2015 IL App (1st) 132767-U
No. 1-13-2767
Order Filed August 14, 2015

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOSEPH COHEN, as Bankruptcy Trustee for debtor Cynthia K. Rossetti,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	
	)	No. 12 L 12201
JEFFREY S. DEUTSCHMAN and DEUTSCHMAN AND ASSOCIATES, P.C., an Illinois Professional Corporation,	)	Honorable Moira S. Johnson, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary judgment for the defendants was proper. *Res judicata* barred the plaintiff's legal malpractice suit, and the plaintiff failed to establish that the application of *res*

judicata would work an injustice. The plaintiff failed to establish that either of the exceptions he raised to the rule against claim-splitting applied in this case.

¶ 2 The plaintiff, Joseph Cohen, Bankruptcy Trustee for the debtor, Cynthia Rossetti, (the Trustee), appeals from an order of the circuit court of Cook County granting summary judgment to defendants, Jeffrey S. Deutschman and Deutschman and Associates, P.C.,(the Deutschman defendants) and dismissing the Trustee's legal malpractice complaint against the Deutschman defendants on the ground of *res judicata*. On appeal, the Trustee contends that *res judicata* does not apply to bar the complaint, and in any event, it would be unjust to apply it to bar the complaint.

¶ 3 BACKGROUND

¶ 4 The following facts are taken from the pleadings, depositions and other relevant materials contained in the record on appeal.

¶ 5 I. Facts

¶ 6 On June 6, 2005, Cynthia Rossetti (Ms. Rossetti) underwent a surgical procedure to treat urinary incontinence by the insertion of a SPARC sling. Dr. Kathleen Salus, M.D. of the Women-to-Women Clinic (the clinic), performed the procedure. During the next year and a half, Ms. Rossetti returned to the clinic on numerous occasions complaining of urinary tract infections. She was treated with antibiotics, but the infections returned. The clinic eventually referred Ms. Rossetti to a urologist. On October 25, 2007, Dr. Tamara Lewis attempted to surgically remove the SPARC sling from the plaintiff. During the surgery, Dr. Lewis determined that the SPARC sling had migrated and perforated Ms. Rossetti's bladder and that a more complex procedure was required to remove it. Ms. Rossetti underwent two more procedures to remove the SPARC sling.

¶ 7 In January 2008, Ms. Rossetti consulted attorney Bonnie MacFarlane (attorney MacFarlane). Attorney MacFarlane agreed to assist Ms. Rossetti in pursuing a medical malpractice claim against her former doctors. Attorney MacFarlane advised Ms. Rossetti that there was sufficient time left to file the complaint and instructed Ms. Rossetti to contact her after she underwent the follow-up surgeries to remove the SPARC sling.

¶ 8 In June 2009, Ms. Rossetti met with attorney MacFarlane and attorney Scott Hiera to discuss filing her medical malpractice claim. Attorney Hiera opined that the four-year statute of repose applicable to medical malpractice claims may have run, extinguishing Ms. Rossetti's claim. Attorney MacFarlane disagreed, asserting that the statute of limitations applied and under the discovery rule, the time for filing the claim would not expire until October 2009, two years after the surgery performed by Dr. Lewis. Within the week, attorney Hiera advised Ms. Rossetti that he would not represent her, and attorney MacFarlane advised her to consult with another medical malpractice attorney.

¶ 9 Subsequently, Ms. Rossetti consulted the Deutschman defendants. On July 1, 2009, Ms. Rossetti mailed a signed retainer agreement and her medical records related to her SPARC sling procedures to the Deutschman defendants authorizing them to pursue a legal malpractice claim against attorney MacFarlane. On February 5, 2012, on behalf of Ms. Rossetti, the Deutschman defendants filed a legal malpractice complaint against attorney MacFarlane in the circuit court of Cook County

¶ 10 II. McHenry County Circuit Court Proceedings

¶ 11 On attorney MacFarlane's motion, venue was transferred to McHenry County. The complaint alleged that attorney MacFarlane was retained by Ms. Rossetti in February 2008 to pursue a medical malpractice claim against the doctors at the clinic. The complaint further

alleged that attorney MacFarlane breached her duty to Ms. Rossetti by failing to investigate her claims to determine when statute of limitations expired, failed to file a malpractice suit within the statute of limitations and failed to advise Ms. Rossetti of the proper statute of limitations. The complaint further set forth allegations in support of the viability of Ms. Rossetti's medical malpractice claim.

