

No. 1-12-3044

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARCELLO SAMS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 L 00419
)	
JAMES GILDEA, et al.,)	The Honorable
)	Eileen M. Brewer,
Defendant- Appellants.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

Held: (1) Plaintiff's voluntary dismissal of claims after compelled confession claim was involuntarily dismissed with prejudice which resulted in termination of case in its entirety, such that the order entered became final for *res judicata* purposes, however, (2) doctrine of *res judicata* did not bar refiling of second claim because the trial court in the first action expressly reserved plaintiff's right to refile action.

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¶ 1 Plaintiff Marchello Sams filed suit against the defendants, Chicago Police Detectives James Gildea, Lawrence Aikin, Paul Zacharis, and Jamie Kane, and the City of Chicago (City), for, among other things, malicious prosecution and compelled confession in connection with a murder investigation. Following the involuntary dismissal of the compelled confession claim, he voluntarily dismissed the remainder of his claims without prejudice. Plaintiff subsequently re-filed the lawsuit, excluding the claim for compelled confession. The defendants filed a motion to dismiss based on *res judicata*. The circuit court denied the motion and also defendants' motion to reconsider. The circuit court subsequently certified a question of law for this appeal pursuant to Supreme Court Rule 308 (155 Ill. 2d R. 308) (eff. Feb. 26, 2010)). Pursuant to the parties' request, the circuit court certified the following question for our review:

"Whether the express reservation exception to *res judicata* applies to an action that has been previously dismissed without prejudice where the written order is silent on the right to refile and the docket entry associated with the order states the action has been dismissed 'with leave to refile,' and the undisputed evidence shows that the docket entry was made by means of an electronic docketing code used by the clerks' office in every case that is voluntarily dismissed without prejudice."

For the following reason, we answer the certified question in the affirmative.

¶ 2 BACKGROUND

¶ 3 Plaintiff originally filed suit in 2005 against defendants for malicious prosecution, false imprisonment, and intentional infliction of emotional distress. The complaint stemmed from plaintiff's arrest and prosecution for the first degree murder of Lavonte George, the infant son of

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his girlfriend. Plaintiff alleged he was detained for approximately 82 hours. He also alleged that defendants engaged in a number of improper and coercive interrogation tactics in order to trick him into signing a false confession to murder. Plaintiff was incarcerated for close to three years until his statement was suppressed based on violations of his constitutional rights. Plaintiff received a directed verdict in his favor on April 18, 2008.

¶ 4 On June 1, 2009, plaintiff filed an amended complaint alleging claims against the same detective defendants for malicious prosecution, compelled confession in violation of section 24/5(a) of the Code of Criminal Procedure (740 ILCS 24/5(a)) (West 2008)), false imprisonment, intentional infliction of emotional distress, and conspiracy. He also sought damages from the City for statutory indemnification and *respondeat superior*. We shall refer to this suit as *Sams I*. Defendants moved to dismiss the compelled confession claim, arguing that the statute creating the cause of action did not apply retroactively or, in the alternative, that the statute of limitations barred the claim. The circuit court granted the motion.

¶ 5 Plaintiff filed a motion to voluntarily dismiss his action without prejudice, pursuant to section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2008)). The trial court granted the motion entering an order stating that the motion was granted "without prejudice" on January 14, 2010. The docket sheet entry corresponding with the dismissal order states:

"Voluntary Dismissal W[ith] Leave to Refile-Allowed."

¶ 6 On January 12, 2011 plaintiff refiled his lawsuit, (*Sams II*), claiming malicious prosecution, false imprisonment, intentional infliction of emotional distress and conspiracy. Defendants moved to dismiss the complaint pursuant to section 2-619 (735 ILCS 5/2-619)(West

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2010)), asserting that a final judgment had been entered in *Sams I* and that the doctrine of *res judicata* applied and barred the refiled complaint. Defendants argued that because plaintiff in this case split his claims by voluntarily dismissing and refiled part of an action after a final judgment had been entered on another part of the case, he had subjected himself to a *res judicata* defense.

