FOURTH DIVISION
September 30, 2013

No. 1-10-0596

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AUGUST F. GHILARDUCCI, individually, and as Special Representative of the Estate of MARIE GHILARDUCCI, Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 09 L 9017
JESS E. FORREST,	)	Honorable Drella Savage,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Epstein and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order granting defendant's section 2-619 motion to dismiss plaintiffs' refiled complaint because it is barred by *res judicata* is affirmed in part and reversed in part. The second complaint is barred by the doctrine of *res judicata*, but the express reservation exception to the rule against claim-splitting applies to the claim that was pending when plaintiffs voluntarily dismissed their

first complaint.

¶ 2 This appeal arises from the trial court's February 8, 2010 order granting defendant Jess E. Forrest's motion to dismiss plaintiffs' July 31, 2009 complaint as barred by *res judicata*. On June 30, 2011, this court entered an order affirming that dismissal. On July 21, 2011 plaintiffs filed a petition for rehearing. We allowed the petition for rehearing and find that the trial court erred in granting defendant's motion to dismiss as to all claims in plaintiffs' July 31, 2009 complaint. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.[1]

¶ 3 BACKGROUND

¶ 4 The prior proceedings, which are grounds for defendant's 2-619 motion alleging plaintiffs' July 2009 complaint is barred by *res judicata*, proceeded to a third amended complaint which plaintiffs filed on April 19, 2007 (hereinafter *Ghilarducci I*). *Ghilarducci I* is in two counts. Count I states it is an action for legal malpractice, and count II states it is an action for forgery, theft and conversion. Count I alleges generally that defendant was the registered agent for Pacelli Holdings and WFA, each of which was an Illinois Limited Liability Company (LLC) which has dissolved, and of which plaintiffs were members. Plaintiffs' son, August C. Ghilarducci, retained defendant, an attorney, to represent August F. Ghilarducci, Marie Ghilarducci, August C. Ghilarducci, the LLCs, and a Trust. The complaint alleges defendant represented "plaintiffs in various legal matters" and that "defendant was negligent in handling

[1] Following Justice Joseph Gordon's demise, Justice Taylor has been added as a panel member and has reviewed the briefs.

matters for the plaintiffs ***." Count I then proceeds to make additional allegations under three unnumbered subheadings. The first subheading is labeled "Negligence Related to Interstate Bank Loans" (hereinafter *Ghilarducci I* count IA), the second subheading is labeled "Negligence Related to Washington Mutual and Westbank" (hereinafter *Ghilarducci I* count IB), and the third subheading is labeled "Negligence Related to Falco and Josefik" (hereinafter *Ghilarducci I* count IC).

¶ 5 *Ghilarducci I* count IA alleged that defendant represented plaintiffs and plaintiffs' son in a foreclosure action by Interstate Bank against property in South Holland and Harvey. WFA owned the South Holland property and Pacelli owned the Harvey property. Each LLC operated a car wash on the properties. The mortgages secured loans by Interstate to WFA and Pacelli. Plaintiffs, individually, also guaranteed the loans.

¶ 6 *Ghilarducci I* count IA alleged that defendant (1) failed to advise plaintiffs of an amended complaint in the foreclosure action which added counts against them individually, or to answer the amended complaint or take any action in the foreclosure action; (2) failed to advise plaintiffs of their rights related to the foreclosure action; (3) failed to inform plaintiffs of their right to cure the default and reinstate or redeem the mortgage or to have Interstate accurately account for payments and loan balances; (4) did not inform plaintiffs of a default judgment against them in the Interstate foreclosure action; (5) did not attempt to vacate the default judgment and seek leave to file an answer; (6) did not return phone calls; (7) failed to tender proceeds of the sale of separate properties during the proceedings which were meant to reduce the indebtedness to Interstate, or failed to have Interstate account for the proceeds of the sale; and (8) did not require

Interstate to account for money it retained in escrow for taxes, insurance, and expenses and see to it that Interstate credited plaintiffs for that amount.

¶ 7 *Ghilarducci I* count IB relates to two loans secured by property in West Chicago and Rolling Meadows. Washington Mutual (Washington) made a loan to Harris Bank as trustee under a trust agreement dated September 26, 1997, secured by the West Chicago Property. Subsequently, Westbank made a loan to plaintiffs and Pacelli, secured by the Rolling Meadows property and the same West Chicago property. Westbank's interest in the West Chicago property was subordinate to Washington's interest. Washington filed its foreclosure action first, followed by Westbank. Westbank then intervened in the Washington foreclosure. We will refer to plaintiffs' allegations of malpractice by defendant in the Washington/West Chicago property matter as *Ghilarducci I* count IB(1), and in the Westbank/Rolling Meadows-West Chicago property matter as *Ghilarducci I* count IB(2). Defendant filed an appearance on behalf of plaintiffs and the trustee. *Ghilarducci I* count IB alleges, generally, that defendant (1) failed to advise plaintiffs of their right to reinstate or redeem the mortgages; (2) caused a default judgment of foreclosure and sale to be entered against plaintiffs and the trustee for failing to answer or otherwise plead in the proceedings; and (3) failed to inform plaintiffs of the default judgment.