¶ 12 After Ms. Rossetti filed for bankruptcy, the Deutschman defendants were appointed to pursue the complaint on behalf the bankruptcy estate. The Trustee was substituted for Ms. Rossetti in the complaint.

¶ 13 On February 7, 2012, attorney MacFarlane filed a third party complaint seeking contribution from the Deutschman defendants. Attorney MacFarlane alleged that based on the opinions of the medical and legal experts retained by the Deutschman defendants, Ms. Rossetti had a viable medical malpractice claim against the doctors at the clinic until the limitations period for the claim expired on October 25, 2009. Attorney MacFarlane asserted that, should she be found to have breached the standard of care by failing to file the medical malpractice suit within the limitations period, then the Deutschman defendants were equally liable for failing to file suit prior to the expiration of the limitations period. On June 12, 2012, the Deutschman defendants were granted leave to withdraw as attorneys for the bankruptcy estate, and the Trustee obtained new counsel.

¶ 14 Attorney MacFarlane filed a motion for summary judgment. She argued that since Ms. Rossetti's medical malpractice claim was still viable when she was discharged as Ms. Rossetti's attorney and the Deutschman defendants undertook to represent Ms. Rossetti, their

representation was a superseding cause that defeated attorney MacFarlane's liability as a matter of law.[1]

¶ 15 The Deutschman defendants filed a motion for summary judgment as to attorney MacFarlane's third party complaint. The Deutschman defendants asserted that attorney MacFarlane was not entitled to contribution because the cause of action in the suit they filed was Dr. Salus's negligence during the June 6, 2005, surgery, whereas the third party complaint sought contribution for negligence committed by the clinic in the follow-up care of Ms. Rossetti, which they maintained was a different cause of action. The Deutschman defendants argued that Ms. Rossetti discovered her injuries were wrongfully caused, at the latest, by November 9, 2006. Therefore, her medical malpractice claim was time-barred prior to the time she retained the Deutschman defendants to represent her. The Deutschman defendants further asserted that under the statute of repose, Ms. Rossetti's medical malpractice claim had expired on June 6, 2009, four years after her surgery on June 6, 2005.

¶ 16 On November 5, 2012, the circuit court of McHenry County granted attorney MacFarlane's motion for summary judgment. The court determined that there was no genuine issue of material fact and found that "[e]ither the statute of limitations began to be triggered on the onset of symptoms or at the time of the surgery, which is October 25, 2007. Either way [Ms. Rossetti] is out of the box." The court found that the Deutschman defendants' negligence, "if any," was an intervening cause and that there was no direct cause of action against attorney MacFarlane.

¶ 17 The November 5, 2012, order provided that the third party complaint for contribution was moot. The order further stated that the court made "no ruling on issues raised by [the

[1] While attorney MacFarlane denied that an attorney-client relationship existed between Ms. Rossetti and her, she acknowledged that, for the purposes of the summary judgment motion, the court should assume that Ms. Rossetti retained attorney MacFarlane.

Deutschman defendants'] motion for summary judgment." While the order was made immediately appealable under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), no appeal was taken from the November 5, 2012, order.

¶ 18 III. The Cook County Circuit Court Proceedings

¶ 19 On October 26, 2012, the Trustee filed a complaint for legal malpractice against the Deutschman defendants in the circuit court of Cook County. The Trustee alleged that the Deutschman defendants were negligent in that they failed to properly investigate Ms. Rossetti's medical negligence claims which would have revealed that her claims of medical malpractice and product liability against the manufacturer of the SPARC sling were viable until late October 2009. The Trustee further alleged that the Deutschman defendants breached their duty of care when they failed to timely file a medical malpractice claim against Ms. Rossetti's former doctors and a products liability claim against the manufacturer of the SPARC sling.

