SIXTH DIVISION
July 12, 2013

No. 1-11-2763

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DENISE M. ALANIZ, individually, and as heir and representative of THE ESTATE OF JOANNE WALKOWICZ, deceased,	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County
v.	)	
BLEAKNEY & TROIANI, a law firm, BRAD E. BLEAKNEY, and THE RENAISSANCE AT MIDWAY, INC.,	)	No. 08 L 12374
Defendants-Appellees,	)	Honorable Bill Taylor, Judge Presiding.
(Truglio and Truglio & Associates,	)	
Defendants).	)	

JUSTICE REYES delivered the judgment of the court.
Justice Hall concurred in the judgment.
Justice Gordon dissented.

ORDER

¶ 1 *Held*: The matter is dismissed for lack of jurisdiction, where the trial court granted leave of court to file a fourth amended complaint prior to the entry of an order granting

summary judgment in defendants' favor on the third amended complaint.

¶ 2 Plaintiff, Denise M. Alaniz ("Alaniz") in her capacity as the special representative of the estate of Joanne Walkowicz ("Walkowicz"), appeals from the trial court's order granting summary judgment in favor of defendants Brad E. Bleakney and Bleakney & Troiani (collectively "Bleakney") and The Renaissance at Midway, Inc. ("Renaissance"), on Alaniz's third amended complaint.[1] For the reasons which follow, this matter is dismissed for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 On October 29, 2004, Walkowicz, a 62 year old woman, was injured in an automobile accident while she was a passenger in a vehicle driven by her husband. Walkowicz was treated at Christ Advocate Hospital for multiple bone fractures. On November 14, 2004, Walkowicz was transferred from Christ Advocate Hospital to Renaissance, a nursing home facility, for continued recovery. On December 1, 2004, while still in the care of Renaissance, Walkowicz died. The next day a private autopsy was performed by Dr. James Bryant. The autopsy report stated that Walkowicz died of a massive gastrointestinal hemorrhage with necrotizing colitis as a secondary factor. At the time of the autopsy, there was no determination rendered by Dr. Bryant as to the causation of the gastrointestinal bleeding.

¶ 5 Alaniz, the daughter of Walkowicz, executed a legal retainer agreement with attorney Bleakney on February 1, 2005. Subsequently, a disagreement arose between Alaniz and

[1] Truglio and Truglio & Associates are not parties to this appeal.

Bleakney regarding their representation. On November 6, 2008, Alaniz filed a complaint for legal malpractice against Bleakney and Truglio and Truglio & Associates, alleging a failure to bring a medical malpractice action against Renaissance within the applicable statute of limitations. On January 14, 2010, Alaniz filed a second amended complaint setting forth allegations that Renaissance owed a duty to Walkowicz which was breached when it failed to maintain safe and reasonably sanitary conditions. In particular, Alaniz alleged "unsanitary, soiled linens or mattress pads, sheets, dirty bedpans, and attire" were the direct and proximate cause of Walkowicz's death. The second amended complaint also maintained the original two counts against Truglio and Bleakney for legal malpractice and expounded on the contact Alaniz had with Bleakney prior to signing the retainer agreement. Renaissance, however, was not a party to this cause of action until the third amended complaint was filed.

¶ 6 On August 2, 2010, the trial court granted Alaniz leave to file a third amended complaint which added Renaissance as a party defendant and alleged the cause of Walkowicz's gastrointestinal bleeding was a direct and proximate result of unsanitary conditions at Renaissance. The third amended complaint contained three counts[2]: count I) alleged legal malpractice against Truglio and Truglio & Associates; count II) alleged legal malpractice against Bleakney and Bleakney & Troiani; and count III) alleged spoilation of medical records against

[2] Truglio and Truglio & Associates were retained by Alaniz to assist in the medical malpractice claim. Truglio and Truglio & Associates and Alaniz entered into a settlement agreement that dismissed them from this case with prejudice which was approved by the trial court on January 18, 2011. Therefore, count I of the third amended complaint, which alleges a cause of action against them, is not at issue on this appeal.

Renaissance.

¶ 7 On February 9, 2011, Bleakney filed a motion for summary judgment on the third amended complaint. 735 ILCS 5/2-1005 (West 2010).

