

2011 IL App (2d) 110085-U
No. 2—11—0085
Order filed July 22, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

BRANDON WILSON and DAPHNE)	Appeal from the Circuit Court
WILSON,)	of Du Page County.
)	
Plaintiffs-Appellees,)	
)	
v.)	No. 10—L—112
)	
EDWARD HOSPITAL,)	
)	
Defendant-Appellant)	
)	
(Barbara Blood, Richard Rosseau, Du Page)	
Medical Group, Ltd., Brian Schander, and)	Honorable
Du Page Valley Anesthesiologists, Ltd.,)	Hollis L. Webster,
Defendants).)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justice Bowman concurred in the judgment.
Justice Schostok specially concurred.

ORDER

Held: Apparent and actual agency are separate claims subject to the bar of *res judicata* and the prohibition against claim splitting where the plaintiffs allege that a hospital is liable for a doctor's negligent performance of a surgery, the actual agency claim is adjudicated in favor of the hospital on summary judgment, the plaintiffs voluntarily dismiss the remaining claims, including the apparent agency claim, and the plaintiffs subsequently refile the apparent agency claim against the hospital.

¶ 1 Defendant, Edward Hospital, filed a motion to dismiss the refiled complaint of plaintiffs, Brandon Wilson and his mother Daphne Wilson. The circuit court of Du Page County denied the motion on the ground that it was barred by *res judicata*. The trial court subsequently allowed the hospital to certify a question under Supreme Court Rule 308 (eff. Feb. 1, 1994). On appeal, the hospital argues that we should answer the question in the affirmative because, following the initial iteration of this case and its voluntary dismissal, plaintiffs' refiled case presents an issue of claim splitting that has been settled and prohibited by *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008). We agree and answer the certified question in the affirmative.

¶ 2 In 2003, Brandon Wilson, then a minor, broke his right femur in a car accident. He was taken to Edward Hospital and doctors there performed surgery on his leg. During the surgery, Brandon vomited and aspirated the vomitus into his lungs, causing an anoxic brain injury.

¶ 3 On July 28, 2004, Brandon and his mother, Daphne Wilson, sued the hospital, two doctors and their employers, and a nurse. Plaintiffs alleged that the surgery on Brandon's leg was of a non-emergency nature and was conducted before allowing a sufficient fasting period to empty the contents of Brandon's stomach. Plaintiffs alleged that the defendants were negligent in so doing, and their negligence proximately caused Brandon to vomit while unconscious, aspirate the vomitus, and suffer a brain injury resulting from lack of oxygen-flow to the brain.

¶ 4 The hospital eventually filed a motion for partial summary judgment, arguing that the two doctors were neither actual nor apparent agents. On June 4, 2008, the trial court granted partial summary judgment on the actual agency issue and denied the motion on the apparent agency issue. After the trial court's ruling, plaintiffs moved to voluntarily dismiss their remaining claims pursuant

to section 2—1009 of the Code of Civil Procedure (735 ILCS 5/2—1009 (West 2008)). On August 26, 2009, the trial court granted plaintiff's motion for voluntary dismissal.

¶ 5 On January 26, 2010, plaintiffs filed a new complaint against the hospital and the other defendants. Ultimately, as pertinent here, counts I through IV of the third amended complaint alleged negligence against the hospital under a theory of apparent agency. The hospital moved to dismiss arguing that the previous grant of summary judgment on the actual agency claim coupled with the plaintiffs' voluntary dismissal resulted in impermissible claim splitting occurring in the third amended complaint, and that the third amended complaint was barred by *res judicata* and the prohibition against claim splitting pursuant to *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325 (1996), and *Hudson*, 228 Ill. 2d 462. The trial court denied the motion but allowed the hospital to certify a question of law pursuant to Supreme Court Rule 308.

¶ 6 The trial court certified the following question:

“Are actual agency and apparent agency separate claims for purposes of the *res judicata* doctrine and the prohibition against claim-splitting set forth by the [Illinois] Supreme Court in *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008)[,] and *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325 (1996), so that a summary judgment entered on the actual agency claims in plaintiff's [*sic*] initial suit bars plaintiff's [*sic*] apparent agency claims in this refiled suit, even in the face of a ruling that there is a question of fact as to the apparent agency claims?”

We allowed the hospital leave to appeal the certified question.