¶ 20 In their amended answer, the Deutschman defendants raised the affirmative defenses of claim-splitting and *res judicata*. They maintained that the Trustee's suit against attorney MacFarlane and her third party contribution complaint shared an identity of parties and causes of action, and that there was a final judgment on the merits. The Deutschman defendants further maintained that the Trustee's claims in the present suit could have been raised in the suit in McHenry County.

¶ 21 On April 16, 2013, the Deutschman defendants moved for summary judgment on the grounds that *res judicata* and the rule against claim-splitting barred the Trustee from pursuing the legal malpractice case against them. In his response, the Trustee argued that the causes of action were not identical because each depended on different facts. He further

argued that there was no final judgment on the merits because there was no final adjudication as to the liability of the Deutschman defendants in the McHenry County proceedings. The Trustee further argued that it would be inequitable to bar the Trustee from proceeding against the Deutschman defendants because this was the first complaint alleging their liability to Ms. Rossetti for failing to pursue her medical malpractice claim.

¶ 22 On June 25, 2013, after hearing the parties' arguments, the circuit court of Cook County granted the Deutschman defendants' motion for summary judgment. The court found that "res judicata prohibits [the Trustee] bringing this lawsuit against [the Deutschman defendants] when an adjudication was already had and [*sic*] the case that was brought on the [*sic*] [attorney] MacFarlane in McHenry County. Res judicata requires that all claims that are brought along with claims that could have been brought are decided." The court did not rule on whether the complaint was barred by claim-splitting.

¶ 23 Following the denial of his motion for reconsideration of the order granting summary judgment, the Trustee filed a timely notice of appeal.

¶ 24 ANALYSIS

¶ 25 I. Standard of Review

¶ 26 A court reviews the grant of summary judgment *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). Whether a claim is barred by *res judicata* is also reviewed *de novo*. *Dookeran v. County of Cook*, 2013 IL App (1st) 111095, ¶ 13.

¶ 27 II. Discussion

¶ 28 "*Res judicata* is an equitable doctrine and is applied to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same." *Dookeran*, 2013 IL App

(1st) 111095, ¶ 15. " '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.' " *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (quoting *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996)). The application of the doctrine of *res judicata* requires that there be: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) identical parties or their privies in both actions. *Dookeran*, 2013 IL App (1st) 111095, ¶ 15. Where established, *res judicata* bars all matters that were offered to sustain or defeat the claim, as well as to any and all other matters which may have or could have been offered for that purpose. *Dookeran*, 2013 IL App (1st) 111095, ¶ 15.

¶ 29 A. Whether the Elements of *Res Judicata* Were Satisfied

¶ 30 1. *Identity of the Parties*

¶ 31 The Trustee does not challenge the identity of the parties' requirement.

¶ 32 2. *Final Judgment on the Merits by a Court of Competent Jurisdiction*

¶ 33 The Trustee maintains that the only final judgment on the merits was rendered as to attorney MacFarlane in the McHenry County proceedings. As part of the final judgment, attorney MacFarlane's third party complaint for contribution against the Deutschman defendants was dismissed as moot. The plaintiff argues that since the third party complaint was dismissed as moot, it does not constitute a final judgment on the merits of the Trustee's legal malpractice claim against the Deutschman defendants.

¶ 34 For purposes of *res judicata*, a judgment on the merits amounts to a decision on the respective rights and liabilities of the parties based on the facts before the court. *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (1999). To be deemed final for purposes

of *res judicata*, a judgment must terminate the litigation on the merits, so that all that remains is to proceed with the execution of the judgment. *SDS Partners, Inc.*, 305 Ill. App. 3d at 896. " 'For purposes of *res judicata*, a judgment is not final until the possibility of appellate review has been exhausted.' " *Dookeran*, 2013 IL App (1st) 111095, ¶ 18 (quoting *Fidelity National Title Insurance Co of New York v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 211 (2007)).

