¶ 6 On October 10, 2018, plaintiff filed a one-count complaint against defendant only, for tortious interference with an expectation of an inheritance (*Trackman II*). The complaint's factual allegations were drawn from the fifth amended complaint, which in the main had repeated those of the fourth amended complaint.

¶ 7 Defendant moved to dismiss the complaint as barred by *res judicata*. See 735 ILCS 5/2-619(a)(4) (West 2018). She argued that all three requirements for *res judicata* had been met: (1) a final judgment on the merits (the dismissal with prejudice of count III of the fourth amended complaint in *Trackman I*), (2) an identity of parties in the two actions, and (3) an identity of causes of action. See *Ward v. Decatur Memorial Hospital*, 2019 IL 123937, ¶ 45 (requirements for *res judicata*). On the third requirement, defendant noted that count III in *Trackman I* had sought the rescission of the 2007 trust amendment, based on Marcella's incapacity, and that *Trackman II* sought damages based on defendant's inducement of Marcella into signing the 2007 amendment. Nonetheless, she contended, the two causes of action were

the same, because they relied on the same operative facts. Defendant noted that count III had incorporated all the factual allegations of counts I and II, for tortious interference and undue influence, respectively, and that *Trackman II*'s sole count was based on the same facts as all three counts in *Trackman I*. Essentially, defendant contended, plaintiff was attempting to relitigate a claim that had been litigated, or could have been litigated, in *Trackman I*. Defendant relied primarily on *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325 (1996).

¶ 8 In response, plaintiff noted that the fifth amended complaint had added factual allegations that were based on evidence discovered on remand. Further, he maintained, the order of voluntary dismissal specifically allowed him to refile the complaint. Plaintiff did not attempt to distinguish *Rein* but instead contended that it had been superseded by *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518. Plaintiff asserted that *Richter* established that the prior dismissal did not bar refiling the action where the trial court explicitly allowed him to do so.

¶ 9 In reply, defendant contended that *Richter* had not overruled *Rein* and that in *Richter* there had been no prior final judgment on the merits but merely a dismissal with leave to refile. Here, by contrast, this court's order had affirmed the dismissal of count III with prejudice, thus satisfying the first requirement for *res judicata*.

¶ 10 The trial court dismissed the complaint. Plaintiff timely appealed.

¶ 11 II. ANALYSIS

¶ 12 We review *de novo* a dismissal under section 2-619(a)(4). *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 565 (2000). *Res judicata* means that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent action between the parties or their privies on the same cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). "*Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided." *Id.* As noted earlier, *res judicata* requires a final judgment on the merits, an identity of parties, and an identity of causes of action. *Id.*

¶ 13 Here, plaintiff does not contest the second requirement. He contends, however, that (1) the cause of action in count III in *Trackman I* was not the same as that in *Trackman II* and (2) there was no final judgment.[1] We disagree with both contentions.

¶ 14 Plaintiff contends first that there was no identity of causes of action. He argues that count III in *Trackman I* was based on the allegation that Marcella did not have the mental capacity to sign the trust document but that *Trackman II* is based on the allegation that defendant engaged in various tortious acts, such as fraud, that caused Marcella to deprive plaintiff of his inheritance. Plaintiff reasons that the old count III and the one count in *Trackman II* cannot be the same cause of action, because they have different elements and the latter requires proof of facts that the former did not. For the following reasons, plaintiff's argument is unavailing.

¶ 15 Illinois law uses the "transactional test" to determine whether two causes of action are identical for *res judicata* purposes. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290,

[1]In his initial brief, plaintiff adopted an argument made in *Ward* that the interaction of sections 2-1009 and 13-217 of the Code of Civil Procedure (735 ILCS 5/2-1009, 13-217 (West 2018)) gave him an absolute right to refile after the voluntary dismissal. In his reply brief, however, citing what he concludes was the supreme court's rejection of that argument (see *Ward*, 2019 IL 123937, ¶¶ 62-63), plaintiff explicitly abandoned that ground for reversal. Therefore, we do not consider it.

310-11 (1998). The transactional test considers whether the claims arise from a common core of operative facts. *Id.* at 311. This depends in turn on a pragmatic consideration of whether the facts are related in time, space, origin, or motivation and form a convenient trial unit. *Id.* at 311-12; *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009).