¶ 7 The issue on appeal is whether plaintiffs engaged in impermissible claim splitting. As this appeal arises pursuant to Rule 308, we note that we review *de novo* the legal question presented.

Anthony v. City of Chicago, 382 Ill. App. 3d 983, 987 (2008). Further, in evaluating certified question pursuant to Rule 308, we answer only the question certified and do not give an opinion or ruling on any underlying order of the trial court. *Anthony*, 382 Ill. App. 3d at 987.

¶ 8 The hospital argues that three cases both define the interplay between claim splitting and *res judicata* and control the answer to the certified question: *Hudson, Rein, and Williams v. Ingalls Memorial Hospital*, 408 Ill. App. 3d 360 (2011). We first review the holdings of each of these cases.

¶ 9 In the original case in *Hudson*, the plaintiffs' child died from respiratory failure related to his asthma. When the child began experiencing breathing difficulty, the plaintiffs requested emergency assistance, informing the 911 operator of the child's breathing difficulty. The defendants dispatched a fire engine which did not have advanced life support equipment, followed by an ambulance with advanced life support equipment that arrived about 15 minutes after the plaintiffs' emergency call. *Hudson*, 228 Ill. 2d at 465. The plaintiffs alleged that the child died as a result of the delay in providing advanced life support. *Hudson*, 228 Ill. 2d at 465. Plaintiffs sued the city alleging negligence in count I and willful and wanton misconduct in count II. *Hudson*, 228 Ill. 2d at 465-66. The defendants claimed immunity on the negligence count, and the trial court dismissed the negligence claim with prejudice, while the willful and wanton claim was continued. In July, 2002, the trial court granted the plaintiffs' motion to voluntarily dismiss the willful and wanton count. *Hudson*, 228 Ill. 2d at 466.

¶ 10 About a year later, the plaintiffs refiled their action, alleging only one count of willful and wanton misconduct against the defendants. The defendants moved to dismiss the refiled claim, arguing that it was barred by *res judicata*. The trial court agreed and dismissed the action, and the plaintiffs appealed. The appellate court affirmed, relying on *Rein* and holding that *res judicata*

precluded the plaintiffs from refiling their willful and wanton misconduct claim. *Hudson*, 228 Ill. 2d at 466.

¶ 11 The supreme court agreed with the appellate court. It first reviewed the elements required to apply the doctrine of *res judicata*: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Hudson*, 228 Ill. 2d at 467. The plaintiffs argued that the willful and wanton claim had never been subjected to a final judgment, so *res judicata* was not applicable to that claim. *Hudson*, 228 Ill. 2d at 467-68. The court concluded that *Rein* controlled the outcome (*Hudson*, 228 Ill. 2d at 469), summarizing its holding: “*Rein* thus stands for the proposition 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” (*Hudson*, 228 Ill. 2d at 473).

¶ 12 Along the way, the supreme court emphasized *Rein*'s analysis of determining whether the element of a final judgment on the merits has been satisfied. The court noted that *res judicata* covers both claims actually adjudicated and claims that could have been adjudicated. The court concluded that in a situation where one of a number of claims had been finally adjudicated, all of the claims arose out of the same set of operative facts, the remaining claims had been voluntarily dismissed, and the remaining claims could have been resolved in the original action, then the refiled claims would be subject to *res judicata* because they should have been resolved in the original action. In other words, the refiling of the voluntarily dismissed claims represented impermissible claim splitting, fulfilling the first element of the *res judicata* test. *Hudson*, 228 Ill. 2d at 471, quoting *Rein*, 172 Ill. 2d at 337-39. The court also noted that there were exceptions to the prohibition on claim

splitting: (1) the parties agreed, expressly or effectively, or the defendant acquiesced, that the plaintiff may split its claim; (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action (although denominating the voluntary dismissal to be without prejudice was insufficient to expressly reserve the plaintiff's right to bring the second action); (3) the plaintiff was unable to obtain relief on its claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a recurring or continuing wrong; or (6) the policies favoring preclusion of the second action are clearly and convincingly overcome for an extraordinary reason. *Hudson*, 228 Ill. 2d at 472-73, quoting *Rein*, 172 Ill. 2d at 341.