¶ 35 For *res judicata* to apply there is no requirement that a judgment on the merits be rendered as to all the claims raised or those that could have been raised. In *Rein*, the circuit court dismissed the plaintiffs' rescission claims that were barred by the statute of limitations. The plaintiffs voluntarily dismissed their common law claims and appealed the dismissal of the rescission counts. After the appellate court affirmed, the plaintiffs filed a complaint again alleging the rescission and the common law counts. The circuit court ruled that both the rescission and the voluntarily dismissed common law counts were barred by *res judicata*. *Rein*, 172 Ill. 2d at 332. A majority of the appellate court affirmed, and the plaintiffs' petition for leave to appeal was granted by the supreme court.

¶ 36 On review, the supreme court determined that for *res judicata* purposes, the final judgment on the rescission counts in the original action served as a final judgment for *res judicata* purposes as to the common law counts. The court explained as follows:

> "The first element of *res judicata* [a final judgment on the merits] is met here because the dismissal of the rescission counts with prejudice in *Rein I* operates as an adjudication on the merits for purposes of *res judicata*, as explained earlier. Although there was not an adjudication on the merits of the common law counts in *Rein I*, the concept of *res judicata* is broader than plaintiffs suggest. If the three

> elements necessary to invoke *res judicata* are present, *res judicata* will bar not only every matter that was actually determined in the first suit, but also every matter that might have been raised and determined in that suit." *Rein*, 172 Ill. 2d at 337-38.

While the present case does not involve voluntarily-dismissed counts, *res judicata* serves to promote judicial economy by preventing repetitive litigations in which parties are forced to relitigate essentially the same case. "To allow the splitting of claims or causes of action even in the absence of a ruling on the merits of all claims or all causes of action is contrary to the policy consideration central to *res judicata* of promoting finality." *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1, 9 (2009).

¶ 37 The cases cited by the Trustee do not aid his argument. Both *Jackson v. Callahan Publishing, Inc.*, 356 Ill. App. 3d 326 (2005) and *SDS Partners, Inc.* dealt with whether a dismissal pursuant to a settlement agreement constituted a final judgment on the merits, an issue not present in this case.

¶ 38 We conclude that for purposes of *res judicata*, the November 5, 2012 order granting summary judgment to attorney MacFarlane constituted a final judgment on the merits by a court of competent jurisdiction as to both the Trustee's complaint against her and her third party complaint against the Deutschman defendants.

¶ 39 3. *Identity of the Cause of Action*

¶ 40 The Trustee argues that the causes of action in the two legal malpractice complaints were not identical because the necessary facts were vastly different. In the McHenry County proceeding against attorney MacFarlane, the Trustee had to prove that attorney MacFarlane failed to file Ms. Rossetti's medical malpractice claim based on her June 6, 2005 surgery on or before June 6, 2009. In contrast, in the subsequent Cook County proceeding against the

Deutschman defendants, the Trustee had to prove that the Deutschman defendants failed to file the medical malpractice claim based on Ms. Rossetti's postsurgical care on or before October 25, 2009, when Dr. Lewis discovered that the insertion of the SPARC sling was the cause of Ms. Rossetti's injury.

¶ 41 To determine whether there is an identity of cause of action for purposes of *res judicata*, the court applies the transactional test. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311(1998) (rejecting the same evidence test as not determinative of the identity of the causes of action). Under the transactional test, claims are part of the same cause of action if they arise from the same transaction or series of connected transactions. *Cload v. West*, 328 Ill. App. 3d 946, 950 (2002). *Res judicata* may bar subsequent claims if they arise from a single group of operative facts, regardless of whether the claims assert different theories of relief or are based on evidence that does not substantially overlap, as long as they arise from the same transaction. *Cload*, 328 Ill. App. 3d at 950. "What constitutes a transaction should be determined pragmatically, and a court should give[ ] weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (Internal quotations marks omitted.) *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009) (quoting *River Park*, 184 Ill. 2d at 312, quoting Restatement (Second) of Judgments §24, at 196 (1982)).