¶ 8 On February 10, 2011, Dr. Bryant's discovery deposition was conducted. Dr. Bryant testified he was unable to formulate any opinion to a reasonable degree of medical certainty as to what may have caused or contributed to the gastrointestinal bleeding or necrotizing colitis. The testimony indicated Dr. Bryant was unable to identify the specific cause of the gastrointestinal bleeding and therefore he was "looking toward other problems like coagulation factor defects, drugs, that kind of thing." He further testified that if he had the medical records to review he might have been able to determine what caused the gastrointestinal bleeding. After the deposition was conducted Renaissance provided Dr. Bryant with medication records from an outside pharmacy agency, Pharmerica.

¶ 9 On February 18, 2011, Renaissance also filed a motion for summary judgment against Alaniz on the third amended complaint.

¶ 10 On April 4, 2011, the trial court granted Alaniz an extension of time until April 21, 2011, to file a response to Bleakney and Renaissance's motions for summary judgment on the third amended complaint. On April 27, 2011, Alaniz filed a joint response to both Bleakney and Renaissance's motions for summary judgment on the third amended complaint. Attached as Exhibit H to Alaniz's response to the motion for summary judgment was Dr. Bryant's affidavit.[3]

[3] Dr. Bryant's affidavit was attached to Alaniz's joint response to Bleakney and Renaissance's motions for summary judgment as Exhibit H and was entitled "Rule 1-109 Sworn

The affidavit stated Dr. Bryant, subsequent to his deposition, reviewed medication records which revealed Walkowicz had been prescribed an anti-coagulant medication, Lovenox. Dr. Bryant opined the cause of the gastrointestinal bleeding was due to the administration of Lovenox. The Pharmerica records were not included with the affidavit, nor does the record indicate any verification of these records.

¶ 11 Alaniz also attached to her response an affidavit from Dr. Ignas Labanauskas, an orthopedic surgeon, in which he opined upon review of the medication records, Dr. Bryant's affidavit, Dr. Bryant's discovery deposition, the autopsy report, the medical records of Christ Advocate Hospital and other records, the gastrointestinal bleeding was caused by the administration of Lovenox.

¶ 12 On May 9, 2011, Alaniz filed a motion for leave to file a fourth amended complaint. On June 7, 2011, the trial court entered a written order, which stated in paragraph six: "Plaintiff given leave to file 4th amended complaint w/ objection by Δs - & objection will be heard on June 20, 2011 [at] 10:35." The fourth amended complaint was filed on the same day the trial court entered the order. The counts in the fourth amended complaint against Bleakney and Renaissance alleged for the first time that the gastrointestinal bleeding was directly and proximately caused by the administration of Lovenox. The trial court set a hearing on objections as to the fourth amended complaint and hearing on the motions for summary judgment on the third amended complaint for June 20, 2011.

Statement of Dr. James Bryant, M.D." For clarity, we will refer to this document as the affidavit throughout this order.

¶ 13 On June 20 2011, the trial court, without conducting a hearing, entered a written order granting Bleakney and Renaissance's motions for summary judgment on the third amended complaint. In the written order granting summary judgment, the trial court addressed each of defendants' motions as they related to the third amended complaint. As to Bleakney, the trial court found Alaniz did not plead nor prove the underlying medical malpractice cause of action, insofar as the unsanitary conditions were the direct and proximate cause of the gastrointestinal bleeding. Therefore, the trial court granted summary judgment as to count II of the third amended complaint. The trial court's ruling did not refer to Lovenox as a cause of the gastrointestinal bleeding as alleged in the fourth amended complaint, or to the affidavits of Dr. Bryant and Dr. Labanauskas in this portion of the order.

¶ 14 The trial court also granted Renaissance's motion for summary judgment on count III of the third amended complaint, finding no genuine issue of material fact regarding the medical malpractice claim, as there was no evidence that unsanitary conditions proximately caused Walkowicz's gastrointestinal bleeding. The trial court did not consider Dr. Bryant's affidavit regarding the cause of the gastrointestinal bleeding.

¶ 15 On June 20, 2011, the trial court did not conduct a hearing to address the objection to the fourth amended complaint as was previously ordered. Additionally, the trial court did not enter any ruling on the viability of the fourth amended complaint.