¶ 7 Plaintiff responded that the motion should be denied because: (1) *res judicata* did not apply because there was no final judgment on the merits of his malicious prosecution, false imprisonment, intentional infliction of emotional distress and conspiracy claims; (2) if *res judicata* applied as to the defendant detectives, *res judicata* did not apply to the City; (3) assuming *res judicata* applied, the express reservation exception precluded dismissal.

¶ 8 The circuit court denied the defendants' motion to dismiss on August 1, 2011, holding that the express reservation exception to *res judicata* applied. The circuit court subsequently granted defendants leave to depose an employee of the clerk of the Circuit Court of Cook County regarding the creation of the docket entry in *Sams I* which listed it as a "Voluntary Dismissal W[ith] Leave to Refile-Allowed."

¶ 9 The parties deposed Iris Reynolds, assistant chief deputy clerk of the law division. Although she was not present when the docket entry at issue was entered, she testified generally regarding the electronic docket system. Reynolds testified that court orders are entered into an electronic docket by the clerk present in the courtroom when the order is entered by the judge. The clerk enters information regarding the order, including an activity code that corresponds with the order. Reynolds testified that there are different activity codes entered when a case is

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dismissed with prejudice, dismissal by stipulation or agreement, and for a dismissal by judgment or jury verdict. There is also a different code used for the denial of a motion for leave to voluntarily dismiss with leave to re-file. Reynolds testified that the docket entry from January 14, 2010 was created using a 4040 activity code. Code 4040 automatically generates a docket with the words "voluntary dismissal with leave to re-file allowed." Reynolds further testified that a clerk making a docket entry has no ability to change or alter the language made by the code. She also testified that when a voluntary dismissal motion is brought pursuant to section 2-1009 of the Code of Civil Procedure it indicates to her that the motion was brought with the intent to request leave to reinstate.

¶ 10 Defendants filed a motion to supplement the record with Reynolds' testimony and asked the circuit court to reconsider its previous order of August 1, 2011. The circuit court granted the motion to supplement but denied the motion to reconsider. This interlocutory appeal followed.

¶ 11 ANALYSIS

¶ 12 Illinois Supreme Court Rule 308 provides a remedy of permissive appeal for interlocutory orders where the trial court has deemed that they involve a question of law as to which there is substantial ground for difference of opinion where an immediate appeal from the order may materially advance the ultimate termination of the litigation. Ill. S. Ct. R. 308 (eff. Feb. 26, 2010). We apply a *de novo* standard of review to legal questions presented in an interlocutory appeal brought pursuant to Supreme Court Rule 308(a). *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 987 (2008). Our review is strictly limited to the certified question presented: we do not render any opinion on the propriety of any underlying rulings of the trial court. *Id.*

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¶ 13 The certified question is:

"Whether the express reservation exception to *res judicata* applies to an action that has been previously dismissed without prejudice where the written order is silent on the right to refile and the docket entry associated with the order states the action has been dismissed 'with leave to refile,' and the undisputed evidence shows that the docket entry was made by means of an electronic docketing code used by the clerks' office in every case that is voluntarily dismissed without prejudice. "

¶ 14 On appeal, defendants contend that the final appealable order they relied on is the trial court's dismissal of the compelled confession claim in *Sams I*, and therefore *res judicata* barred plaintiff's refiled complaint. Plaintiff contends that the trial court, in granting his voluntary motion to dismiss without prejudice, allowed him to refile his complaint. Specifically, plaintiff argues that there was no final, appealable order entered in *Sams I*, which is a necessary element of *res judicata*. Alternatively, plaintiff claims his case falls into an exception to the rule of *res judicata*; that the trial court expressly reserved his right to maintain the second action.

¶ 15 Section 2-1009(a) of the Code (735 ILCS 5/2-1009(a) (West 2008)) provides that a plaintiff may, at any time before trial begins, dismiss an action or part of an action without prejudice. However, " '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.' " *Nye v. Boado*, 2012 IL App (2d) 110804 ¶ 13 (quoting *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008) (quoting *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996))).