¶ 42 The Trustee maintains that there was no identity of causes of action because each suit involved different times, witnesses, dates and other necessary facts to prove up the allegations of the complaints. " 'The passage of time is only one of the *River Park, Inc.* factors used to determine whether a group of facts constitute a transaction.' " *Lane*, 394 Ill.

App. 3d at 334 (quoting *Doe v. Gleicher*, 393 Ill. App. 3d 31, 38 (2009)). In *Gleicher*, the reviewing court held that *res judicata* could bar claims in the second complaint which were based on conduct occurring after the first complaint was voluntarily dismissed. The court found that the two claims arose out of the same operative facts because in both cases, the plaintiffs " 'sought redress, albeit under difference causes of action, for what they deem[ed to be] inappropriate conduct with their embryos.' " *Lane*, 394 Ill. App. 3d at 334 (quoting *Gleicher*, 393 Ill. App. 3d at 38). Relying on *Gleicher*, the court in *Lane* found that "the fact the events underlying the causes of action in [the plaintiff's two complaints] occurred at different times was not sufficient to find that they did not arise out of the same set of operative facts." *Lane*, 394 Ill. App. 3d at 334.

¶ 43 In *Wilson v. Edward Hospital*, 2012 IL 112898, in the original suit, partial summary judgment was entered finding that the defendant doctors were not actual agents of the defendant hospital but leaving unresolved whether the doctors were apparent agents. After taking a voluntary dismissal, the plaintiffs' refiled their suit and alleged apparent agency. While the appellate court found that *res judicata* barred the plaintiffs' refiled suit alleging apparent agency, the supreme court disagreed and reversed. The supreme court differentiated between causes of action and theories of recovery, explaining that "[a] cause of action is defined by the facts that give rise to a right to relief. Though one group of facts may give rise to a number of different theories of recovery, there remains a single cause of action." *Wilson*, 2012 IL 112898, ¶ 10. The court determined that actual agency and apparent agency were not separate and distinct causes of action for purposes of *res* judicata, but theories of recovery. *Wilson*, 2012 IL 112898, ¶¶ 24-25. The partial summary judgment order was not final for *res judicata* purposes as to the recovery theory of apparent agency, and therefore,

the plaintiffs were not barred from asserting their allegations of apparent agency in their refiled action. *Wilson,* 2012 IL 112898, ¶ 26.

¶ 44 In the present case there was only one cause of action: legal malpractice for failure to file a medical malpractice claim against Dr. Salus and/or the clinic. Both the suit against attorney MacFarlane and her third party complaint against the Deutschman defendants arose out of facts demonstrating that the attorneys breached their duty of care to Ms. Rossetti by failing to timely file her medical malpractice case. The Trustee's complaint filed in the Cook County proceedings against the Deutschman defendants arose out of the same core of operative facts, *i.e.*, the failure to timely file Ms. Rossetti's medical malpractice complaint. Even though two complaints may require different witnesses and/or proof of different facts, the complaints may still have an identity of cause of action. See *Cload*, 328 Ill. App. 3d at 951 (even if the evidence does not overlap, a claim may still be considered part of the same cause of action under the transactional test).

¶ 45 We conclude that the Trustee's legal malpractice complaints against attorney MacFarlane and the Deutschman defendants share an identity of causes of action.

¶ 46 Nonetheless, fundamental fairness may bar the application of *res judicata*. *Dookeran*, 2013 IL App (1st) 111095, ¶ 34. The Trustee argues that it would be inequitable to bar him from litigating the legal malpractice claim against the Deutschman defendants because they were never forced to litigate their culpability in the Trustee's case against attorney MacFarlane. The Trustee relies on *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill. App. 3d 638 (1989).