¶ 13 The court determined that all of the elements of *res judicata* were fulfilled, including the first, the final judgment on the merits, and that none of the exceptions were present. *Hudson*, 228 Ill. 2d at 471, 473. The court also reviewed the policy justifications enunciated in *Rein*: first, to prevent a plaintiff from voluntarily dismissing some claims while proceeding to final judgment on other claims and, if unsuccessful on those claims, refiling the previously dismissed claims; and second, to prevent plaintiffs from using a voluntary dismissal to circumvent a trial court's refusal to issue a Supreme Court Rule 304(a) (eff. Feb. 20, 2010) certification. *Hudson*, 228 Ill. 2d at 473. The court concluded that the parents' refiled willful and wanton claim was precluded by *res judicata* and claim-splitting considerations. *Hudson*, 228 Ill. 2d at 473-74.

¶ 14 We next turn to *Rein*. In that case, the plaintiffs filed their first action in 1990, alleging that the defendants misled them about the nature of certain securities they were purchasing. The plaintiffs alleged that the defendants persuaded them that the bonds were high-quality municipal bonds when they were actually high-risk investments in a private project. The plaintiffs' complaint

sought rescission, along with claims for common law fraud and breach of fiduciary duty. *Rein*, 172 Ill. 2d at 327-29. The defendants moved to dismiss the rescission counts of the complaints and the trial court agreed, dismissing them with prejudice on the grounds that they were beyond the limitations period. *Rein*, 172 Ill. 2d at 329. The plaintiffs moved to reconsider and for leave to amend by adding an equitable estoppel argument that, according to the plaintiffs, would override the statute of limitations bar. The trial court rejected the plaintiffs' motions and refused to grant a Rule 304(a) finding that there was no just reason to delay enforcement or appeal of the dismissal of the rescission claims. The plaintiffs subsequently voluntarily dismissed the remaining counts of their complaints and appealed the dismissal of the rescission counts. The appellate court affirmed the dismissal of the rescission counts. *Rein*, 172 Ill. 2d at 330.

¶ 15 Following the appellate court decision, the plaintiffs refiled their remaining claims in a new action, and the complaints were virtually identical to the previous complaints. The defendants moved to dismiss the new complaints based on *res judicata*, the trial court granted the motion, and the appellate court affirmed. *Rein*, 172 Ill. 2d at 332-33.

¶ 16 The supreme court quickly determined that the second and third elements of *res judicata*, identity of causes of action and parties, were fulfilled. *Rein*, 172 Ill. 2d at 335. Regarding the finality of the judgment, the court held that the dismissal of the rescission claims counted as a final judgment on the merits for the purposes of *res judicata*. The court held that *res judicata* prohibited the rescission claims and that they were properly dismissed from the refiled action. *Rein*, 172 Ill. 2d at 335-36.

¶ 17 Turning to the remaining claims, the court determined that the first and third elements were fulfilled. The dismissal of the rescission claims was a final judgment, and the parties were identical.

Rein, 172 Ill. 2d at 338. The court considered the second element, the identity of causes of action. The court held that, because the same set of facts gave rise to the first and second sets of complaints, the causes of action were identical. *Rein*, 172 Ill. 2d at 338-39. The court concluded that the refiled action was precluded by *res judicata*. *Rein*, 172 Ill. 2d at 339.

¶ 18 The court then turned to the issue of claim splitting. The court noted that, as a matter of public policy, a plaintiff was not allowed to split up its causes of action; in other words, the rule against claim splitting “prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action.” *Rein*, 172 Ill. 2d at 340. The court cautioned that a plaintiff, in order “[t]o avoid the bar of *res judicata*, *** could have proceeded to a decision on the merits of the [remaining] counts in [the first action] and, if unsuccessful, appealed both the results regarding the [remaining] counts and the trial judge’s order dismissing the rescission counts with prejudice.” *Rein*, 172 Ill. 2d at 340.

¶ 19 The court justified its holding by noting that, if the plaintiffs were allowed to split their claims in this case, then they would be able to defeat the policy underlying the doctrine of *res judicata*, which is to protect the defendant from harassment and the public from multiple litigations. Likewise, to allow the plaintiff to succeed in refiled the remaining counts after first having the rescission claims dismissed would allow it to circumvent Rule 304(a) by allowing a plaintiff, not the court, to choose when an unsuccessful claim could be appealed (and then allowing the plaintiff to proceed again on the remaining counts). *Rein*, 172 Ill. 2d at 343.