¶ 16 Under this test, count III in *Trackman I* and the single count in *Trackman II* are the same for *res judicata* purposes. As defendant notes, count III pleaded the same facts (incorporated by reference) as did count I for tortious interference, which was the predecessor to the present complaint. More importantly, though, count III and *Trackman II* are based on the same core of operative facts, even though their theories and factual bases are not identical. Both are based on Marcella's conduct in creating trust documents that excluded plaintiff from any inheritance. Both allege the same harm. That they would have formed a convenient trial unit is self-evident and also shown by plaintiff's having pleaded both theories in *Trackman I*.

¶ 17 Although we have found no Illinois case on point, a foreign opinion is highly persuasive. In *Hadley v. Cowan*, 804 P.2d 1271 (Wash. Ct. App. 1991), the decedent's children filed a petition in probate contesting her will, which revised an earlier will so as to decrease their inheritances and increase those of her mother and sisters (the respondents). The petition alleged that the decedent had been infirm and not of sound mind when she executed the revised will. The parties settled the action, with the settlement stating that the petition was dismissed with prejudice but intentionally omitting any statement that there was no cause of action against the respondents for undue influence. *Id.* at 1272-73.

¶ 18 Later, the children filed an action in tort against the respondents, alleging that they had exerted undue influence and that, as a result, the children had been denied their full inheritances and had suffered emotional injuries. The respondents obtained summary judgment on the basis that the settlement agreement had *res judicata* effect on the tort action. *Id.* at 1276.

¶ 19 On appeal, the court held in part that *res judicata* barred the tort action insofar as it was based on allegations of undue influence, abuse of confidence, fraud, and substitution of the respondents' will for the decedent's. The court noted that one criterion for applying *res judicata* under Washington law was " ' "whether the two suits arise out of the same transactional nucleus of facts." ' " *Id.* (quoting *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982), quoting *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980)). The court continued:

> "The allegations of undue influence, abuse of confidence, fraud, and substitution of respondents' will for the deceased's will all are of a single 'transactional nucleus of facts' that could and should have been determined in the probate challenge. The damages resulting from the alleged conduct in the present case and in the probate challenge are substantially the same and are intimately related in time, origin, and motivation, because they arise out of the same interactions between the deceased and the respondents. It is also obvious that the claims in the present proceedings would have constituted a convenient trial unit in the probate proceeding." *Id.*

¶ 20 The *Hadley* court's reasoning applies fully here. We hold that the trial court correctly concluded that there was an identity of actions.

¶ 21 We turn to the remaining issue on appeal: whether there was a final judgment that barred *Trackman II*. Plaintiff's primary theory is that our order in *Trackman I* was not final, because we remanded the cause with directions to allow him to continue his action on counts I and II of the complaint. Plaintiff cites general authority that a reversal and remand for further

proceedings is not a final judgment and thus will not support *res judicata*. Plaintiff's theory is misplaced.

¶ 22 Our order in *Trackman I* did not finally resolve the proceedings on counts I and II of the complaint. But the trial court's dismissal of count III with prejudice *was* a final judgment as to that count, and we affirmed that judgment. Thus, plaintiff's assertion that "[his] claims had not been finally disposed of in the first appellate court decision" is true only of counts I and II.

¶ 23 Plaintiff is correct that, upon remand, he could still pursue relief on counts I and II. Indeed, he started out doing so by filing the fifth amended complaint, which included counts I and II. *Res judicata* did not apply, for the simple reason that this was still *Trackman I*. Had plaintiff continued to pursue *Trackman I*, *res judicata* could not have barred the fifth amended complaint—although it would have barred adding count III back in.

¶ 24 But the situation changed when plaintiff voluntarily dismissed *Trackman I* and then filed *Trackman II*. *Trackman II* was not a continuation of *Trackman I* but rather an entirely new action. See *Hudson*, 228 Ill. 2d at 469. *Res judicata* could apply, because now there *was* a prior action. That prior action included a final judgment on the merits on count III. And although plaintiff did not replead count III, he pleaded a claim that arose from the same core of operative facts and sought relief against the same party.

¶ 25 Plaintiff attempts to distinguish controlling authority or cite it as support. We set out these cases in some depth, then explain why we disagree with plaintiff's readings of them.