¶ 16 On June 22, 2011, Alaniz filed a motion to reconsider in which it was argued that the fourth amended complaint was never considered by the trial court. On August 29, 2011, hearing on the motion to reconsider was conducted. Alaniz argued leave had been granted to the file

fourth amended complaint and it was properly filed that same day. The trial court stated, "[The fourth amended complaint] had not been allowed to be filed. Yes, you had it stamped, but I did not give you permission to file the fourth amended complaint." Ultimately, Alaniz's motion to reconsider was denied and the order stated in full, "This matter on plaintiff's motion for reconsideration of the court's June 20, 2011 order. After hearing on the matter the court denies the motion for reconsideration as to all defendants. Pursuant to Rule 304(a) there is no just reason to delay enforcement or appeal." There was no discussion on the record regarding the inclusion of the Rule 304(a) finding. This appeal was timely filed on September 19, 2011.

¶ 17 ANALYSIS

¶ 18 Alaniz appeals the June 20, 2011, order of the trial court granting Bleakney and Renaissance's motions for summary judgment on the third amended complaint. Alaniz argues the trial court improperly granted Bleakney and Renaissance's motions because the trial court did not: (1) consider the affidavits of Dr. Bryant and Dr. Labanauskas; (2) accept evidence relating to Walkowicz's cause of death; and (3) consider the fourth amended complaint.

¶ 19 Prior to discussing the merits of this appeal, we must determine however, whether this court has jurisdiction. *Circle Management, LLC v. Olivier*, 378 Ill. App. 3d 601, 607 (2007). Although neither party challenges jurisdiction, we have an independent obligation to consider our jurisdiction and to dismiss when jurisdiction is lacking. *Quaid v. Baxter Healthcare Corp.*, 392 Ill. App. 3d 757, 765 (2009). "Jurisdiction of the appellate courts is limited to reviewing appeals from final judgments, except where statutory or supreme court rule exceptions apply." *Cribbin v. City of Chicago*, 384 Ill. App. 3d 878, 885 (2008) (citing *In re Marriage of Verdung*, 126 Ill. 2d

542, 553 (1989)). "A judgment is considered final 'if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof.' " *In re Curtis B.*, 203 Ill. 2d 53, 59 (2002) (quoting *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998)).

¶ 20 Alaniz appeals the order of June 20, 2011, granting summary judgment on the third amended complaint in favor of Bleakney and Renaissance as of right pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). Rule 301 states, "Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Our supreme court defines a final judgment as "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit." *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). A motion for summary judgment will not be determined final if it does not dispose of all issues arising from the claim. See *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997) (an "order is 'final' if it disposes of the rights of the parties, either on [an] entire case or on some definite and separate part of the controversy").

¶ 21 Our jurisdiction in this matter is dependent on whether the motion for summary judgment on the third amended complaint was a final order. Though it is true the June 20, 2011, order granting summary judgment on counts II and III of the third amended complaint disposed of all issues in the matter, the fact Alaniz's fourth amended complaint was filed on June 7, 2011, with

leave of court presents an issue as to whether the June 20, 2011, order was actually a final order.[4]

¶ 22 Renaissance disputes whether the trial court granted Alaniz leave to file the fourth amended complaint. Renaissance asserts it was the trial court's intention to hold a hearing regarding whether the fourth amended complaint should be filed. Renaissance contends the order of June 7, 2011, supports this argument, as well as the trial court's statement that, "[The fourth amended complaint] had not been allowed to be filed. Yes, you had it stamped, but I did not give you permission to file the fourth amended complaint." Bleakney does not contest Alaniz was granted leave to file the fourth amended complaint, but asserts the trial court never conducted the hearing on objections as stated in the June 7, 2011, order.[5]

¶ 23 Our review of the record reveals the trial court entered an order on June 7, 2011, granting Alaniz leave to file the fourth amended complaint, which was filed the same day. Though Renaissance and Bleakney do not contest whether the trial court erred by granting Alaniz leave to file the fourth amended complaint on appeal, we note that the trial court may allow amendments to complaints under section 2-616 of the Code of Civil Procedure. 735 ILCS 5/2–616 (West 2010). Section 2-616(a) of the Code of Civil Procedure provides at any time before final judgment, amendments to pleadings, including those adding parties or causes of action, may be

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[4] As previously noted, count I, which alleged legal malpractice against Truglio and Truglio & Associates, was previously dismissed pursuant to a settlement agreement.