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¶ 16 "Res judicata bars not only what was actually decided in the first action but also whatever could have been decided." *Id.* 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. *Id.* Thus, the rule "'prohibits a plaintiff from suing for part of a claim in one action and them suing for the remainder in another action.'" *Nye*, 2012 IL App (2d) 110804 ¶ 13 (quoting *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1, 7 (2009) (quoting *Rein*, 172 Ill. 2d at 340)).

¶ 17 We therefore turn to the issue of whether the trial court properly found that plaintiff's refiled complaint was barred by *res judicata*. The parties disagree here as to whether the elements required for *res judicata* are present here. Defendant argues that *Hudson* compels us to find that plaintiff's refiled claim was barred by *res judicata*, while plaintiff contends that the order entered on the compelled confession claim is not a final judgment, and since a final judgment had not been entered in *Sams I*, *res judicata* does not apply.

¶ 18 Plaintiff argues that defendants' claim of *res judicata* fails because they could not establish the first element of "a final judgment on the merits," insofar as his compelled confession claim was never adjudicated on the merits. Plaintiff relies on *Downing v. Chicago Transit Authority*, 162 Ill. 2d 70 (1994), for the proposition that where the basis for the previous judgment bears no relationship to the actual merits of the case, the first element of *res judicata* is not present. *Id.*

¶ 19 In *Downing*, plaintiff sued the CTA and an unknown employee and agent for injuries he sustained after he was struck by a CTA bus. More than two years after his injury, the plaintiff

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amended his complaint to name the previously unknown employee. *Id.* at 72. The employee filed a motion for summary judgment on the basis that the statute of limitations had run. *Id.* The motion was granted and a final and appealable order was entered. *Id.* The CTA then filed a motion for summary judgment, which the trial court granted reasoning that summary judgment in favor of the CTA employee was a prior adjudication on the merits and *res judicata* therefore barred the claims against the CTA. *Id.* Our supreme court reversed the grant of summary judgment for the CTA, holding that *res judicata* did not apply because "[w]hen a summary judgment is granted because the statute of limitations has run, the merits of the action are never examined." *Id.* at 77.

¶ 20 Plaintiff argues that the instant case is analogous to *Downing*, because his compelled confession claim was never adjudicated on the merits. In *Sams I*, defendants sought dismissal of the compelled confession claim on two grounds: (1) the compelled confession statute, enacted in 2006, did not apply retroactively, and (2) the statute of limitations had expired. The trial court granted defendants' motion without specifying the reasons for dismissal. Plaintiff contends that neither of the proffered reasons would have been predicated upon the merits of the statutory claim.

¶ 21 We disagree. Our supreme court held in *Rein v. Noyes*, 172 Ill. 2d 325, 326 (1996), that dismissal of a count as barred by the statute of limitations is considered a ruling on the merits under Rule 273, which provides: "[A]n 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; see also *Matejczyk v. City of Chicago*, 397

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Ill. App. 3d 1, 6 (2009). Furthermore, when a dismissal order is silent as to the specific grounds on which it rests, it must be treated as having rested on every ground raised in the motion to dismiss. *Lanno v. Nasser*, 79 Ill. App. 3d 1, 4 (1979); see also *Illinois State Toll Highway Authority v. Amoco Oil Co.*, 336 Ill. App. 3d 300, 305 (2003).

¶ 22 Moreover, this case is controlled by our supreme court's decision in *Hudson*, where our supreme court held that a plaintiff engages in claim-splitting if that plaintiff voluntarily dismisses a claim pursuant to section 2-1009 of the Code after final judgment has been entered on another part of the cause of action and then subsequently refiles that claim. *Hudson*, 228 Ill. 2d at 482; see also *Quintas v. Asset Management Group*, 395 Ill. App. 3d 324, 329 (2009). The *Hudson* court said that once a voluntary dismissal has been entered, the case is terminated in its entirety and all final orders become immediately appealable. *Id.* at 468 (citing *Dubina v. Mesirow Realty Development, Inc.* 178 Ill. 2d 496, 503 (1997)). The plaintiffs in that case filed a complaint alleging negligence and willful and wanton misconduct. The negligence count was dismissed. Plaintiffs subsequently voluntarily dismissed the willful and wanton misconduct count prior to trial and refiled the count within one year. The supreme court held that the refiled action was barred by *res judicata* because part of the original action had already gone to final judgment in the previous case. *Hudson*, 228 Ill. 2d at 483-84.