¶ 20 Looking at the court’s decision in *Hudson* and *Rein*, we see that the cases teach that a plaintiff must adjudicate all his claims in a single action. If the plaintiff has one of several claims dismissed and does not obtain either a Rule 304(a) certification (which, under *Hudson* and *Rein*,

would seem to qualify as the express agreement to allow the plaintiff to split his claims), it must continue in the action or risk the subsequent bar of *res judicata*. For example, if one of the plaintiff's three claims arising out of a single set of operative facts is dismissed, then the plaintiff must proceed on the other two before appealing. If the plaintiff undertakes a voluntary dismissal of the remaining two claims so it can appeal the dismissal of the first, then, if the plaintiff refiles an action consisting of the remaining two claims, that refiled action will be subject to preclusion by *res judicata*. While there are exceptions to this rule, where none are present, then courts will routinely grant a motion to dismiss on grounds of *res judicata* where the plaintiff has improperly split its claims.

¶ 21 Having reviewed the teachings of *Hudson* and *Rein*, we now turn to a third case that implements their rules, *Williams*, 408 Ill. App. 3d 360, which we note is factually very similar to this case. In that case, the plaintiffs sued the defendant hospital following the child's birth during which he received a brachial plexus injury. Pertinently, the plaintiffs claimed that the hospital was vicariously liable for the doctor's negligence on the basis of actual and apparent agency. *Williams*, 408 Ill. App. 3d at 361-62. The hospital moved for a partial summary judgment on the apparent agency claim, which was granted. Subsequently, the plaintiffs voluntarily dismissed the remaining claims, including the actual agency claim. *Williams*, 408 Ill. App. 3d at 362. About a year later, the plaintiffs filed a new action containing the remaining claims from the previously dismissed action. The defendants moved to dismiss on the grounds of *res judicata*, arguing that summary judgment on the apparent agency claim was a final judgment on the merits. The trial court denied the motion, but agreed to allow the defendants to certify two questions for appellate review. *Williams*, 408 Ill. App. 3d at 362-63.

¶ 22 The appellate court first determined that vicarious liability based on actual agency stated a different claim from liability based on apparent agency. *Williams*, 408 Ill. App. 3d at 370. The court held that each claim contained different elements and different modes of proof. *Williams*, 408 Ill. App. 3d at 370-71. The court concluded that the summary judgment on the apparent agency claim was a final judgment on the merits so that, even though the actual agency claim was not adjudicated in the first action, it could have been, and the *res judicata* effect of the order in the previous action extended to bar every matter actually determined as well as every matter that might have been raised and determined in the previous action. *Williams*, 408 Ill. App. 3d at 371-72.

¶ 23 The court went on to consider whether any exceptions to claim splitting were applicable. The court concluded that the fact that the defendants' motion (attacking only apparent agency) and the order drafted by the defendants meant that the defendants implicitly agreed to leave the actual agency claim pending. *Williams*, 408 Ill. App. 3d at 373-74. The court held that the plaintiffs were not precluded from litigating the actual agency claim. *Williams*, 408 Ill. App. 3d at 374.

¶ 24 The plaintiffs further argued that the apparent agency claim against the hospital was "personal" to the hospital and did not extend to all other defendants, so the adjudication on the merits applied only to the hospital, not the other defendants. The trial court accepted this argument, holding that the summary judgment in the prior action on apparent agency caused the hospital to address the merits of the plaintiffs' claim. Applying Supreme Court Rule 273 (eff. Jan 1, 1967), the court concluded that the summary judgment on apparent agency was on the merits and applied as a *res judicata* bar against relitigating the remaining claims (except apparent agency, which the hospital acquiesced to) against the hospital. Regarding the other defendants, however, the prior summary judgment did not cause them to address the merits of the plaintiffs' claim, so there was no *res*

judicata bar against relitigating the remaining claims against them. *Williams*, 408 Ill. App. 3d at 378.

¶ 25 *Williams*, then, squarely holds that actual and apparent agency are independent claims by which a plaintiff may attempt to prove a defendant's liability. Further, when one of those claims is dismissed or adjudicated, and the plaintiff takes a voluntary dismissal, the remaining claim may not be relitigated against the defendant as a result of the *res judicata* bar that applies to such a case of claim splitting. Moreover, the factual context of *Williams* is virtually identical to the instant case: the patient is injured by a doctor and the plaintiffs seek to hold the hospital liable for that injury by alleging both actual and apparent agency claims against the hospital for the doctor's negligence. *Williams* also squarely follows *Rein* and *Hudson* in its analysis of *res judicata* and claim splitting.