[5] Bleakney's brief states, "Defendants objected to plaintiff's motion to amend, and the court entered an order on June 7, 2011, giving plaintiff leave to file the fourth amended complaint but noting the 'objection by' defendant and stating that the 'objection will be heard on June 20, 2011.' "

allowed on just and reasonable terms. 735 ILCS 5/2–616(a) (West 2010). "[U]nder the statute, a party's right to amend a pleading is not absolute or unlimited [citation], and it has been generally held a party is required to obtain the court's permission to file an amendment [citations]." *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 839 (2010). Illinois law supports a liberal policy of allowing amendments to the pleadings to enable parties to fully present their alleged cause of action. *1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 870 (2009). Additionally, in allowing the amendment the trial court acted entirely appropriately given the record before it. *Logan v. Old Enterprise Farms, Ltd.*, 139 Ill.2d 229, 237 (1990) ("[a] motion for summary judgment is to be decided on the basis of the record as it exists at the time the motion is heard."). The record demonstrates that no further action was taken on the fourth amended complaint, as the appeal was filed within thirty days after the denial of the motion to reconsider.

¶ 24 Since the trial court granted leave to file the fourth amended complaint, we must now consider what effect this had on the entry of summary judgment on the third amended complaint. An order entering summary judgment is not final if leave is granted to file an amended complaint. *Kawa v. Harnischfeger Corp.*, 204 Ill. App. 3d 206, 210 (1990). This is because the case is still pending before the trial court. *Id.* In the present case, leave to file the amended complaint was granted prior to the entry of the order granting Bleakney and Renaissance's motions for summary judgment on the third amended complaint. Thus, it follows that because the fourth amended complaint is still pending, the motion for summary judgment on the third

amended complaint is not a final order and therefore we lack jurisdiction.

¶ 25 We must note that there was an Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006) finding included in the order denying the motion to reconsider. A Rule 304(a) finding does not make an otherwise nonfinal order final and appealable. *Curtis v. Lofy*, 394 Ill. App. 3d 170, 186 (2009); *Grove v. Carle Foundation Hospital*, 364 Ill. App. 3d 412, 416 (2006); *People ex rel. Block v. Darm*, 267 Ill. App. 3d 354, 356 (1994). "An examination of finality in the context of Rule 304(a) is the same as any other analysis of whether an order is final or nonfinal." *Lofty*, 394 Ill. App. 3d at 186. An order is considered final if it terminates the litigation between the parties on the merits or disposes of the rights of the parties. *In re Curtis B.*, 203 Ill. 2d at 59. Here, the trial court's denial of Alaniz's motion for summary judgment on the third amended complaint is not a final order because the fourth amended complaint was filed prior to the entry of that order. The mere presence of Rule 304(a) language in the order does not make it final, as Alaniz abandoned the third amended complaint on which the motion for summary judgment was based when the fourth amended complaint was filed. See *Dubina*, 178 Ill. 2d at 502. The trial court, therefore, could not enter summary judgment on the third amended complaint once it was abandoned by Alaniz.

¶ 26 When an amended pleading is filed, the earlier pleading for most purposes is in effect abandoned and withdrawn. *Pritza v. Village of Lansing*, 405 Ill. App. 3d 634, 638-9 (2010) (citing *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 61 (1992) (overruled on other grounds by *ABN AMRO Mortg. Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010)). Allegations in a former

complaint, not incorporated in the final amended complaint, are deemed waived. *Pfaff*, 155 Ill. 2d at 61. Thus, when a party files such an amended complaint, any objection to the trial court's ruling on the former complaint is waived. *Id.*