¶ 8 *Ghilarducci I* count IC contains the following allegations. Defendant filed a common law action against Salvatore Falco, a partner in the operation of WFA's car wash in South Holland, and Falco's assistant, on behalf of WFA and plaintiffs' son, the other partners in the car wash operation. The claim arose from the assistant and Falco's alleged theft from the car wash operation. Count IC alleges defendant (1) failed to retain an expert; (2) settled the claims without

authority and without informing plaintiffs or their son; and (3) failed to remit the settlement funds. Count II of *Ghilarducci I* alleges defendant forged plaintiffs' son's name on the settlement papers in the common law action and stole the settlement proceeds.

¶ 9 On February 26, 2009 the trial court entered a written order on defendant's motion for summary judgment on *Ghilarducci I*. The court dismissed the claims of WFA and Pacelli with prejudice. Neither LLC was "in good standing with the state of Illinois, and at this point in time, neither is entitled to maintain a civil action in Illinois." The court noted that *Ghilarducci I* "commingles claims" and that the "first discernable claim concerns defendant's handling of a 2001 foreclosure by Interstate Bank." According to the trial court's summary judgment order, "Plaintiffs also claim that defendant was negligent in handling a 2002 foreclosure action by Washington Mutual." Finally, plaintiffs "also claim damages for defendant's negligence in handling a suit that [plaintiffs' son] and WFA brought against Salvatore Falco."

¶ 10 The trial court found that plaintiffs were not parties to the underlying suit in count II of *Ghilarducci I* and could not sue as shareholders of WFA. The court found that because "no attorney/client relationship exists between [plaintiffs] and defendant in regards to this suit, no duty was owed to them." The court dismissed count II for lack of a proper plaintiff. The court also addressed defendant's argument that "the allegations concerning the Interstate foreclosure case are time barred." The court found that plaintiffs were chargeable with knowledge of the default judgment against them in that case when they hired a new attorney to vacate that judgment in January 2003. The court rejected plaintiffs' argument their cause of action against defendant did not accrue until the court denied their motion to reconsider in the Interstate

foreclosure action in May 2004. Nonetheless, the court denied defendant's motion "as to count I."

¶ 11 On March 18, 2009, the trial court entered a written order on the parties' cross-motions to reconsider. Following arguments by the parties, the court granted defendant's motion to reconsider and granted summary judgment "in regards to any claim of damages arising from the loss in foreclosure of the South Holland Property *** of the Interstate Bank foreclosure action ***. All claims arising out of that proceedings are dismissal [sic] *with prejudice* as they are time-barred." (Emphasis in original.) The court denied plaintiffs' cross-motion to reconsider.

¶ 12 At this stage of the prior proceedings, the only claims remaining were those stated in what we have labeled *Ghilarducci I* count IB(1) and *Ghilarducci I* count IB(2). The next event in the prior proceedings that is relevant to this appeal occurred on March 18, 2009, when the trial court entered a written order on the parties' motions *in limine* in anticipation of a trial. The pertinent order is on defendant's motion *in limine* number 17 to bar introduction of any testimony about, or any claim for damages arising from the West Chicago property. The court granted the motion *in limine* and further wrote in the order that plaintiffs' claims in count I of *Ghilarducci I* arising out of the Washington foreclosure action, or relating to the West Chicago property, are dismissed with prejudice on the grounds that plaintiffs have no standing to seek damages as this property was owned by a separate trust and plaintiffs were not the beneficiaries of that trust.

¶ 13 After the trial court's March 18, 2009 order on the motions *in limine* in the prior proceedings, the only claim that remained for trial was our *Ghilarducci I* count IB(2) for malpractice in the Westbank foreclosure action. On March 18, 2009, the trial court entered an

order of dismissal. The order reads as follows:

> "THIS CAUSE COMING TO BE HEARD on Plaintiffs' Motion for Voluntary Dismissal, the Court being fully advised in the premises, IT IS HEREBY ORDERED:
>
> This case is dismissed voluntarily dismissal pursuant to Section 2-1009 of the Code of Civil Procedure with all applicable costs pursuant to the statute.
>
> [Handwritten:] The Defendant will submit a bill of costs within 21 days or by April 8, 2009."

