2011 IL App (1st) 090361-U
No. 1-09-0361

FIFTH DIVISION
December 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BETTY ROBINSON	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Plaintiff/Appellant	)	
	)	
v.	)	No. 08 L 975
	)	
SAFEWAY INSURANCE CO.,	)	
	)	
Defendant/Appellee.	)	
	)	
	)	Honorable
	)	Charles Winkler
	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

Held: Appellate court lacks jurisdiction to entertain an appeal more than 30 days after plaintiff voluntarily dismissed all pending counts of her complaint, thereby rendering the trial court's prior orders immediately final and appealable. Further, plaintiff's refiled counts which had been involuntarily dismissed in a prior action were barred by res judicata. However, the doctrine of *res judicata* did not

preclude plaintiff from refiling counts which she had voluntarily dismissed where the docket sheet indicated that the circuit court expressly reserved her right to refile.

¶ 1BACKGROUND

¶ 2 Plaintiff Betty Robinson appeals from a judgment entered below in favor of her insurance carrier, defendant Safeway Insurance Company, in a lawsuit for attorney's fees and damages incurred by plaintiff as a result of defendant's refusal to indemnify her for a judgment entered against her in connection with a traffic accident, which occurred on November 14, 1991. Its procedural history is relatively complex and the record before us does not contain all of the pleadings filed in connection with the all of the underlying tort action that took place between plaintiff, defendant and the other driver's insurer, Chicago Motor Company.

¶ 3 It appears that Chicago Motor Company, who is not a party to this appeal, obtained a judgment against plaintiff for damages arising from that accident in the amount of $25,000, apparently as a subrogee of its insured in the underlying action. To enforce that judgment, Chicago Motor Company filed a citation to discover assets against defendant, plaintiff's purported insurer, who apparently provided plaintiff with an attorney to represent her in the underlying lawsuit. Defendant contested that citation by denying coverage on grounds that plaintiff's insurance policy was not issued until five days after the accident, and that defendant was, therefore, not obligated to indemnify the plaintiff. At trial, it appears that plaintiff, now represented by her own counsel, requested a continuance, which the trial court denied and found in favor of defendant. In doing so, the trial court agreed with defendant and found that it did not

have a contract with plaintiff on the date of the accident and was not obligated to pay the judgment entered against plaintiff.

¶ 4 Plaintiff subsequently filed a separate suit against Safeway, the defendant (Robinson I), in which she brought claims sounding in contract and tort. She alleged, *inter alia*, that defendant had extended temporary insurance to her through a binder two days prior to the accident. Plaintiff further alleged that, in any event, defendant should be estopped from denying her coverage because it had provided her with an attorney, without a reservation of rights, to represent plainitff in the underlying liability action with Chicago Motor Company. In addition to the foregoing, plaintiff charged defendant with other counts, including fraud, fraudulent concealment and violation of the Consumer Fraud and Deception Act.

¶ 5 Defendant apparently filed a combined 2-615/2-619 motion, pursuant to section 2-619.1 of the Illinois Code of Civil Procedure, to dismiss plaintiff's complaint. Defendant argued, *inter alia*, that plaintiff had failed to state a cause of action and, in addition, was barred under the doctrine of collateral estoppel by the trial court's ruling in the citation proceeding in which it was determined that defendant had not insured plaintiff. The trial court granted defendant's motion and dismissed plaintiff's complaint with prejudice.

¶ 6 Plaintiff appealed from the dismissal of her complaint against defendant in Robinson I, as well as from the trial court's underlying ruling in the citation proceeding by Chicago Motor Company. This court heard both appeals together, and reversed and remanded both cases in *Chicago Motor Club v. Betty Robinson*, 316 Ill. App. 3d 1163 (2000). In doing so, this court found that plaintiff's counsel was not allowed sufficient time to prepare for trial in the citation proceeding. Id. at 1171-71. Having reversed the ruling on the citation proceeding, this court

then found that collateral estoppel was no longer a valid ground for dismissal of plaintiff's complaint in Robinson I. Id. at 1171. The court noted, however, that unlike plaintiff's breach of contract claim, her tort based claims against defendant were superseded by section 155 of the Illinois Insurance Code. Id. at 1173-74. Thus, the court stated that plaintiff was limited in her recovery to damages for breach of contract and only the extra-contractual damages that are consistent with the provisions of the Insurance Code. Id. at 1174.