¶ 26 Applying the rules of *Hudson*, *Rein*, and *Williams* to our case, we conclude that plaintiffs' refiled apparent agency claim is barred by *res judicata*. As noted above, the elements of *res judicata* include (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of cause of action; and (3) the parties or their privies are identical in both actions. *Williams*, 408 Ill. App. 3d at 367. There was a final judgment on the merits of the actual agency claim when the trial court granted the hospital's motion for partial summary judgment. The same facts were alleged in the refiled action as well as the claim of apparent agency. Last, the parties are the same in both actions. Accordingly, the elements of *res judicata* are satisfied. See *Williams*, 408 Ill. App. 3d at 371. The effect of this finding is also given by *Williams*. Where, in the initial action, both apparent and actual agency claims are raised, one is involuntarily resolved, the remaining claim is voluntarily dismissed and later refiled, the plaintiff's action will be subject to preclusion by the doctrine of *res judicata* and the policy against claim splitting. *Williams*, 408 Ill. App. 3d at 371-72. There is

nothing in the record to suggest that any of the exceptions to the policy against claim splitting apply in this case. Accordingly, we hold that the answer to the certified question is “yes.”

¶ 27 Plaintiffs attempt to distinguish *Hudson, Rein, and Williams* and instead, point to *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887 (2009), and *Curtis v. Lofy*, 394 Ill. App. 3d 170 (2009), as being more factually similar to this case. We turn first to *Piagentini*.

¶ 28 In that case, one of the plaintiffs was involved in a car accident. The plaintiffs eventually sued the Ford Motor Company, alleging claims of negligence and strict liability. In both of the claims, the plaintiffs alleged that the car was designed with insufficient stability and had an inadequate seatbelt/occupant protection system. Ford obtained a partial summary judgment that had the effect of striking the allegations regarding stability from each of the claims; the remaining allegations were not stricken. *Piagentini*, 387 Ill. App. 3d at 888-89. The plaintiffs voluntarily dismissed the remaining claims in the initial action without prejudice. The plaintiffs did not appeal the partial summary judgment striking the stability allegations. *Piagentini*, 387 Ill. App. 3d at 889.

¶ 29 Nearly a year later, the plaintiffs refiled their action, again alleging negligence and strict liability, with specific allegations relating to the inadequacy of the seatbelt/occupant protection system. *Piagentini*, 387 Ill. App. 3d at 889. Ford moved for summary judgment on the ground of *res judicata*. Ford argued that the partial summary judgment striking certain allegations operated as a bar to the refiled action. The trial court granted summary judgment in favor of Ford, and the plaintiffs eventually appealed. *Piagentini*, 387 Ill. App. 3d at 889-90.

¶ 30 The appellate court, after first analyzing *Rein* and *Hudson*, determined that the partial summary judgment order was not a final order for two reasons. First, the order had the effect of striking only the allegations relating to the vehicle stability and potential to roll over, but no claim

of the complaint was actually dismissed. Second, the order expressly granted the plaintiffs time in which to replead the allegations regarding inadequate seatbelts. *Piagentini*, 387 Ill. App. 3d at 893. The court further held that, while certain allegations had been dismissed, there remained allegations sufficient to prove each of the claims alleged in the plaintiffs' complaint, so the first element of *res judicata* was not satisfied. *Piagentini*, 387 Ill. App. 3d at 894.

¶ 31 The appellate court also concluded that Ford acquiesced to claim splitting. The court noted that, for 3½ years after the refile, Ford filed affirmative defenses that did not mention *res judicata*, participated in discovery, and defended the lawsuit before finally filing a motion for summary judgment based on *res judicata*. The court held that Ford's failure to file a timely objection constituted acquiescence. *Piagentini*, 387 Ill. App. 3d at 898.