¶ 14 On July 31, 2009 plaintiffs filed the complaint at issue in this appeal (*Ghilarducci II*). *Ghilarducci II* is in two counts. Count I states it is for legal malpractice and count II states it is an alternative count for the tort of outrage. The complaint states it "is a re-filed case having been previously filed on October 5, 2005 *** and having been voluntarily dismissed by Plaintiffs on or about March 18, 2009." Count I in *Ghilarducci II* identifies the parties and contains a general statement of facts, then makes several allegations under two unnumbered subheadings. The first subheading is "The Interstate Bank Loans and Litigation" (hereinafter *Ghilarducci II* count IA). *Ghilarducci II* count IA alleges Interstate Bank filed a foreclosure action on a mortgage against property in South Holland. The property secured two loans to WFA and Pacelli and plaintiffs guaranteed the loans. WFA held title on the property.

¶ 15 *Ghilarducci II* count IA also alleges that the foreclosure sought a personal judgment against plaintiffs, among others, for any deficiency. The complaint alleges, in pertinent part, that defendant (1) never had contact with plaintiffs, (2) failed to advise plaintiffs of their rights related to the foreclosure action or to advise plaintiffs of the status of the foreclosure action, (3)

failed to advise plaintiffs what courses of action were available to them, (4) failed to ascertain their goals in the litigation or to determine what action plaintiffs wanted to take with respect to the foreclosure action, (5) failed to analyze the facts and circumstances regarding other properties and plaintiffs' car wash business, (6) never advised plaintiffs that Interstate filed an amended complaint and failed to answer the amended complaint, (7) caused a default judgment to be entered against plaintiffs by failing to answer the amended complaint after which other claims against plaintiffs remained pending, and (8) failed to advised plaintiffs of the entry of the default judgment.

¶ 16 *Ghilarducci II* count IA alleges an attorney filed a motion to vacate the default judgment, which was denied, but that plaintiffs did not hire him and were unaware of his representation until after December 2003, when plaintiffs were served with a citation to discover assets. After receiving the citation to discover assets, plaintiffs hired an attorney and learned, for the first time, the South Holland property was in arrears, a foreclosure case had been filed, judgment had been entered against them, and that a different attorney had filed pleadings on their behalf. Plaintiffs' retained attorney filed an appearance in March 2004 and in May 2004 filed a motion to reconsider the order denying the motion to vacate which had been filed for plaintiffs without their knowledge. The trial court denied the motion to reconsider on May 21, 2004.

¶ 17 The next unnumbered subheading in *Ghilarducci II* is "West Chicago and Rolling Meadows" (hereinafter *Ghilarducci II* count IB). *Ghilarducci II* count IB is based on (a) a loan by Washington Mutual (Washington) to Harris Bank as trustee secured by property located in West Chicago, (b) a loan by Westbank secured by a first mortgage on property in Rolling

Meadows and a second mortgage on property in West Chicago (the same property that secured the Washington loan), and (c) foreclosure actions by Washington and Westbank. *Ghilarducci II* count IB alleges plaintiffs had no knowledge of a foreclosure action that included claims to foreclose the West Chicago and Rolling Meadows properties or any events that transpired in the foreclosure cases until they were served with a citation to discover assets in December 2003. Plaintiffs alleged defendant owed them a duty of care as a result of filing an appearance and answer on their behalf in the South Holland foreclosure case and in the case involving the Rolling Meadows and West Chicago properties. Plaintiffs alleged defendant owed them a duty to inform them about the facts and circumstances in and related to the foreclosure cases and their rights and remedies therein, to determine their goals with respect to those cases, to respond to pleadings, to advise them how to protect their interests and how their interests conflicted with other parties, and otherwise to represent their interests in the litigation.

¶ 18 The complaint contains a single paragraph comprised of a litany of defendant's alleged malpractice in the litigation in the Interstate, Washington, and Westbank actions, and lists specifically plaintiffs' damages that resulted from those proceedings and defendant's alleged breaches of his duties in each case.

¶ 19 Count II in *Ghilarducci II* is titled "The Tort of Outrage, In The Alternative" and alleges that defendant's conduct was outrageous. The claim specifically alleges it is in the alternative, should defendant claim that no attorney-client relationship existed between himself and plaintiffs. Plaintiffs allege defendant "filed a written appearance in the Interstate Bank case and the Washington/West Bank case" and that by doing so, defendant harmed plaintiffs in various

ways. Count II also alleged defendant failed to protect plaintiffs' interests and that various damages could have been avoided had defendant communicated with plaintiffs regarding the South Holland foreclosure, the Interstate loans, and the default on the West Chicago property. Plaintiffs also alleged that had defendant communicated the information to them, they would have cured the default on the Rolling Meadows property. Finally, count II in *Ghilarducci II* alleged that prior to January 2004, plaintiffs had no knowledge that defendant's negligence caused the judgments against them.