¶ 23 Plaintiff next argues that *res judicata* does not apply to his claims against the City, because in *Sams I* the dismissed cause of action was the compelled confession count which sought damages against only the defendant detectives. By contrast, both *Sams I* and the present case asserted liability against the City based on theories of *respondeat superior* and statutory

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indemnification. The city was not a party to the compelled confession count in *Sams I* and the involuntary dismissal order did not dispose of any counts directed against the City. Plaintiff maintains that the previous dismissal order in *Sams I* does not act as a bar against plaintiff's causes of actions against the City in *Sams II*. Defendants respond that plaintiff has sought to hold the City vicariously liable for the acts of its employees under principles of indemnification and respondeat superior. For *res judicata* purposes, the master and servant are in privity. *Leow v. A&B Freight Line, Inc.*, 175 Ill 2d 176, 178 (1997). We agree with defendants.

¶ 24 Plaintiff relies on *Leow*, 175 Ill. 2d at 180, for the proposition that while employees and employers normally constitute a single party for purposes of *res judicata*, an exception applies where the basis for the prior judgment is personal to the individual defendant dismissed. In *Leow*, the plaintiff suffered injuries in a loading dock accident. The plaintiff was using a forklift to load a truck owned by A&B Freight when an employee of A&B Freight drove away, causing the forklift to fall from the dock to the concrete floor. *Id.* The plaintiff initially sued only A&B Freight, alleging liability based on respondeat superior. *Id.* The plaintiff subsequently amended the complaint to assert a count against the employee. *Id.* The employee's motion to dismiss based on the statute of limitations was granted. *Id.* A&B Freight subsequently filed a motion to dismiss arguing that the involuntary dismissal against the employee acted as a prior adjudication on the merits and therefore the doctrine of *res judicata* barred the claims against it. *Id.* at 179. The circuit court granted the motion.

¶ 25 The supreme court reversed and held that the doctrine of *res judicata* did not apply. *Id.* at 186-87. The court noted that the employee was dismissed for the sole reason that he was not

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properly named as a defendant until after the statute of limitations had expired. *Id.* But the dismissal did not constitute a final judgment with regard to that defendant's employer, who had been named before the limitations period had expired and as to whom the lawsuit otherwise would have proceeded normally. *Id.* Thus, while employers and employees normally constitute a single party for purposes of *res judicata*, an exception applies where the basis for the prior judgment is "personal" to the individual defendant dismissed. *Id.* The involuntary dismissal of a claim against a defendant does not constitute a final judgment for that defendant's employer for purposes of *res judicata* if the dismissal rested on grounds personal to that defendant. *Deluna v Treister*, 185 Ill. 2d 565, 581-82 (1999). A ground for dismissal is personal only if it is substantively different for each defendant, such that the defense is unavailable for one or the other. *Id.*

¶ 26 Defendants argue that a defense is only personal where, if the dismissed defendant had never been joined, the claim against the other defendant would have proceeded normally. *Leow*, 175 Ill. 2d at 184. In the case at bar, the non-retroactivity of the compelled confession claim would not have proceeded normally because the claim was barred by the statute of limitations. Further, since plaintiff has made claims of *respondeat superior* and indemnification against the City, he is seeking to hold the City vicariously liable for the acts of its employees, defendant detectives. Defendants point out that our supreme court has stated that "a judgment for either the master or servant, arising out of an action predicated upon the [acts] of the servant, bars a subsequent suit against the other for the same claim." *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 122 (1978). Defendants further argue that this is so because "[f]or vicarious liability claims, the

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employer and employee are 'one and the same' defendant, and the 'liability of the master and servant for the acts of the servant is deemed that of one of tortfeasor and is a consolidated or unified one.' " *Downing v. Chicago Transit Authority*, 162 Ill. 2d 70, 74 (1994) (quoting *Towns*, 73 Ill. 2d at 124-25). Defendants contend that the City's liability has, from the start, been wholly derivative of the individual defendants' liability. Further, in the case at bar, the dismissal order does not state the grounds for dismissal, and thus we can not determine if the grounds were "personal."