¶ 27 Here, the trial court granted summary judgment on the third amended complaint after the fourth amended complaint was filed. Alaniz demonstrated intent to abandon her initial claims against Bleakney and Renaissance as alleged in the third amended complaint. This is evidenced by the fact that the causation alleged in the third amended complaint, that unsanitary conditions caused the gastrointestinal bleeding, was replaced with new factual allegations that the administration of Lovenox was the proximate cause of the gastrointestinal bleeding. This is not an instance where the plaintiff merely added a party defendant and proceeded on the same claim. See *Garza v. Navistar Intern. Transp. Corp.*, 271 Ill. App. 3d 1082, 1084 (1994) (overruled on other grounds by *Garza v. Navistar Intern. Transp. Corp.*, 172 Ill. 2d 373 (1996)). In the present case, Alaniz fundamentally changed the factual allegations as to the proximate cause of Walkowicz's gastrointestinal bleeding. Therefore, once the fourth amended complaint was filed, Alaniz abandoned the third amended complaint and waived any objections to the trial court's rulings based on that complaint. *Pfaff*, 155 Ill. 2d at 61.

¶ 28 The dissent suggests we are incorrect in finding the trial court granted Alaniz leave to file a fourth amended complaint. The order entered on June 7, 2011, states, "Plaintiff given leave to file 4th amended complaint w/ objection by Δs - & objection will be heard on June 20, 2011 [at] 10:35." We agree with the dissent that, typically, when a trial court sets a hearing to hear a

defendant's objections to a plaintiff's filing an amended complaint, the order states that it is granting plaintiff leave to file a motion to amend its complaint. *Chandler v. Doherty*, 314 Ill. App. 3d 320, 323 (2000). However, the record here includes an order which indicates Alaniz was granted leave to file the fourth amended complaint. There is no transcript in the record for June 7, 2011, therefore we can only base our decision on what is presented to us in the record on appeal. There is also no transcript included in the record for June 20, 2011, when oral arguments should have been heard on the fourth amended complaint according to the prior order. Bleakney does not contest on appeal that Alaniz was given leave to file the fourth amended complaint. Only Renaissance on appeal argues the trial court did not grant Alaniz leave to file the fourth amended complaint.

¶ 29 The dissent suggests it was the trial court's "apparent intention" to hear objections to the fourth amended complaint. The June 7, 2011, order, however, stated "objection will be heard on June 20, 2011." The record is devoid of any reference to the fourth amended complaint on this date. The dissent further states that the order granting Alaniz leave to file the fourth amended complaint could have been vacated at any time by the trial court, and we agree. *Hernandez v. Pritikin*, 2012 IL 11304, ¶ 42. However, the record demonstrates the order was never vacated. The trial court's statement that it never granted leave to file the fourth amended complaint runs contrary to the notion that the order of June 7, 2011, was vacated.

¶ 30 Moreover, the *Hernandez* decision also casts doubt on the efficacy of the oral pronouncements of a trial judge. *Hernandez*, 2012 IL 11304, ¶¶ 43, 53. The *Hernandez* court

stated, "Defendants cannot look to oral pronouncements to explain otherwise unambiguous written orders where the oral pronouncements themselves are, *at best*, ambiguous indicators of the court's intent." *Id.* at ¶ 53 (emphasis in original); see also *Bailey v. State Bank*, 121 Ill. App. 3d 17, 24-5 (1983); *Schwaner v. Belvidere Medical Building Partnership*, 155 Ill. App. 3d 976, 989 (1987). In the present case, the trial court entered an unambiguous written order on June 7, 2011, granting Alaniz leave to file her fourth amended complaint. No motion was made by either of the defendants to vacate this order. On August 29, 2011, two and a half months after the fourth amended complaint was filed, during hearing on the motion to reconsider, the trial court stated, "But it [the fourth amended complaint] had not been allowed to be filed. Yes, you had it stamped, but I did not give you permission to file the [f]ourth [a]mended [c]omplaint." After conducting the hearing on Alaniz's motion to reconsider, the trial court denied the motion. The trial court did not memorialize its statement regarding the fourth amended complaint by issuing a written order vacating the June 7, 2011, order. Thus, following *Hernandez* we cannot rely on the statements made by the trial court, but must instead look to the unambiguous written order of June 7, 2011. *Hernandez*, 2012 IL 11304, ¶ 53

¶ 31 Finally, otherwise nonappealable orders may be appealed pursuant to supreme court rules. The only supreme court rule that would permit an appeal in the instant case is a petition for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb.1, 1994), which permits an application for leave to appeal in situations where the trial court finds that the order "involves a question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of the litigation." As there is no such finding in the case at bar we cannot consider the issues set forth by the parties on appeal and must dismiss the appeal for lack of jurisdiction.