¶ 20 On September 15, 2009 defendant filed a motion to dismiss *Ghilarducci II*. The motion argued that under *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008), the doctrine of *res judicata* bars not only all claims that have been actually litigated to final judgment on the merits, but also all claims that could have been litigated to final judgment and were dismissed. Defendant's motion recited the procedural history of *Ghilarducci I* , including the trial court's order granting summary judgment in part, granting defendant's motion to reconsider, the court's order on defendant's motion *in limine*, and, finally, granting plaintiffs' motion to voluntarily dismiss the remainder of the claims. Defendant argued that plaintiffs filed *Ghilarducci II* to reinstate their previously dismissed claims, therefore, the matter should be dismissed, with prejudice, as a matter of law.

¶ 21 On February 8, 2010, following argument by the parties, the trial court entered an order granting defendant's motion to dismiss with prejudice. This appeal followed.

¶ 22 On appeal plaintiffs argued that the trial court did not enter a final judgment on the merits of their legal malpractice claim in *Ghilarducci I*. Plaintiffs argued the trial court only made

rulings on certain allegations in their legal malpractice claim, which were not final orders because the entire legal malpractice claim had not been dismissed and the remaining allegations under the malpractice claim were proceeding to trial. Plaintiffs argued that under *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887 (2009), the nonfinal orders dismissing allegations under plaintiffs' legal malpractice claim did not become final when plaintiffs voluntarily dismissed the remainder of the case, and the nonfinal orders on the legal malpractice claim did not dispose of a separate branch of the controversy because "separate branch" refers to other causes of action related to a set of operative facts, not a portion of a single cause of action. Nor, plaintiffs argued, is the dismissal of count II in *Ghilarducci I* a basis for *res judicata* as to count I. Plaintiffs argued that *Hudson* is distinguishable because plaintiffs' claims (the claims to which plaintiffs were proper parties) in *Ghilarducci I* did not involve multiple claims but only a single claim for legal malpractice.

¶ 23 On January 6, 2011 plaintiffs filed a motion to supplement the record and to provide additional authority. Plaintiffs sought leave to supplement the record with a certified copy of the relevant portion of the docket sheet and transcript of proceedings on plaintiffs' motion to voluntarily dismiss. Plaintiffs argued that this court's recent decision in *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 239 (2010), decided after the parties completed briefing in this case, had a direct impact on plaintiffs' appeal. Plaintiffs argued that under *Severino*, the express-reservation exception to *res judicata* applies to this case because the court docket entry states the trial court granted plaintiffs leave to refile their complaint, and during the hearing on the motion to voluntarily dismiss, both the court and defense counsel's statements indicate their

understanding the case would be refiled. We granted plaintiffs' motion.

¶ 24 On June 30, 2011 this court entered an order affirming the trial court's judgment granting defendant's section 2-619 motion to dismiss on the grounds *Ghilarducci II* is barred by *res judicata*. We distinguished *Piagentini* on the grounds the trial court did not expressly grant plaintiffs time to replead the remaining allegations in count I of *Ghilarducci I* when it dismissed plaintiffs' claims, and defendant did not acquiesce in the refiling of the claims. Thus, the dismissals were final. We also found an identity of parties in counts I and II of *Ghilarducci I*, and, therefore, that the trial court disposed of a separate branch of plaintiffs' litigation with defendant when it dismissed count II of *Ghilarducci I*.

¶ 25 On July 21, 2011 plaintiffs filed a petition for rehearing. On August 6, 2012 this court ordered the parties to present briefs confined to the issues raised in the petition for rehearing in *Severino*, 407 Ill. App. 3d 239. At issue was whether the plaintiff in a refiled case was limited to the theory of recovery that was pending at the time the plaintiff voluntarily dismissed the prior case. Plaintiffs complied, arguing such a plaintiff has a right to proceed on a new theory of recovery. Plaintiffs argued that where the plaintiff is entitled to refile their claim, which constitutes an entirely new and separate action, and there is no *res judicata* bar, the plaintiff should be allowed to advance an additional theory of recovery.

¶ 26 For the following reasons, the trial court's order granting defendant's motion to dismiss is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this order.

¶ 27 ANALYSIS

¶ 28 "A court of review determines *de novo* whether the trial court should have granted dismissal. *** [I]n ruling on the motion, the *** court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004).

> "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided. Three requirements must be satisfied for *res judicata* to apply: (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." (Internal quotation marks and citations omitted.) *Hudson*, 228 Ill. 2d at 467.

¶ 29 "The rule against claim-splitting, which is an aspect of the law of preclusion, prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 340 (1996). "[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 (citing *Rein*, 172 Ill. 2d 325). For purposes of determining whether there has been a final judgment on the merits, our supreme court has applied Illinois Supreme Court Rule 273 (Ill. S. Ct. R. 273 (eff. Jan. 1, 1967)). *Hudson*, 228 Ill. 2d at 468. Rule 273 reads as follows:

> "Unless the order of dismissal 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. Jan. 1, 1967).