¶ 27 Plaintiff next contends that section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217) (West 2010)) grants him an absolute right to re-file voluntarily dismissed complaints within one year from the date of dismissal. He argues that the legislature has granted this as an absolute right that may not be infringed upon by the courts. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 163 (1997).

¶ 28 Defendant responds that our supreme court has twice rejected this argument. *Rein* held that section 13-217 (735 ILCS 5/13-217) (West 2010)) did not 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. *Rein*, 172 Ill. 2d at 342-43. *Hudson* explicitly distinguished *Timberlake*, which referred only to a plaintiff's rights *vis a vis* the limitations period, which is the only subject addressed by section 13-217. 735 ILCS 5/13-217 (West 2010). The *Hudson* court went on to state "there is no basis for concluding that the legislature intended in * * * section 13-217 to give plaintiffs an absolute right to split their claims." *Hudson*, 228 Ill. 2d at 483. 735 ILCS 5/13-217 (West 2010).

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¶ 29 Here, it is clear that the basic principles of *res judicata* apply. There was a final judgment on the merits in *Sams I*, the issues that were raised in *Sams II* could have been adjudicated in *Sams I*, and the parties or their privies were identical.

¶ 30 Plaintiff, in the alternative, contends that one of the recognized exceptions to *res judicata* is applicable: that the trial court expressly granted leave to refile when plaintiff voluntarily dismissed the case. Defendants respond that this exception does not apply because the October 25, 2010 order did not contain express language granting plaintiff the right to refile. Defendants further contend that the docket entry conflicts with the underlying order and any inconsistency between the two is to be resolved in favor of the order.

¶ 31 Illinois has adopted exceptions to the rule against claim-splitting as set forth in section 26(I) of the Restatement (Second) of Judgments (Restatement (Second) of Judgments § 26(I) (1982)). *Hudson*, 228 Ill. 2d at 472. Under this section, "*res judicata* principles do not bar a second action where the court in the first action has expressly reserved the plaintiff's right to maintain the second action." Restatement (Second) of Judgments § 26(I)(b), at 233 (1982). The supreme court has noted that the use of "without prejudice" language is not sufficient to protect a plaintiff against the bar of *res judicata* when another part of plaintiff's case has reached final judgment in a previous action. *Hudson*, 228 Ill. 2d at 472. However, in *Green v. Northwest Community Hospital*, 401 Ill. App. 3d 152, 155 (2010) (quoting *Quintas*, 395 Ill. App. 3d at 333), after the circuit court entered a dismissal order, this court ruled that a docket sheet entry including the language " 'with leave to refile' " clearly and unmistakably grants leave to refile, triggering the exception to the rule against claim-splitting.

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¶ 32 Plaintiff relies on *Quintas* for the proposition that when a docket entry states "Voluntary Dismissal W[ith] Leave to Refile-Allowed," the trial court has expressly reserved plaintiff's right to refile. In *Quintas*, the plaintiffs had originally filed a three-count complaint alleging that defendants committed negligence, breach of fiduciary duty, and violation of the Consumer Fraud and Deceptive Business Practices Act (the Act) (815 ILCS 505/1 *et seq.* (West 2006)). *Quintas* 395 Ill. App. 3d at 326. The trial court granted summary judgment for defendants on the fiduciary duty and Act counts but denied summary judgment on the negligence count. Subsequently, the plaintiffs filed for voluntary dismissal pursuant to section 2-1009 of the Code. Plaintiffs then refiled the action, alleging only negligence. Defendants then moved for summary judgment on the grounds that the refiled action was barred by *res judicata*. The trial court granted the motion and plaintiffs appealed, contending that the trial court in the original action granted plaintiffs leave to refile. *Quintas*, 395 Ill. App. 3d at 326.