¶ 7 Defendant apparently settled the citation proceeding with Chicago Motor Company, and the trial court dismissed that proceeding pursuant to that settlement. It found, however, that the settlement between Chicago Motor Company and Safeway with respect to the citation claim did not collaterally estop plaintiff from seeking recovery for costs and damages in connection with her collateral pursuit of defendant until a settlement was reached.

¶ 8 While Robinson I was still pending on remand, plaintiff filed an amended complaint against defendant, which was stricken. She then filed a second amended complaint, which contained seven counts against defendant, namely: breach of contract (count I); violation of section 155 of the Code (count II); waiver and estoppel to deny coverage (count III); actual fraud (count IV); constructive fraud (count V); fraudulent concealment (count VI); and violation of the Consumer Fraud Act (count VII). The trial court later entered an order denying defendant's motion to dismiss under section 2-615.[1] In that same order, the circuit court permitted plaintiff to file an amended count III (waiver and estoppel), and stated that Safeway needed only to answer counts I and II of that second amended complaint and the amended count III. That order

1 While defendant's motion is not contained in the record before us, it appears that Safeway filed a motion to dismiss plaintiff's second amended complaint.

further stated that the remaining counts of the complaint "shall be treated as filed only to preserve the right to appeal." Plaintiff subsequently refiled her entire second amended complaint as a “third amended complaint,” apparently without requesting leave of court to do so. That complaint was identical to her second amended complaint, except for count III, which was amended to claim only estoppel. Furthermore, plaintiff apparently filed a motion to file yet another amended complaint, and a motion for further discovery, both of which were denied on October 2, 2006.[2]

¶ 9 On November 3, 2006, the trial court granted summary judgment in favor of defendant on count I of plaintiff's third amended complaint, namely, breach of contract. In its written order, the court found that plaintiff had not introduced evidence to refute defendant's assertion, supported by affidavits, that the insurance broker who submitted plaintiff's application for insurance was not an agent of defendant for purposes of issuing a binder. However, the trial court denied defendant's motion for summary judgment on counts II and III of that complaint, finding that there were material issues of fact with respect to plaintiff's allegations in those counts. Accordingly, the circuit court set counts II and III for trial.

¶ 10 On January 29, 2007, the date when this case was set for trial on counts II and III, plaintiff moved for a voluntary dismissal of her case, which the circuit court granted. Following that dismissal, the record does not indicate that plaintiff ever filed a timely notice of appeal from any of the orders entered by the trial court in that case (Robinson I).

¶ 11 On January 28, 2008, 364 days later, plaintiff filed a new complaint against defendant (Robinson II), which was virtually identical to her third amended complaint in Robinson I,

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2 The order on October 2, 2006, is not included in the record before us, but it does not appear to be in dispute.

except for count I, where in place of breach of contract in the previous complaint, plaintiff sought contract reformation to reflect that she was covered on the date of her accident. Defendant filed a motion to dismiss plaintiff's complaint in Robinson II pursuant to section 2-619 on the ground that her claims were barred by *res judicata* because of the identity between the claims raised in Robinson II and the issues which the circuit court dismissed in Robinson I. Attached to that motion were numerous pleadings and orders which had been entered in connection with Robinson I, including plaintiff's complaints and the circuit court's orders disposing of each complaint as described above. Most notably, among the orders attached to defendant's motion were the circuit court's order that defendant did not need to answer counts IV through VII of plaintiff's second amended complaint, the order granting summary judgment in favor of defendant on count I of plaintiff's third amended complaint, and the order granting plaintiff's motion to voluntarily dismiss counts II and III of that complaint.

¶ 12 On August 14, 2008, the trial court dismissed plaintiff's entire complaint with prejudice pursuant to section 2-619 of the Illinois Code of Civil Procedure. In that same order, the trial court entered a 304(a) finding that there was no just reason to delay enforcement or appeal of that judgment.[3] On September 12, 2008, plaintiff filed a motion to reconsider the dismissal of her complaint, which the court denied on January 6, 2009.

¶ 13 On February 5, 2009, plaintiff filed a notice of appeal from the trial court's judgment dismissing her complaint in Robinson II, and from two of the trial court's orders entered in Robinson I, namely: (1) the order from October 2, 2006, in which, as noted earlier, the court

3 The record is unclear as to why the circuit court entered a 304(a) finding instead of relying on an appeal pursuant to Rule 301.

denied plaintiff's motions to file an additional amended complaint and for additional discovery; and (2) the order from November 3, 2006, in which the trial court granted summary judgment on count I of her third amended complaint in favor of defendant.