¶ 30 "[T]o determine whether there is an identity of causes of action between the first and second suits, we must look to the facts that give rise to plaintiffs' right to relief, not simply to the facts which support the judgment in the first action ***." *Rein*, 172 Ill. 2d at 338-39. Finally, *res judicata* applies if all of the other requirements are met and "the parties or their privies are identical in both actions." *Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (2011).

> "In order to be bound by a prior judgment in an action where it was not a party, the party in the subsequent lawsuit must have been in privity with one of the parties in the prior lawsuit. [T]his element focuses on the interests of the parties in question. A determination regarding whether privity exists is to be conducted on a case-by-case basis.
>
> Privity expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. Simply put, privity exists between a party to the prior suit and a nonparty when the party to the prior suit adequately represented the same legal interests of the nonparty. And, more specific to the instant cause, privity clearly exists between parties who share a mutual or successive relationship in property rights that were the subject of an earlier action. Ultimately, a nonparty to a prior suit may be bound pursuant to privity if its interests are so closely aligned to those of a party in that prior suit that the party was, essentially, a virtual representative of the nonparty." (Internal quotation marks and citations omitted.) *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 220 (2011).

¶ 31 The trial court entered a final judgment on the merits in *Ghilarducci I*. The court dismissed count II in its entirety for lack of a proper plaintiff. The dismissal of count II in *Ghilarducci I* was a final judgment on the merits under Rule 273 because it was an involuntary dismissal and the dismissal was not for lack of jurisdiction, for improper venue, or for failure to

join an indispensable party. Ill. S. Ct. R. 273 (eff. Jan. 1, 1967). Plaintiffs do not dispute that the dismissal of count II was a final judgment on the merits.

¶ 32 There is an identify of causes of action between the dismissed count and the refiled complaint, because "the [*res judicata*] bar extends not only to what has actually been determined in the former proceedings, but also to any other matters properly involved by the subject matter which could have been raised and determined." *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co., Inc.*, 189 Ill. App. 3d 638, 650 (1989). In *Best Coin-Op, Inc.*, the court found that the case law of this State and the decisions of this court support the contention that a plaintiff has a responsibility to litigate all matters relating to a single agreement between the parties where both the nature and alleged breach of that agreement "were presented to the court by plaintiff's pleadings and were argued by all *** parties." *Id*. at 659. The plaintiff's first complaint in *Best Coin-Op, Inc.* was a complaint for injunctive relief and specific performance of an agreement to operate a laundry room facility in a residential building. *Id*. at 641. During the pendency of an appeal of an order denying the plaintiff's request for a temporary restraining order in the original complaint, in which the trial court also granted the defendant's motion to dismiss the complaint, the plaintiff filed a second complaint against a new defendant for tortious interference with the laundry room agreement. *Id*. at 645. In a second appeal involving the original defendant, the appellate court found that the trial court's prior order was a final adjudication on the merits. *Id*. at 647. Subsequently, the "new" defendant filed a motion to dismiss the plaintiff's claims against him on *res judicata* grounds. *Best Coin-Op, Inc.,* at 648. The plaintiff "maintained that its action for tortious interference with contract was a separate and distinct cause of action and that

consequently, the dismissal of its action for equitable relief had no *res judicata* effect on the case at bar." *Id.*

¶ 33 The complaints in *Best Coin Op. Inc.* resulted from entirely different tortious acts, but the relationship between the plaintiff and the alleged tortfeasors each arose from a single, core operative fact–the plaintiff's written agreement with regard to the operation of a laundry facility. Here, there is a single core operative fact common to both suits–defendant's alleged negligence in representing plaintiffs' and their privies' interests as their attorney. See *Cartwright v. Moore*, 394 Ill. App. 3d 1, 7 (2009) ("we find no credible basis for Cartwright to carve out a distinct and independent cause of action given the central contention that the Cartwright and Mohr suits necessarily shared: trustee Moore's alleged mishandling of the Alberding trust"). Although the *Best Coin-Op, Inc.* court ultimately held that the plaintiff's second claim was not barred by *res judicata*, it did so "under the particular facts of [that] case." *Best Coin-Op, Inc.*, 189 Ill. App. 3d at 659. The court distinguished the authorities it relied on to find support for the contention that the plaintiff has a responsibility to litigate all matters arising from a single core of operative facts and when those issues are raised by the pleadings. See *Id.* "[I]n the cases cited above, either the first suit presented claims directly against the same defendant sued in the second action, or the separately filed claims were more closely connected in terms of their similar or identical factual allegations, duties owed, and duties breached than were the actions *** at issue here." *Id.* at 659.