¶ 32 CONCLUSION

¶ 33 We find that this court is without appellate jurisdiction to consider Alaniz's appeal because the fourth amended complaint was properly filed prior to the denial of Bleakney and Renaissance's motions for summary judgment and thus neither the order of June 20, 2011, nor August 29, 2011, were final orders.

¶ 34 Appeal dismissed for lack of jurisdiction.

¶ 35 JUSTICE GORDON, dissenting:

¶ 36 In the case at bar, the majority dismisses solely for lack of jurisdiction. I find that we do have jurisdiction and, thus, I must respectfully dissent.

¶ 37 The majority's decision rests entirely on a factual finding made by the majority. The majority finds, as a matter of historical fact, that the trial court granted plaintiff leave to file a fourth amended complaint. Then the majority concludes that we lack jurisdiction to review the trial court's grant of summary judgment with respect to the third amended complaint, because the fourth amended complaint was still pending and thus the summary judgment order was not a final order. I am sure we can all agree that, if the majority's factual finding is incorrect, then so is

the legal conclusion that is based on this finding.[6] For the reasons explained below, I believe that the majority's factual finding is contradicted by the record.

¶ 38 On review, an appellate court must interpret the orders of the trial court "from the entire context" in which they were entered, with reference to other parts of the record, including the pleadings and the other motions and issues pending before the court, as well as the arguments made by counsel. *Dewan v. Ford Motor Co.*, 343 Ill. App. 3d 1062, 1069 (2003) (citing *P&A Floor Co. v. Burch*, 289 Ill. App. 3d 81, 88 (1997)). An appellate court must construe a trial court's orders "in a reasonable manner so as to give effect to the apparent intention of the trial court." *Dewan*, 343 Ill. App. 3d at 1069 (citing *P&A Floor Co.*, 289 Ill. App. 3d at 88-89).

¶ 39 The majority's factual finding is incorrect for four reasons. First, the trial court's grant of leave to file the fourth amended complaint was made with reservations; it was conditional. Typically, when a trial court sets a hearing to hear a defendant's objections to a plaintiff's filing of an amended complaint, the order states that it is granting the plaintiff leave to file *a motion* to amend its complaint. *E.g., Chandler v. Doherty*, 314 Ill. App. 3d 320, 323 (2000) (the trial court granted plaintiffs leave to file a *motion* for leave to file an amended complaint; defendant filed its objections; and the trial court then held a hearing). Here the order states: "Plaintiff given leave

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[6] While the majority states that "Renaissance disputes" whether the trial court granted leave to file the fourth amended complaint, it states that "Bleakney does not contest" this point. *Supra* ¶ 22. Although Bleakney's appellate brief indicates that plaintiff obtained leave to file the fourth amended complaint with objections, Bleakney's brief also states that, with this action, plaintiff merely "attempted" to file the complaint. Thus, Bleakney's brief does not concede this point.

to file 4th Amended Complaint w/objection by Ds - & Objection will be heard on June 20th, 2011[at] 10:35 [a.m.]." It would have been better if the order in this case had stated that it was granting leave to file a motion rather than a complaint, thereby eliminating any grounds for confusion. However, our job in reviewing the trial court's order is to ascertain the trial court's "apparent intention" (*Dewan*, 343 Ill. App. 3d at 1069), and the trial court's intention is apparent from the face of this order.

¶ 40 The trial court's intent is apparent from the facts: (1) that the order states that the filing is made only "with objection"; and (2) that the order sets a hearing date on the then-pending summary judgment motions, which were directed only against the third amended complaint. The order states, in its first paragraph, that the purpose of the order is to set a schedule for the "2-1005 Summary Judgment" motions, and for "Other[:] Court[']s status." The second paragraph states that "[t]he matter is set for hearing on June 20th, 2011 at 10:35 a.m." The last paragraph states: "Other: Plaintiff given leave to file 4th Amended Complaint w/objection by Ds - & Objection will be heard on June 20th, 2011[at] 10:35 [a.m.]."