¶ 47 In *Best Coin-Op, Inc.*, after setting forth the complex factual and procedural aspects of the case, the court noted that the issue before it was not whether the plaintiff could have

added the claims to its first complaint, but rather, it was "whether Best Coin's failure to take such action resulted in a *res judicata* bar to its later, separately filed, complaint" and depended upon whether the claim in the second complaint was substantially the same claim or cause of action as was litigated in the first suit, "despite the different theory of recovery alleged and the money damages demanded." *Best Coin-Op, Inc.*, 189 Ill. App. 3d at 651. The reviewing court held that *res judicata* did not apply because there was no identity as to the cause of action, and the rule against claim-splitting was not applicable under the special circumstances in the case, *i.e.* the procedural history of the case. Moreover, the court would not apply *res judicata* in such a technical way as to create inequitable and unjust circumstances. See *Best Coin-Op, Inc.*, 189 Ill. App. 3d at 660 (reviewing court noted that, in addition to errors of judgment and strategy made by both parties, there was substantial confusion that the parties were not responsible for creating).

¶ 48 The Trustee argues that once attorney MacFarlane filed her motion for summary judgment in the McHenry County proceedings, he was faced with three choices: deal with the summary judgment claims, move to voluntarily dismiss the complaint, or amend the complaint to include the Deutschman defendants as parties. The Trustee maintains that amending the pleadings would not have served the estate since by their representation of Ms. Rossetti and then the Trustee, the Deutschman defendants had "tainted" the McHenry County proceedings. The Trustee asserts that the concepts of fairness and objective reasonableness allowed him to pursue a new action in a different county.

¶ 49 In contrast to *Best Coin-Op, Inc.*, in the present case, the two legal malpractice complaints share an identity of cause of action. Since *res judicata* bars claims that could have been raised as well as those that were litigated in the prior suit, to avoid the

consequences of *res judicata*, the Trustee was required to amend the MacFarlane complaint to add the Deutschman defendants rather than file a new complaint against them in Cook County circuit court.

¶ 50 Moreover, the Trustee's argument makes clear that it was a conscious choice on his part not to amend the complaint to raise his claims against the Deutschman defendants in the McHenry County case. Therefore, considerations of equity and fundamental fairness do not bar the application of *res judicata* to the complaint filed against the Deutschman defendants in Cook County. See *Dookeran*, 2013 IL App (1st) 111095, ¶ 38 (fundamental fairness did not bar *res judicata* where the plaintiff failed to raise his claims in the earlier proceedings).

¶ 51 B. Claim-Splitting

¶ 52 "The principle that *res judicata* prohibits a party from later seeking relief on the basis of issues which might have been raised in the prior action also prevents a litigant from splitting a single cause of action into more than one proceeding." *Rein*, 172 Ill. 2d at 339. However, *res judicata* principles do not bar a second action if the parties agreed to the claim-splitting, the defendant acquiesced to splitting the claim, or the court in the first action expressly reserved the plaintiff's right to maintain the second action. *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324, 330 (2009) (citing Restatement of Judgments (Second) §26(1), at 233 (1982),

¶ 53 The Trustee maintains that the filing of the complaint against the Deutschman defendants in Cook County was not claim-splitting because the causes of action were different. Since we have determined that the two suits shared an identity of causes of action, we reject the Trustee's argument that filing the Cook County complaint against the Deutschman defendants did not constitute claim-splitting.

¶ 54 Even if filing the complaint against the Deutschman defendants in Cook County constituted claim-splitting, the Trustee maintains that the Deutschman defendants acquiesced to the claim-splitting by reserving the right to raise their arguments in the McHenry County proceedings in the Cook County proceedings.