¶ 26 First is *Rein*. In 1990, the Reins and the Millers filed an eight-count complaint against David A. Noyes & Co. (Noyes) and its agent (Rath) based on the sale of certain securities in 1985. All the counts were based on the same factual allegations, but counts I and V alleged statutory fraud and sought rescission, while the remaining counts sought damages based on common-law fraud, failure to register the securities and provide a prospectus per statute, and breach of fiduciary duty. Also in 1990, Fehrmann filed a four-count complaint against Noyes and its agent (Ainsworth). The complaint used similar factual allegations and the same legal bases for recovery. Count IX (the first count) sought rescission and was consolidated with the Rein-Miller complaint. *Rein*, 172 Ill. 2d at 328-29.

¶ 27 The trial court dismissed the three rescission counts with prejudice, holding that they were time-barred. The court did not make its order immediately appealable (see Ill. S. Ct. R. 304(a) (eff. Feb. 1, 1994)). The plaintiffs voluntarily dismissed the remaining counts and appealed the dismissal of the rescission counts. We affirmed the dismissal (271 Ill. App. 3d 768 (1995) (*Rein I*)). *Rein*, 172 Ill. 2d at 330.

¶ 28 In 1993, the plaintiffs filed a 12-count complaint that was "virtually identical" to the 1990 complaints (*Rein II*). *Id.* at 331. The defendants moved to dismiss the complaint as barred by *res judicata*, based on the dismissal with prejudice of the rescission counts. The trial court granted the motion. *Id.* at 331-32. We affirmed, holding that, although the counts used different theories of recovery, they were all one cause of action, being based on the same operative facts. *Id.* at 332.

¶ 29 The supreme court affirmed. The court held first that the rescission counts were barred by *res judicata*. The plaintiffs had conceded that, in *Rein I* and *Rein II*, (1) there was an identity of causes of action (rescission based on the same facts) and (2) there was an identity of parties. The court held that there had been a final judgment on the merits in *Rein I*, as the trial court there had dismissed the rescission counts with prejudice and had rejected the plaintiffs'

contention that equitable estoppel defeated the affirmative defense of untimeliness, a ruling that the plaintiffs had not challenged on appeal. *Id.* at 335-36.

¶ 30 The court then turned to the "common-law" counts of the complaint in *Rein II*. *Id.* at 336. The identity of parties was not disputed. Further, the dismissal of the rescission counts with prejudice was a final judgment on the merits. Last, there was an identity of causes of action. Although in *Rein I* the common-law counts had been voluntarily dismissed, the final judgment involuntarily dismissing the rescission counts applied to them as well, because the facts that gave rise to any recovery were the same for all of the counts. *Id.* at 338. Because the rescission counts and the common-law counts arose out of "the same set of operative facts," there was only one cause of action. *Id.* at 339. It was of no moment that the common-law counts were never dismissed with prejudice; the plaintiffs could have litigated these claims in *Rein I* and were not allowed to split their claims by filing a second action raising claims that might have been raised and determined in the first action. *Id.*

¶ 31 Plaintiff contends that *Rein* is distinguishable because there several counts of the complaints were voluntarily dismissed before the appeal in the first case, whereas in *Trackman I* counts I and II were not voluntarily dismissed and were reinstated by our order. Plaintiff's argument merely reiterates his attempt to use the principle that a reversal and remand is not a final judgment to circumvent the principle that a dismissal with prejudice *is* a final judgment. As noted, on remand, counts I and II were still viable, and plaintiff repleaded them in the fifth amended complaint in *Trackman I*. But *Trackman II* was a new action, and it thereby exposed plaintiff to *res judicata* based on *Trackman I*'s dismissal with prejudice of count III.

¶ 32 In *Hudson*, the plaintiffs sued a city and several of its agents for causing the death of the decedent. The first count alleged negligence; the second count alleged willful and wanton misconduct. The trial court dismissed the first count on tort-immunity grounds, after which the plaintiffs voluntarily dismissed the second count. The plaintiffs refiled only the second count. The trial court dismissed the new complaint as barred by *res judicata*. The appellate court affirmed, and the plaintiffs appealed. *Hudson*, 228 Ill. 2d at 464-66.

¶ 33 The plaintiffs contended that *res judicata* was inapplicable because there had been no final judgment on the merits of the voluntarily dismissed second count. (The plaintiffs conceded the other two prerequisites for *res judicata*.) The supreme court held that, under *Rein*, the final judgment on the first count barred refiling the second count. *Id.* at 467. The court noted that, once the second count had been voluntarily dismissed, the first action ended and the dismissal of the first count became immediately appealable. *Id.* at 468. Thus, refiling the second count started a new action. *Id.* at 469. *Rein* established that "a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense." *Id.* at 473. As the negligence and willful-and-wanton claims arose out of the same operative facts, the dismissal with prejudice of the former barred a new action based on the latter. *Id.* at 474.