¶ 32 Based on our review of *Piagentini*, we conclude it is distinguishable. While the hospital did not acquiesce to the claim splitting involved here, the fact that no claim was dismissed in *Piagentini* serves to distinguish that case from ours. In *Piagentini*, certain allegations involved in both claims against Ford were removed from the complaint. The court held that removing issues was not the same as adjudicating a claim. *Piagentini*, 387 Ill. App. 3d at 894. Here, by contrast, the claim based on actual agency was adjudicated, and no allegations supporting that claim remained, thereby fulfilling the first element of *res judicata* when plaintiffs refiled their complaint. *Piagentini*, therefore, is distinguishable and does not serve to change the outcome of our analysis under *Rein*, *Hudson*, and *Williams*.

¶ 33 We next consider *Curtis*. In that case, the plaintiff was struck by a car driven by one of the defendants. The plaintiff's complaint alleged that the owner of the vehicle and the driver, acting as the owner's agent, were negligent by operating the vehicle too fast for conditions, failing to reduce

speed to avoid an accident, and failing to take necessary evasive action to avoid an accident. *Curtis*, 394 Ill. App. 3d at 173. The owner moved for summary judgment on the agency theory, contending that the uncontested evidence rebutted the presumption of agency created by her ownership. The trial court granted the motion and the plaintiff voluntarily dismissed the action. *Curtis*, 394 Ill. App. 3d at 173.

¶ 34 About a year later, the plaintiff refiled her complaint, this time alleging that the driver had been negligent, and the owner owed a duty to provide proper supervision of the driver and to ensure the safe operation of her vehicle by her agent, the driver. The owner filed a motion to dismiss, which was granted. *Curtis*, 394 Ill. App. 3d at 173. Subsequently, the driver filed a motion for summary judgment based on *Hudson* and *res judicata* and the motion was granted. *Curtis*, 394 Ill. App. 3d at 174-75.

¶ 35 The court, after reviewing *Rein*, *Hudson*, and *Piagentini*, determined that the summary judgment granted in favor of the owner on the claim of agency did not have a *res judicata* effect against the driver. The court reasoned:

“the judgment against [the plaintiff] and in favor of [the owner] was based on a defense ‘personal’ to [the owner]. In her motion for summary judgment, [the owner] asserted the undisputed facts rebutted the presumption that [the driver] was her agent and she his principal. The summary judgment in favor of [the owner] did not address the merits of [the plaintiff’s] case against [the driver]. Therefore, while the dismissal was a dismissal on the merits as to [the owner] (because it caused [the owner] to prepare to address the actual merits of [the plaintiff’s] claim), the dismissal was based on a defense personal to [the owner] and

does not have a *res judicata* effect against a different defendant, [the driver].” *Curtis*, 394 Ill. App. 3d at 185.

¶ 36 The court also considered the summary judgment granted to the driver regarding some of the allegations contained in subparagraphs in count I of the plaintiff’s complaint. The court followed *Piagentini* and held that the dismissal of allegations (but not the claim itself) did not have a *res judicata* effect after the plaintiff’s voluntary dismissal and refile of the claim. *Curtis*, 394 Ill. App. 3d at 186-87. The court also held, alternatively, that, like in *Piagentini*, the driver acquiesced to the refile because he did not argue that the refiled complaint was barred by *res judicata* for 3½ years after it was refiled. *Curtis*, 394 Ill. App. 3d at 188.

¶ 37 We find that *Curtis* is also distinguishable. The *Curtis* court found that the grant of a summary judgment based on a defense personal to one defendant did not have a *res judicata* effect against another defendant. *Curtis*, 394 Ill. App. 3d at 185. Here, however, there is no second defendant who received a summary judgment in the initial action on a “personal” defense. Likewise, the hospital’s summary judgment did not involve some allegations common to the actual and apparent agency claims (see *Curtis*, 394 Ill. App. 3d at 186-87), but involved the entirety of the actual agency claim. Accordingly, *Curtis* is also distinguishable and does not change the outcome of our analysis under *Rein*, *Hudson*, and *Williams*.

¶ 38 This case is squarely controlled by *Williams*. In *Williams*, the court determined that the dismissal of an actual agency claim where both actual and apparent agency had been alleged as bases to find the hospital negligent precluded a refiled apparent agency claim on the grounds of *res judicata* and the prohibition against claim splitting. Likewise here. Plaintiffs alleged both actual and apparent agency as basis for the hospital’s negligence. The actual agency claim was adjudicated

by summary judgment, following which, plaintiffs voluntarily dismissed the remaining claims. Upon refiling, the apparent agency claim was subject to preclusion on the grounds of *res judicata* pursuant to *Williams*. Further, plaintiffs' authority is distinguishable, and plaintiffs can point to no exceptions to claim splitting or other circumstances that would take them outside the rule of *Williams*.