¶ 33 On appeal, the *Quintas* court noted that the parties agreed that the elements required for *res judicata* applied in the case because the order that granted summary judgment to defendants on two counts but denied it on the negligence count was a final order, and the parties and the cause of action were the same. However, the court found that one of the recognized exceptions to *res judicata* was applicable in that case, namely, that the trial court expressly reserved plaintiffs' right to refile the case. *Quintas*, 395 Ill. App. 3d at 328-30.

¶ 34 The plaintiffs in *Quintas* acknowledged that both of the voluntary dismissal orders stated that the dismissal was without prejudice, but contained no reference to refile. However, the court docket sheet entry stated, " 'Voluntary Dismissal W[ith] Leave to Refile-Allowed.' "

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Quintas, 395 Ill. App. 3d at 330. The court noted that docket sheets are part of the common law record and are presumed to be correct, and that this court has accepted a docket sheet entry as an order of the court where there was no transcript of the hearing or no written order. *Quintas*, 395, Ill.App. 3d at 330. In *Quintas*, the written order granted the motion for voluntary dismissal without prejudice and the court held that although the order did not contain any reference to refiling, that did not mean it conflicted with the docket entry, but rather that it was merely silent on the issue of refiling. Further, the *Quintas* court determined that the docket entry constituted an express reservation of plaintiff's right to maintain the second action. *Quintas*, 395 Il. App. 3d at 333. Moreover, the *Quintas* court found that the words "without prejudice" in the order implied that the case could be refiled. *Quintas*, 395 Ill. App. 3d at 331. Thus, the court found that the trial court clearly and unmistakably granted leave to refile, meaning the exception applied, and plaintiff's suit was not barred by *res judicata*. *Quintas*, 395 Ill. App. 3d at 333.

¶ 35 In the case at bar, the order granting plaintiff's motion to voluntarily dismiss the case pursuant to section 2-1009 of the Code states that it is granted "without prejudice" (735 ILCS 5/2-1009 (West 2010)). Plaintiff acknowledges that the voluntary dismissal order contains no reference to refiling. Plaintiff further included a certified docket sheet which states: "Voluntary Dismissal W[ith] Leave to Refile-Allowed" and contains the exact same language that appeared on the docket sheet in *Quintas*.

¶ 36 Defendants argue that when there is a written order, and a conflict exists between the court order and a docket entry, the court order controls, citing *First National Bank of Sullivan v. Bernius*, 127 Ill. App. 3d 193 (1984). We find this case to be inapposite. In *Bernius*, the court had

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to determine whether a posttrial motion had been timely filed. There was a conflict between the date of the docket sheet entry and the date on the order. This court held that the motion was timely filed because the date on the actual order was controlling. *Bernius*, 127 Ill. App. 3d at 196.

¶ 37 In the case at bar, we find there is no conflict between the docket entry and the order that would require us to determine which is controlling. The order grants the voluntary dismissal without prejudice. The docket entry states that the motion for voluntary dismissal with leave to refile is allowed. The order does not contain any reference to refiling and thus it is merely silent on the issue of refiling. Moreover, because the words "without prejudice" in the order imply that the case can be refiled, the language in the docket sheet entry is in fact consistent with the order. In fact, we are compelled to find, as was found in *Quintas* and *Servino*, that because the docket sheet entry granting plaintiff's motion for voluntary dismissal with leave to refile is accepted as an order of the court and does not conflict with the written order, that the express reservation exception applies and plaintiff's suit was not barred by res judicata.

¶ 38 Defendants' reliance on *Law Offices of Nye & Associates, Ltd v. Boado*, 2012 Ill. App. (2d) 110804, for the proposition that the exception to *res judicata* does not apply, is also misplaced. In *Nye*, Nye filed a complaint against its former client Boado seeking attorney fees and costs in connection with Nye's representation of Boado in a marital dissolution action. *Nye*, 2012 IL App (2d) 110804, ¶ 3. Nye moved to voluntarily dismiss the complaint without prejudice and with leave to refile. *Id.* at ¶ 4. Boado filed a response that objected to portions of the motion and to strike the paragraph that asked for leave to refile. *Id.* The trial court granted Nye's motion.