¶ 41 There would be absolutely no point for the order to set the then-pending summary judgment motions down for a resolution date, when they were directed solely against the third amended complaint, if the trial court – in the very same order – intended to allow the third amended complaint to be superceded by a fourth one. The majority's and the plaintiff's

interpretation[7] creates an order at war with itself.

¶ 42 If the June 7th order is not a model of clarity, plaintiff should be the last one to complain. Plaintiff's attorney submitted an affidavit stating that he drafted the order, and the key parts of the order are handwritten.

¶ 43 Although the order states that the filing of the fourth amended complaint was done only "w/ objection," the order does not indicate that there were any objections made to hearing the then-pending summary judgment motions on June 20, 2011. Plaintiff also does not claim on appeal that she made any objections at the time to the trial court, and matters that are not objected to are waived for purposes of appeal. *Clifford v. The Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34, 41-42 (2004).

¶ 44 Second, if we had any doubts about the trial court's actual intent, the trial court removed those doubts on August 29, 2011, when it stated in open court that the fourth amended complaint "had not been allowed to be filed. Yes, you had it stamped, but I did not give you permission to file the fourth amended complaint." In reviewing a trial court's order, an appellate court must examine "the entire context" (*Dewan*, 343 Ill. App. 3d at 1069), and examining the entire context in the case at bar removes any doubt about the trial court's intention. In the case at bar, plaintiff asked the trial court to make the same factual finding that the majority now makes about the meaning of the trial court's order, and the trial court – the issuing court – rejected the same

[7] In its brief to this court, plaintiff concedes that: "On June 7, 2011, the trial court entered an order setting briefing and hearing dates on the *pending* Motions for Summary Judgment." (Emphasis added.)

argument that the majority raises here *sua sponte*. *People v. Ryan*, 259 Ill. App. 3d 611, 614 (1994) ("collectively, the context in which the trial judge ruled, the issues he was deciding, and *the judge's own observations* about the defendant's motion demonstrate that he did not intend his order to be a final adjudication on the merits" (emphasis added)).

¶ 45 Third, even if we were to assume for argument's sake that the trial court had granted plaintiff leave to file a fourth amended complaint and then reversed itself when it later stated that it had not, the order granting leave was an interlocutory order and the trial court had the power to vacate its order at any time while the court still had jurisdiction over the entire case. *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 42 ("recognizing the circuit court's inherent power to review, modify, or vacate interlocutory orders while the court retains jurisdiction over the entire controversy"). "Interlocutory" is defined as that " 'which does not finally determine a cause of action but only decides some intervening matter pending to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.' " *Pinkerton Security & Investigation Services v. Illinois Department of Human Rights*, 309 Ill. App. 3d 48, 56 (1999) (quoting Black's Law Dictionary 815 (6th ed. 1990)). Since an order granting leave to file an amended complaint "with objection" is an order that, by its very terms, " 'requires further steps' " (*Pinkerton*, 309 Ill. App. 3d at 56), it was an interlocutory order that the trial court could vacate at any time while it still had jurisdiction. *Hernandez*, 2012 IL 113054, ¶ 42 ("recognizing the circuit court's inherent power to *** vacate interlocutory orders while [it] retains jurisdiction").

¶ 46 The majority responds that "the *Hernandez* decision also casts doubt on the efficacy of the oral pronouncements of a trial judge." *Supra* ¶ 30 (citing *Hernandez*, 2012 IL 11304, ¶¶ 43, 53). Actually, *Hernandez* stands for just the opposite.[8]

¶ 47 As noted above, in *Hernandez*, our supreme court reaffirmed its adherence to the principle that a circuit court has the "inherent power to review, modify, or vacate interlocutory orders while the court retains jurisdiction over the entire controversy." *Hernandez*, 2012 IL 11304, ¶ 43. As an example, the supreme court observed that "this court has repeatedly held that the circuit court has the inherent power to modify or vacate an interlocutory order granting summary judgment any time before final judgment." *Hernandez*, 2012 IL 11304, ¶¶ 42.