¶ 34 In plaintiff's opening brief, the discussion of *Hudson* notes the general principle that a defendant may waive a *res judicata* defense by acquiescing in claim-splitting. See *Rein*, 172 Ill. 2d at 341. Even if the brief can be read to argue that defendant did so here, it cites no facts of record in support. Therefore, any such argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *Holmstrom v. Kunis*, 221 Ill. App. 3d 317, 325 (1991). In his reply brief, plaintiff makes the acquiescence argument explicit, but he bases his assertion on defendant's decision not to object to his motion for a voluntary dismissal. Aside from coming too late and

thus being forfeited, this argument ignores that "[a]cquiescence occurs *after* refiling." (Emphasis in original.) *Kantner v. Waugh*, 2017 IL App (2d) 160848, ¶ 21. That of course did not happen here. A plaintiff can also avoid *res judicata* by showing that, before the refiling, the defendant agreed in terms or in effect to allow claim-splitting, but an agreement requires more than silence on the part of the defendant. As we said in *Kantner*, "a defendant is not obligated to stop a plaintiff from making a fatal mistake." *Id.* ¶ 23. Here, defendant did no more than indulge plaintiff's mistake.

¶ 35 Plaintiff also contends that *Hudson* is distinguishable on the same basis as *Rein*—the voluntary dismissal in the original suit. But, as we have noted, this is a spurious distinction. In *Hudson* and here, there was a final judgment on the merits in the first action, a new action, and an identity of parties and causes of action between the two. That is what matters.

¶ 36 In *Wilson v. Edward Hospital*, 2012 IL 112888, the plaintiffs filed a malpractice action against a hospital, two doctors and their practice groups, and a nurse. They alleged that the doctors were the hospital's agents and that the hospital was vicariously liable for their actions. The trial court granted partial summary judgment to the hospital on the ground that the doctors were not its actual agents but held that there was a genuine issue of fact as to whether they were its apparent agents. The plaintiffs voluntarily dismissed the complaint and refiled it, this time alleging that the doctors were liable only as apparent agents of the hospital. The trial court dismissed the new complaint on *res judicata* grounds but certified for review the issue of whether actual agency and apparent agency are separate claims for purposes of *res judicata*; if so, then the partial summary judgment on actual agency would be a final judgment on the merits and bar the refiled complaint. *Id.* ¶¶ 1, 19.

¶ 37 The supreme court held that the partial summary judgment had not been a final judgment on the merits, because it did not actually dispose of the rights of the parties on the entire controversy or a branch thereof. *Id.* ¶ 19. The court explained that actual agency and apparent agency are not separate claims or causes of action but part of the duty analysis for the one claim in the complaint. They were separate theories of recovery but not separate claims. Thus, the grant of summary judgment did not dispose of the parties' rights but merely removed some of the allegations against the hospital. *Id.* ¶¶ 24-26.

¶ 38 Plaintiff contends that this case is indistinguishable from *Wilson*. However, he does not explain how one claim for negligence based on *respondeat superior* is analogous to separate claims for rescission based on Marcella's incapacity and for damages based on defendant's allegedly wrongful acts. Although these causes of action arise out of the same core of operative facts, they are not different aspects of the same basis of liability. We agree with the *Hadley* court that an action based on a person's improper influence over a testator and one based on the testator's incapacity are not merely different aspects of one claim, but separate for *res judicata* purposes. Plaintiff's use of *Wilson* is unavailing.

¶ 39 In *Richter*, 2016 IL 119518, the plaintiffs filed a three-count complaint against a dairy cooperative that had terminated their membership (*Richter I*). The counts alleged claims under the Business Corporation Act of 1983 (805 ILCS 5/1.01 *et seq.* (West 2006)), a consumer-fraud statute, and common-law fraud. The defendant moved to dismiss all three counts with prejudice. The trial court did not dismiss the first count. It dismissed the second and third counts but gave the plaintiffs leave to file an amended complaint within 30 days. *Richter*, 2016 IL 119518, ¶¶ 3-9.