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Id. Nye subsequently filed an amended complaint seeking fees and the trial court dismissed this complaint with prejudice on the basis that it was time-barred. *Id.* at ¶ 5.

¶ 39 Nye then filed a third complaint alleging the same two counts that were voluntarily dismissed in *Nye I*. *Id.* at ¶ 6. Boado moved to dismiss under section 2-619(a)(4), alleging that the action was barred by principles of *res judicata*. *Id.* Nye responded that *res judicata* did not apply, arguing that *Nye I* was specifically dismissed without prejudice and with leave to refile the dismissed counts at a later date. *Id.* The trial judge found that *res judicata* applied and that an exception based on express permission by the court or an agreement of the parties for leave to refile did not apply. *Id.* at ¶ 9.

¶ 40 On appeal, Nye contended that the trial court erred in dismissing the *Nye II* complaint, because the intent of the parties and the *Nye I* trial court was that Nye be able to voluntarily dismiss the counts without prejudice and with leave to refile. *Id.* at ¶ 11. Boado responded that the matter was barred by *res judicata* and that Nye failed to meet its burden of showing that an exception applied based on any express agreement between the parties or by the trial court that the counts could be refiled. *Id.*

¶ 41 Nye argued that because it requested leave to refile and the counts in *Nye I* were dismissed without prejudice, the record shows that the court intended that Nye have leave to refile. *Id.* at ¶ 17. Nye further argued that the record as a whole showed that court intended to allow it to refile. *Id.* at ¶ 21. Nye argued that the combination of its motion to voluntarily dismiss, which asked for leave to refile, with Boado's failure to object and the court's grant of the motion, was sufficient to show that it had leave to refile. *Id.* The court found that the voluntary-dismissal

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order was silent whether the counts in *Nye I* were dismissed without prejudice and therefore, nothing was expressly stated by the court in regard to the ability to refile. *Id.*

¶ 42 Nye relied on three cases that it argued required a different result, but in those cases, the trial court expressly stated that plaintiff had the right to refile. *Id.* at ¶ 22. *Servino*, 407 Ill. App. 3d at 251 (order stated costs were to be paid upon refile of the complaint and docket sheet stated leave to refile was allowed); *Green*, 401 Ill. App. 3d at 155 (order granted "leave to reinstate as a matter of right"); *Quintas*, 395 Ill. App. 3d at 333 (docket sheet stated that motion was granted with leave to refile). The *Nye* court found in that these cases were distinguishable, since the *Nye* trial court's dismissal order was silent regarding any right to refile and nothing in the record indicated that the order was written with an exception to claim-splitting in mind. Thus, the *Nye* decision stands directly in contrast to the case at bar, where the court expressly stated that plaintiff had a right to refile.

¶ 43 Defendants finally argue that the testimony of Iris Reynolds, an employee of the clerk of the circuit court, demonstrated that the docket entry did not reflect the intent of the circuit court. Instead, they argue that the entry was the product of an electronic code 4040 used by clerks whenever a case is voluntarily dismissed. Defendants assert that the code 4040 automatically adds the words "voluntary dismissal with leave to re-file allowed" which the clerk cannot alter. By using a code that adds language to the docket entry, defendants claim that the clerk altered the terms of the order and the rights of the parties.

¶ 44 Plaintiff responds that Reynolds testified that a clerk does not enter anything into the docket until the judge signs an order, at which time the clerk enters that order into the electronic

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docket system. Plaintiff further contends that there are a series of codes that are used when a case is dismissed and that a 4040 code is not used when a case is dismissed with prejudice. Further, plaintiff maintains that the docket entry created by the clerk through the use of a code does not mean that it was not the intent of the circuit court to grant plaintiff's leave to reinitiate the lawsuit. We agree.

¶ 45 We find the docket entry in the case at bar was created in the exact manner as the docket entries in both *Quinatas* and *Servino*. This court has thus twice held that the same docket entry reserves the right to re-file. We see no reason to depart from these well-reasoned opinions.

¶ 46 CONCLUSION

¶ 47 For the foregoing reason, we answer the certified question in the affirmative and remand the cause to the circuit court.

¶ 48 Certified question answered; cause remanded.

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