¶ 39 For example, plaintiffs attempt to argue that there was but a single claim, namely, for negligence, supported in different ways by actual and apparent agency. The elimination of one basis, according to plaintiffs, does not affect the unitary nature of the claim, so *Rein*, *Hudson*, and *Williams* should not apply, because they all had at least two claims. This contention fails, however, because plaintiffs are unable to distinguish *Williams* or otherwise diminish its applicability to their situation. Similarly, plaintiffs are unable to establish that the negligence alleged against the hospital is but a single claim, which is a prerequisite for the success of their contention. Instead, in a similar situation, *Williams* teaches that, in attempting to prove a hospital negligent, apparent and actual agency are two separate claims, and not aspects of a single claims. *Williams*, 408 Ill. App. 3d at 371.

¶ 40 Because plaintiffs have not adequately distinguished *Williams*, and because *Williams* is on all fours with our case, we are compelled to follow it. Accordingly, we answer the certified question in the affirmative.

¶ 41 For the foregoing reasons, we answer the question certified by the circuit court of Du Page County in the affirmative.

¶ 42 Certified question answered.

¶ 43 JUSTICE SCHOSTOK, specially concurring:

¶ 44 The majority reaches the result that is dictated by our supreme court’s decisions in *Rein* and *Hudson*. I write separately, however, because I agree with both Chief Justice Kilbride and former Chief Justice Fitzgerald that the analysis in *Rein* and *Hudson* is flawed and that the issue of how *res judicata* and the prohibition against claim-splitting applies to a voluntarily dismissed complaint should be considered again by the supreme court. See *Hudson*, 228 Ill. 2d at 484, 498 (Kilbride, J., dissenting, joined by Fitzgerald, J.).

¶ 45 As Chief Justice Kilbride explained in his dissent in *Hudson*, a plaintiff that voluntarily dismisses his complaint has an absolute right to refile his claim. *Id.* at 494 (Kilbride, J., dissenting, joined by Fitzgerald, J.). Chief Justice Kilbride further expounded:

“*Res judicata* is not applicable to a voluntary dismissal, and a voluntary dismissal without prejudice is a recognized exception to the rule against claim-splitting precisely because a voluntary dismissal without prejudice is not a final judgment on the merits.” *Id.* at 495 (Kilbride, J., dissenting, joined by Fitzgerald, J.).

¶ 46 Here, after the plaintiffs voluntarily dismissed their claims alleging that the doctors working at the hospital were apparent agents, they should have been allowed to refile their complaint and reassert their claims alleging apparent agency. See 735 ILCS 5/2—1009(a) (West 2010). However, the plaintiffs have lost that right under *Rein* and *Hudson* which serve to “mechanically *** infringe on plaintiffs’ legislatively created right to refile their voluntarily dismissed claim, based on grounds totally divorced from the merits of plaintiffs claim.” *Id.* at 498 (Kilbride, J., dissenting, joined by Fitzgerald, J.).

¶ 47 Moreover, the result dictated by *Rein* and *Hudson* is unfair to the plaintiffs in this case because they did not engage in any claim-splitting. See *id.* at 501 (Kilbride, J., dissenting, joined

by Fitzgerald, J.). After the trial court granted the hospital's motion for partial summary judgment as to the agency claim, the plaintiffs did not voluntarily dismiss their apparent agency claim in order to continue to litigate the agency claim. Cf. *Rein*, 172 Ill. 2d at 330 (plaintiffs voluntarily dismissed certain counts of their complaint in order to appeal dismissal of other counts). Rather, the plaintiffs only sought to pursue their apparent agency claims.

¶ 48 Finally, there is no indication in the record that the hospital was prejudiced by the plaintiffs' voluntary dismissal of their apparent agency claims. For all these reasons, the plaintiffs should be allowed to proceed with their apparent agency claims. Nonetheless, based on the supreme court's decisions in *Rein* and *Hudson*, I acknowledge that this court may not grant the plaintiffs the relief to which they should be equitably entitled. See *People v. Kolton*, 347 Ill. App. 3d 142, 155 (2004) (Theis, J., dissenting) (an intermediate court of review must follow the majority opinion of our state's supreme court rather than the dissent).