¶ 14 On June 11, 2009, plaintiff filed an emergency motion to allow the records from Robinson I and from the citation proceeding to be included as part of the common law record on the current appeal, which the trial court granted on that same day. However, on December 16, 2009, circuit court judge Charles Winkler vacated the order from June 11, finding that the Illinois supreme court rules do not allow the trial court to certify documents not filed in the current action (Robinson II) and not considered in its rulings.

¶ 15 On appeal, plaintiff filed a motion to file an amended brief, *instanter* in the form then submitted,[4] which was denied on May 18, 2010. In that same order, the appellate court allowed plaintiff to file an amended brief on or before July 12, 2010, but struck all materials attached as appendices to the amended brief and all materials in the record on appeal which were not filed before the circuit court on January 6, 2009, the date when the circuit court denied plaintiff's motion to reconsider. Notwithstanding the appellate court's order from May 18, 2010, circuit court judge Lee Preston entered an order on June 25, 2010, supplementing the record in this appeal with pleadings from Robinson I. Following the entry of that order, this court entered a new order on July 7, 2010, allowing the record to be supplemented with Judge Preston's order. However, on August 18, 2010, the appellate court entered an order striking any orders entered by the circuit court which were in conflict with Judge Winkler's order from December 16, 2009, and with this court's order entered on May 18, 2010. In that same order, the court struck any records

4 Plaintiff's brief in that form is not included in the record before us.

that Judge Preston's order attempted to include in the supplemental record, namely, pleadings from Robinson I "which were not filed before the circuit court on January 6, 2009."

¶ 16 Notwithstanding this court's orders, plaintiff's brief, filed on October 20, 2010, includes several appendices which contain documents that are not included in the record on appeal. One of those excluded documents is a certified copy of the docket sheet from Robinson I, which has an entry for January 29, 2007, the date when plaintiff voluntarily dismissed counts II and III of her third amended complaint, which states: "voluntary dismissal with leave to re-file – allowed."

¶ 17ANALYSIS

¶ 18 Plaintiff's notice of appeal and brief purport to appeal from judgments entered in both Robinson I and Robinson II. With regard to Robinson I, she first appears to contend that the trial court erred in Robinson I when it denied plaintiff's motion for additional discovery, and when it refused to grant summary judgment in favor of plaintiff on count III of plaintiff's third amended complaint pursuant to a motion which plaintiff apparently filed, but which we do not have in the record before us. In addition, she appears to contend that summary judgment in favor of defendant with respect to count I of her third amended complaint in Robinson I was granted in error and was inconsistent with the trial court's denial of summary judgment for the defendant with respect to counts II and III of that complaint.

¶ 19 Defendant correctly notes that we lack jurisdiction to entertain plaintiff’s challenges to the circuit court’s orders entered in Robinson I. Illinois Supreme Court Rule 303(a) requires a party appealing from a judgment of a circuit court to file a notice of appeal within 30 days after entry of the final judgment appealed from, or, if a timely postjudgment motion against the judgment is filed, within 30 days from the entry of the order disposing of the last postjudgment

motion. S. Ct. R. 303(a) (eff. Dec. 17, 1993). Compliance with the deadlines under Rule 303 is jurisdictional, and this court therefore is without jurisdiction to review an appeal that was not filed in a timely manner. *Martin v. Cajda*, 238 Ill. App. 3d 721, 728 (1992); *In re Application of County Treasurer*, 208 Ill. App. 3d 561, 563 (1990).

¶ 20 Furthermore, it is well established that when a plaintiff voluntarily dismisses the remaining counts of a complaint, all previously entered orders disposing of other counts in that complaint become immediately final and appealable. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 474 (2008). Additionally, the refiling of a count that had been voluntarily dismissed commences a new action, and does not transform the final orders entered in the previous case into nonfinal ones. Id. Thus, in order to appeal from any final order entered in the initial action between the parties, a plaintiff must file a notice of appeal within 30 days of the voluntary dismissal of the remaining counts of that order. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 504 (1997).