¶ 34 Here, all of the claims are against the same defendant. Plaintiffs' complaints clearly demonstrate that all of their claims arise from the single operative fact of defendant's handling of plaintiffs' legal issues and how defendant's negligent handling of those issues as they related to

each other resulted in the lost properties and businesses. Notably, with regard to defendant's alleged breach as stated in count II of *Ghilarducci I*, plaintiffs specifically alleged in count IC that had defendant handled that matter appropriately, then "those funds would have been used *** to reduce the obligations [WFA] had to Interstate Bank and the business could have been sustained." Plaintiffs have alleged a pervasive pattern of defendant's misrepresentation of plaintiffs and their privies as it relates to the properties and car wash businesses that resulted in the unnecessary loss of property and termination of the businesses. The claims are closely connected in terms of factual allegations, the duties owed, and duties breached. Accordingly, we find an identify of causes of action for *res judicata* purposes.

¶ 35 Plaintiffs argue this court should follow *Piagentini* and find that the dismissal of certain allegations of negligence in their legal malpractice count are not final orders because "the dismissal of certain allegations under a single theory of recovery does not terminate litigation between the parties on the merits or dispose of the rights of the parties on a separate branch of the controversy." *Piagentini*, 387 Ill. App. 3d at 894. Plaintiffs also argue there is no identity of parties between the parties to count II of *Ghilarducci I* and the parties to *Ghilarducci II*, therefore *res judicata* does not apply to bar plaintiffs' claims in *Ghilarducci II* based on the dismissal of count II in *Ghilarducci I*. Specifically, plaintiffs argue that the dismissal of count II does not raise the *res judicata* bar because plaintiffs were not proper parties to count II, as the trial court found. In their petition for rehearing, plaintiffs argue there is no evidence that the primary purpose of the attorney-client relationship between defendant and WFA was to benefit plaintiffs. "In order for a nonclient third party to succeed in a negligence action against an attorney, he must

prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party." *Kopka v. Kamensky and Rubenstein*, 354 Ill. App. 3d 930, 934-35 (2004). Thus, plaintiffs argue, the exception to the privity requirement for a third-party lawsuit against an attorney for negligence does not apply in this case, consequently, the parties lack privity. Plaintiffs admit that general privity principles apply but merely assert that there is no evidence that plaintiffs were in privity with WFA.

¶ 36 We hold that the dismissal of count II in *Ghilarducci I* is sufficient to raise the *res judicata* bar against plaintiffs for *Ghilarducci II*. Plaintiffs' argument that the dismissal of certain allegations within their legal malpractice claim should not bar their refiled action is, therefore, inapposite. Nor is our holding based on finding that count II in *Ghilarducci I* was a third-party action by plaintiffs against defendant. Rather, we reach this holding because the trial court entered a final judgment on the merits of count II in *Ghilarducci I*, and because we find that plaintiffs were in privity with WFA. Both *Ghilarducci I* and *Ghilarducci II* allege that plaintiffs were members of WFA. *Ghilarducci II* alleges the Ghilarducci family "through WFA and Pacelli" operated a number of car wash businesses and owned and controlled the property that became the subject of the foreclosure actions, from which defendant's alleged negligence arose. *Ghilarducci II* alleges "WFA and Pacelli were created by [plaintiffs] as a corporate shield but they maintained control and ownership individually." In *Ghilarducci I*, plaintiffs alleged Interstate made a loan to WFA, which plaintiffs guaranteed. In *Ghilarducci I* plaintiffs alleged that had defendant properly communicated with them, plaintiffs, individually, would have "cured any default and reinstated and/or redeemed the [Interstate] mortgage" which secured the WFA

loan, as well as the Pacelli loan. Plaintiffs repeated similar allegations in *Ghilarducci II*, specifically alleging that plaintiffs, individually, "would have made all the mortgages [sic] payments on the South Holland property" which WFA owned.

¶ 37 Count II in *Ghilarducci I* is based on defendant's alleged negligence in representing WFA as it related to the operation of the car wash business. As previously noted, plaintiffs alleged in count IC of *Ghilarducci I* that "had WFA recovered the funds *** those funds would have been used by WFA to reduce the obligations it had to Interstate Bank and the business could have been sustained." Based on the record before us, we cannot say there was no privity between the Ghilarduccis and WFA. The allegations in the complaints make clear that plaintiffs, who were not proper parties to count II in *Ghilarducci I*, were connected with that count in that their interests would be affected by a judgment as if they were parties. See *Agolf, LLC*, 409 Ill. App. 3d at 220. Moreover, plaintiffs' interests and WFA's interests are so closely aligned that WFA was in fact a representative of plaintiffs in count II of *Ghilarducci I*. Therefore, plaintiffs are bound to WFA pursuant to privity. *Id*. Accordingly, we find plaintiffs' argument that there was no identity of parties unpersuasive.