¶ 40 The plaintiffs never filed an amended complaint. The case proceeded on the first count only. The plaintiffs moved for a voluntary dismissal, which the court granted. *Id.* ¶¶ 9-10. The plaintiffs then filed a four-count complaint (*Richter II*). Count I sought relief under the Business Corporation Act. Counts II through IV alleged, respectively, misrepresentation, common-law fraud, and breach of fiduciary duty. The defendants moved to dismiss the suit as barred by *res judicata*. The trial court granted the motion, but the appellate court reversed and remanded, holding that there had been no final judgment in the first suit because the dismissal of the fraud counts had been without prejudice. *Id.* ¶¶ 12-14.

¶ 41 The defendant appealed. The supreme court affirmed the appellate court. The court explained its decision as follows. The sole issue was whether the order dismissing the second and third counts but giving the plaintiffs leave to replead them was a final judgment on the merits in *Richter I*. The court held that it was not. The court explained that ordinarily an order that dismisses the counts of a complaint but allows the plaintiff to amend is not final, because it does not terminate the litigation. *Id.* ¶ 25. Even if the plaintiff stands on the original complaint (or what is left of it), the order dismissing the complaint is not final until a subsequent order finally dismisses it. *Id.* ¶ 28. Thus, as there was no such order in *Richter I*, there was no final judgment on which *res judicata* could be based. *Id.* ¶ 36. This distinguished the case from *Rein* and *Hudson*, as in each of those cases there had been a final judgment dismissing the action. *Id.* ¶ 40.

¶ 42 Plaintiff contends that *Richter* supports reversal here. He notes that the first dismissal in *Richter* was without prejudice and that the voluntary dismissal here was without prejudice. But here the voluntary dismissal is not the basis for finding a final judgment on the merits. The dismissal of count III with prejudice is the final judgment. Although the dismissals of counts I and II were reversed on appeal, the dismissal of count III was final and was affirmed. *Richter* is distinguishable from this case, just as it is from *Rein* and *Hudson*.

¶ 43 Finally, there is *Ward*. There, the plaintiff filed a series of medical-malpractice complaints against a hospital and its agents. The original, first amended, second amended, and third amended complaints were each in turn dismissed, but always with leave for the plaintiff to replead. Over the course of repleading, the plaintiff raised and eventually abandoned several claims. After the third amended complaint was dismissed, he moved for leave to file a fourth amended complaint. The trial court denied the motion. The plaintiff voluntarily dismissed the third amended complaint. He then filed a new action essentially tracking the proposed fourth amended complaint. The trial court granted the hospital's motion to dismiss the action as barred by *res judicata*. *Ward*, 2019 IL 123937, ¶¶ 35-39.

¶ 44 The supreme court held that the new action was not barred by *res judicata*. The crucial consideration was that the numerous dismissals in the first action had all been without prejudice; thus, none of them was final. *Id.* ¶ 49. This consideration made the case similar to *Richter* and distinguishable from *Hudson* and *Rein*. *Id.* ¶¶ 50-53.

¶ 45 In his reply brief, filed after the supreme court decided *Ward*, plaintiff argues that this case also lacks a final judgment on which *res judicata* can be based. In the main, plaintiff repeats his argument that our order in *Trackman I* did not resolve all the matters pending, while again ignoring that it did conclusively resolve count III by affirming the dismissal of that count with prejudice. Plaintiff also appears to contend that the trial court order from which he appealed did not specify that count III was dismissed. But the order stated that the entire fourth amended complaint was dismissed with prejudice, and, since count III was part of the fourth amended

complaint, it is obvious that the order dismissed count III with prejudice. Plaintiff also notes that an order dated October 11, 2013, which dismissed the original complaint, specifically mentioned count III and permitted plaintiff to refile. Plaintiff asserts that this fact is pertinent to the issue of the existence of a final judgment in the dismissal with prejudice of the entire fourth amended complaint a year later. We disagree. That the October 11, 2013, order was nonfinal has nothing to do with the finality of the dismissal with prejudice of count III a year later.

¶ 46 Plaintiff also attempts to import significance to the fact that the order allowing the voluntary dismissal stated that he had the right to file a new action. That is to be expected of an order allowing a voluntary dismissal. And, indeed, plaintiff had the right to file a new action, and he exercised it. However, the order nowhere deprived defendant of her right to raise the affirmative defense of *res judicata* against the new action. The right to file a new action meant just that and only that. It did not mean a right to be immunized against the perils of refiling.

¶ 47 Plaintiff's second argument against the judgment fails. We conclude that the trial court did not err in dismissing the complaint on the basis of *res judicata*.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 50 Affirmed.