¶ 48 To determine whether a judgment was final, the supreme court reviewed *both* the trial court's written orders and its oral pronouncements. *Hernandez*, 2012 IL 11304, ¶¶ 43, 44 ("First, we look at the oral pronouncements ***, and the resulting written orders"). In *Hernandez*, the trial judge orally stated that he was dismissing plaintiff's original complaint pursuant to defendant's motion to dismiss. Plaintiff then orally asked to add allegations, and the trial court orally stated that it would "allow *** that." The resulting written order stated that plaintiffs were

[8] In criminal cases, it is well-established that, when the trial court's oral pronouncement of sentence conflicts with the written sentencing order, it is the oral ruling that governs. *People v. Roberson*, 401 Ill. App. 3d 758, 774 (2010) ("When the oral pronouncement of the court and the written order conflict, the oral pronouncement of the court controls."); *People v. Lee*, 303 Ill. App. 3d 356, 369 (1999); *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993) ("It is the oral pronouncement of the judge which is the judgment of the court. The written order of committment is merely evidence of he judgment of the court.") It would be odd to say that an oral ruling governs in criminal cases, where a person's liberty is at stake, but is insufficient for civil cases.

granted 30 days to file an amended complaint. *Hernandez*, 2012 IL 11304, ¶ 45.

¶ 49 Our supreme court held that, since "[t]here is no indication in [the trial judge's] oral pronouncement or written order that anything was 'absolutely and finally' settled," the trial court's oral dismissal of the original complaint was not a final judgment. *Hernandez*, 2012 IL 11304, ¶¶ 47. Thus, despite the majority's claim that *Hernandez* "casts doubt on the efficacy of oral pronouncements by a trial judge" (*supra* ¶ 30), the supreme court, in fact, relied on and interpreted the trial judge's oral pronouncement in reaching its holding. Instead of casting doubt, *Herandez* stands for just the opposite – that a reviewing court must consider a trial judge's oral pronouncements in determining whether there was a final judgment.

¶ 50 The majority also responds that, while the trial court could have vacated the order granting plaintiff unconditional leave to file the fourth amended complaint, the trial court never did so. *Supra* ¶ 29. Of course, it would never have occurred to the trial court to vacate an order that it never thought it issued in the first place. However, even if the trial court's June 7th order was supposed to have the effect that the majority finds that it did, that effect was vacated when the very same trial judge who issued the June 7th order clarified, a mere 13 days later, that this was never the order's intention. To concur with the majority would require concurring with a factual finding that a respected trial judge did not know his own mind; and I cannot concur with that result.

¶ 51 Fourth, the majority's decision requires us to discard two unambiguous orders: (1) the trial court's order granting summary judgment; and (2) the trial court's denial of plaintiff's motion

to reconsider summary judgment. Nobody claims that either of these orders is ambiguous. The trial court's intent in these orders is clear and undisputed: to end the litigation through summary judgment. The majority would have us simply disregard these clear and unambiguous orders.

¶ 52 In support, the majority quotes out of context the following sentence from *Hernandez*: "Defendants cannot look to oral pronouncements to explain otherwise unambiguous written orders where the oral pronouncements themselves are, *at best*, ambiguous indicators of the court's intent." *Hernandez*, 2012 IL 113054, ¶ 53. In *Hernandez*, the defendants were arguing the *res judicata* or preclusive effect of an ambiguous oral ruling. *Hernandez*, 2012 IL 113054, ¶ 52. Similarly, in the case at bar, plaintiff is arguing the *res judicata* or preclusive effect of an ambiguous ruling, namely, the ruling where the trial court allegedly granted her leave to file another complaint. In *Hernandez*, our supreme court held that defendants could not satisfy their burden of showing the preclusive effect of the ruling, when that ruling was ambiguous and there was an unambiguous written order to the contrary. *Hernandez*, 2012 IL 113054, ¶¶ 52-53. Similarly, in the case at bar, plaintiff cannot satisfy her burden of showing the preclusive effect of the order allegedly allowing her leave to file, when that ruling is ambiguous and there are unambiguous written orders to the contrary – namely, the trial court's final orders dismissing the entire litigation.

¶ 53 For these reasons, the majority's factual finding is incorrect, and we have jurisdiction to hear this appeal. Therefore, I must respectfully dissent.