¶ 38 The record demonstrates that the trial court entered a final judgment on the merits in *Ghilarducci I*, there is an identity of the causes of action in the two complaints at issue, and the parties or their privies are identical in each. Plaintiffs are barred by the doctrine of *res judicata* from attempting to raise and litigate their legal malpractice claim in *Ghilarducci II*, regardless of whether there was an adjudication on the merits of that claim in the prior suit. *Rein*, 172 Ill. 2d at 339.

¶ 39 This does not, however, end the analysis. "[T]he principle that *res judicata* prohibits a party from seeking relief on the basis of issues that could have been resolved in a previous action serves to prevent parties from splitting their claims into multiple actions." *Hudson*, 228 Ill. 2d at 471-72.

> "[T]he rule against claim-splitting would not bar a second action if:
>
> *** (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action ***." *Id*. at 472-73.

¶ 40 Plaintiffs argue that in this case, the trial court in *Ghilarducci I* expressly reserved plaintiffs' right to maintain their second action. Plaintiffs supplemented the record with the court's docket sheet, which states, in pertinent part, as follows: "VOLUNTARY DISMISSAL W/LEAVE TO REFILE-ALLOWED." Plaintiffs argue that under this court's recent decision in *Severino*, 407 Ill. App. 3d 238, and based in part on the foregoing docket entry[2], the express reservation exception to *res judicata* should be applied. In *Severino*, the order granting the plaintiff's motion to voluntarily dismiss stated that the motion was granted without prejudice and costs to any party, the order stated in handwriting that costs were to be paid upon the refiling of the complaint, and a certified docket sheet stated "Voluntary Dismissal [with] Leave to Refile–Allowed." The *Severino* court followed the earlier decision in *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324 (2009), which held that docket sheets are part of

[2] Plaintiffs also argue that the transcript of the proceedings on March 18, 2009, which included plaintiffs' motion to voluntarily dismiss "reveals the attorneys and the court all knew the case was going to be refiled." Because we agree with plaintiffs' argument that the docket entry is sufficient to invoke the express reservation exception, we do not need to determine whether the "acquiescence" exception also applies.

the common law record and are presumed to be correct. *Id*. at 250 (citing *Quintas*, 395 Ill. App. 3d at 330). In *Severino*, this court found that because of the language on the docket sheet, and in light of the fact there was no contradiction between the docket sheet and the order granting the plaintiff's voluntary dismissal, the court was compelled to find that the express reservation exception applied to prevent application of the *res judicata* bar to the plaintiff's refiled claim. *Id*. at 251. The court did, however, affirm the trial court's judgment dismissing a second count in the refiled complaint raising a new theory of recovery (wilful and wanton conduct). *Id*.

¶ 41 In this case, the trial court's order granting plaintiffs' motion to voluntarily dismiss does not state the court granted the dismissal "without prejudice." The order does not expressly grant plaintiffs leave to refile. However, in *Quintas*, the order was similarly silent on the issue of refiling. *Quintas*, 395 Ill. App. 3d at 331. The court found that the docket entry did state that leave to refile was allowed, and the fact that the order was silent on that issue did not mean that the order and the docket entry were in conflict. *Id*. In *Quintas*, the court found that "[d]ocket sheet entries are presumed to be correct and are accepted as orders of the court. The entry here clearly states that the motion was allowed with leave to refile. The docket sheet entry does not conflict with the written order entered on the same date but merely includes additional information related to refiling that is consistent with the language 'without prejudice' in the order." *Id*.

¶ 42 Although the order at issue in this case does not contain the "without prejudice" language, voluntary dismissals are typically without prejudice. *Hudson*, 228 Ill. 2d at 483 (citing 735 ILCS 5/2–1009(a) (West 2006)) ("Section 2–1009 gives plaintiffs the right to voluntarily dismiss an

action, without prejudice, in whole or in part any time before trial or hearing begins."). Therefore, we find no conflict between the order and the docket entry. Therefore, "we must conclude that the trial court gave the instruction that the docket sheet entry should include the language 'with leave to refile.' This language clearly and unmistakably grants leave to refile; thus, the exception applies and plaintiffs' [refiled] suit is not barred by *res judicata*." *Id*. at 333.

¶ 43 However, this holding only applies to causes of action that remained pending at the time plaintiffs' voluntarily dismissed their complaint. See *Severino*, 407 Ill. App. 3d at 251. Plaintiffs argued that the *res judicata* exception applies not only to the claims pending at the time of the voluntary dismissal but also to any additional theory of recovery the plaintiff may have. Plaintiffs' reliance on section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 2010)) is misplaced. Our supreme court has made clear that section 13-217 should not be read "to automatically immunize a plaintiff against the bar of *res judicata* or other legitimate defenses a defendant may assert in response to the refiling of voluntarily dismissed counts." *Hudson*, 228 Ill. 2d at 482.