¶ 55 On October 26, 2012, the Trustee filed the complaint against the Deutschman defendants in Cook County. At the November 5, 2012, hearing on attorney MacFarlane's motion for summary judgment in the McHenry County proceedings, the attorney for the Deutschman defendants stated to the court as follows:

> "MR. SIPCHEN: I just want to say that some of the issues before this court pertaining to the statute of limitations will be at play in that lawsuit. I filed a motion for summary judgment [as to the third-party complaint]. I don't intend to argue that today. The court doesn't want me to argue that today.
>
> THE COURT: In this case?
>
> MR. SIPCHEN: In this case, yes, where I have argued a different statute of limitations and a different expiration date than what Mr. Carroll [counsel for attorney MacFarlane] is arguing.
>
> I just want to reserve my rights in that regard. And should you grant Mr. Carroll's motion, I don't want there to be any misconstruing that my silence today is in agreement with that argument. I don't believe that there has been a full opportunity in to hear my arguments in this case, and I reserve those arguments for the case that is pending in Cook County should the case go forward and this one not."

¶ 56 The appropriate time to object is when the action is refiled. *Quintas*, 395 Ill. App. 3d at 334. At the time of the McHenry County summary judgment hearing, the Deutschman

defendants had not yet filed an appearance in the Cook County case. Moreover, nothing in the above colloquy suggests that the Deutschman defendants acquiesced in the filing of the Cook County complaint against them. As the last comment of the colloquy makes clear, the Deutschman defendants were preserving their arguments in the event the Cook County case proceeded; they were not agreeing to allow it to go forward.

¶ 57 The Trustee further maintains that by ruling that the Deutschman defendants' negligence, if any, occurred at the time they represented Ms. Rossetti and served as an intervening cause, the McHenry court reserved the Trustee's right to file a second action. Under the exception to the claim-splitting rule, the court must expressly state the right to refile. *Law Offices of Nye & Associates v. Boado*, 2012 IL App (2d) 110804, ¶ 21(citing *Matejczyk*, 397 Ill. App. 3d at 10-11). "An express reservation requires that the intent be clearly and unmistakably communicated or directly stated." *Law Offices of Nye & Associates*, 2012 IL App (2d) 110804, ¶ 21. Nothing in the McHenry court's finding expressed or even inferred that the Trustee had the right to bring a second action for legal malpractice.

¶ 58 The Trustee's reliance on *Rein* and *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887 (2009), is misplaced. Unlike *Rein*, the present case does not involve claims that were voluntarily dismissed. In *Piagentini*, the reviewing court found that the defendant had acquiesced to the splitting of the claims by participating in discovery, taking depositions and finally waiting over 3 ½ years before filing its motion to dismiss raising *res judicata* for the first time. See *Piagentini*, 387 Ill. App. 3d at 898; see *Matejczyk*, 397 Ill. App. 3d at 12 n.1 (the court distinguished *Piagentini* from the case before it where the plaintiff refiled his case in September and the defendant moved to dismiss it on *res judicata* in December) . In the present case, the Deutschman defendants filed their amended answer and affirmative

defenses of claim-splitting and *res judicata* on March 25, 2013, six months after the Trustee filed the Cook County suit.

¶ 59 We conclude that the Trustee's action in filing a complaint against the Deutschman defendants in Cook County constituted claim-splitting. Moreover, the exceptions to the rule against claim-splitting did not apply in this case: the Deutschman defendants did not acquiesce in the claim-splitting, and the McHenry court did not state expressly that the Trustee had the right to refile the same cause of action.

¶ 60 CONCLUSION

¶ 61 We conclude that *res judicata* barred the Trustee's legal malpractice suit filed against the Deutschman defendants in Cook County. We further conclude that since the Trustee had the opportunity to litigate his claims against the Deutschman defendants in the McHenry County suit but chose not to do so, fundamental fairness did not bar the application of *res judicata*. Finally, we conclude that the Trustee's action in filing the complaint against the Deutschman defendants in Cook County violated the rule against claim-splitting and that none of the exceptions relied on by the Trustee applied in this case.

¶ 62 The circuit court's grant of summary judgment to the Deutschman defendants is affirmed.

¶ 63 Affirmed.