> "It is true that this court has referred to section 13–217 as providing a plaintiff with an 'absolute' right to refile a complaint within one year or within the remaining limitations period, but this description referred only to a plaintiff's rights vis-à-vis the limitations period, which is the only subject addressed by section 13–217. These sections do not address what happens when a plaintiff commences a second action after part of his cause of action has gone to final judgment in a previous case. We see no basis for concluding that the legislature intended in *** section 13–217 to give plaintiffs an absolute right to split their claims." (Internal quotation marks and citations omitted.) *Hudson*, 228 Ill. 2d at 483.

¶ 44 The trial court dismissed plaintiffs' claims with regard to the Interstate Bank matter with prejudice as time-barred. The court also dismissed plaintiffs' claims with regard to the Washington foreclosure and any claims based on the West Chicago property with prejudice for lack of standing. Neither of those dismissals are for lack of jurisdiction, improper venue, or failure to join an indispensable party. Accordingly, each may serve as a final adjudication on the merits under Rule 273. Those orders also became final and appealable upon the voluntary dismissal of the remainder of the complaint. *Hudson*, 228 Ill. 2d at 474 n. 3. "The refiling of the voluntarily dismissed count does not transform the final orders entered in the previous case into nonfinal ones, because the refiling commences a new action." *Id*. (citing *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503-04 (1997)). In *Dubina*, the court held that "[t]he voluntary dismissal terminated the action in its entirety. All pending claims were dismissed. The order of voluntary dismissal, because it disposed of all matters pending before the circuit court, rendered all orders which were final in nature, but which were not previously appealable, immediately final and appealable." *Dubina*, 178 Ill. 2d at 503.

¶ 45 In *Rein*, the plaintiffs voluntarily dismissed the common law counts of their complaint after the trial court granted the defendants' motion to dismiss the recision counts in the complaint. *Rein*, 172 Ill. 2d at 329-30. If, we, as did our supreme court, "simply insert the case names and the types of counts from this case into the [relevant] passage from *Rein*" (*Hudson*, 228 Ill. 2d at 473), we would get the following: "To avoid the bar of *res judicata*, plaintiffs could have proceeded to a decision on the merits of [count IB(2) in *Ghilarducci I*] and, if unsuccessful, appealed both the result regarding [count IB(2)] and the trial judge's order dismissing [count IA

and IB(1)] with prejudice. By failing to proceed on [count IB(2)] in the first action, plaintiffs are barred from attempting to litigate those issues in a subsequent suit." *Rein*, 172 Ill. 2d at 340. Thus, plaintiffs are barred by the doctrine of *res judicata* from attempting to raise and litigate the claims the trial court dismissed in *Ghilarducci I* in a subsequent suit unless an exception applies. *Id*. at 340-41.

¶ 46 Our supreme court adopted the exceptions to claim-splitting from section 26(1) of the Restatement (Second) of Judgments (1982). *Hudson*, 228 Ill. 2d at 472. The *Rein* court had interpreted that section to provide that "the rule against claim-splitting does not apply to bar *an independent claim of part of the same cause* of action ***." (Emphasis added.) *Rein*, 172 Ill. 2d at 341. See also *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 392-93 (2001) ("Although the claims in question may be initially regarded as a single cause of action for application of *res judicata*, subsequent events may alter their status. For example, *res judicata* does not apply to bar an independent claim of part of the same cause of action if the court in the first action expressly reserves the plaintiff's right to maintain the second action.").

¶ 47 "The exception to the rule against claim-splitting necessarily implies that the specific claims that have already reached a final judgment remain final judgments." *Green v. Northwest Community Hospital*, 401 Ill. App. 3d 152, 157 (2010). The express reservation exception applies only to those portions of the prior complaint which had not reached final judgment and the plaintiff voluntarily dismissed. See Restatement (Second) of Judgments § 26 (1982) cmt. 2 ("the plaintiff should be left with an opportunity to litigate in a second action that *part of the claim which he justifiably omitted* from the first action. A determination by the court that its

judgment is 'without prejudice' (or words to that effect) to a second action *on the omitted part of the claim*, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action") (Emphases added.). Accordingly, we affirm the trial court's judgment except as it pertains to claims based on defendant's alleged negligence with regard to the Westbank foreclosure matter, which was the only claim that had not reached final judgment when plaintiffs voluntarily dismissed their complaint in *Ghilarducci I. Green*, 401 Ill. App. 3d at 157.

¶ 48 CONCLUSION

¶ 49 The trial court's judgment granting defendant's motion to dismiss the claims in plaintiffs' July 2009 complaint based on defendant's alleged negligence with regard to the Interstate Bank and Washington Mutual Bank foreclosure actions, and the tort of outrage is affirmed. The judgment granting defendant's motion to dismiss plaintiffs' claims based on the Westbank foreclosure action is reversed.

¶ 50 Affirmed in part, reversed in part, and remanded.