¶ 21 In this case, the summary judgment and all other orders entered in Robinson I became appealable on January 29, 2007, when plaintiff voluntarily dismissed the remaining counts of her complaint. Further, when plaintiff refiled her complaint in Robinson II, she began a new action, which did not extend the time that she had to appeal from the orders entered in Robinson I. Thus, plaintiff's notice of appeal from both Robinson I and Robinson II, filed more than two years later on February 5, 2009, was not timely with respect to the orders entered in Robinson I. Accordingly, this court lacks jurisdiction to entertain her appeal from those orders.[5]

5 As noted earlier, plaintiff's appeal from the circuit court's judgment in Robinson II was timely, since the circuit court denied her motion to reconsider on January 6, 2009, and she filed a notice of appeal on February 5, 2009.

¶ 22 Plaintiff next contends, with respect to Robinson II, that the trial court erred in dismissing her complaint as barred by *res judicata*. She appears to argue that the doctrine of *res judicata* is not applicable to this case because the trial court erred in granting summary judgment for defendant on count I of her third amended complaint in Robinson I, and because the trial court did not enter a final judgment on counts II through VII of that complaint. She further maintains that there was insufficient identity between the causes of action in Robinson I and Robinson II, and that the dismissal of the citation proceeding after that matter was settled was not a final and appealable order. Alternatively, plaintiff contends that this case falls into one or more exceptions to the doctrine of *res judicata*, because the trial court expressly reserved her right to refile, which according to plaintiff, would preclude the applicability of *res judicata*.

¶ 23 Defendant first responds that plaintiff's appeal from Robinson I and Robinson II should be dismissed because her brief violates Illinois Supreme Court rule 341(h) by failing to support many of her factual allegations and arguments with citations to the record on appeal, and by citing to matters which are outside the record. We need not consider this contention with respect to Robinson I, since we have already concluded that we lack subject matter jurisdiction over plaintiff's appeal from the circuit court's orders entered in that case. We, therefore, focus only on Robinson II with regard to defendant's argument that this appeal should be dismissed due to plaintiff's failure to comply with Rule 341(h).

¶ 24 To that end, plaintiff contends that she cannot support those factual allegations with citations to the record on appeal because this court did not permit her to supplement that record with pleadings filed in Robinson I. She further maintains that this court should vacate its previous orders which struck from the record on appeal any pleadings from Robinson I that were

not before the circuit court on January 6, 2009, when plaintiff's motion to reconsider the dismissal of Robinson II was denied. According to plaintiff, the entire record of Robinson I has bearing on the circuit court's decision in Robinson II. However, the only document from Robinson I that plaintiff identifies as independently significant to the current appeal, which was not filed as exhibits to pleadings in Robinson II, is the docket sheet from the circuit court in Robinson I. In fact, plaintiff also asks this court to take judicial notice of that document.

¶ 25 We first note that regardless of whether this court was correct in excluding the record of Robinson I on appeal from Robinson II, we decline to dismiss the appeal due to plaintiff's failure to support her statement of facts with citations to the record on appeal. Rule 341(h)(6) requires an appellant's brief to contain "facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate references to the pages of the record." S. Ct. R. 341(h)(6). However, it is within this court's discretion to consider an appeal despite minimal citation to the record in the appellant's opening brief. *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 228 (2008).

¶ 26 Moreover, we believe that plaintiff should have been permitted to include the docket sheet from Robinson I as requested, notwithstanding that it is derived from a case that is technically separate from Robinson II. While documents to be included in the record on appeal may generally consist only of those filed in connection with that case (*Dopp v. Village of Northbrook*, 257 Ill. App. 3d 820, 824 (1993), litigants may supplement the record on appeal with the records of a different proceeding which has special significance to the judgment being challenged on appeal (*City of Chicago v. Thomas*, 102 Ill. App. 2d 143, 147 (1968)). In *Thomas*, 102 Ill. 2d at 147, the defendant was fined $2,000 for violations of the Building Code of the City

of Chicago and committed to the house of corrections to work out that fine at the rate of $5 per day. That defendant then petitioned the circuit court for release pursuant to the Insolvent Debtors Act, which the court granted. Id. On appeal from that order, this court allowed the City of Chicago to supplement the record on appeal with the records of the housing court proceeding. Id. In doing so, this court noted that a study of the record from the housing court had led the circuit court to conclude that the Insolvent Debtors Act was applicable to that case, and that "we see no reason why this court should be deprived of the benefit of having the same record before us now to insure a proper adjudication of the issue before us." Id.

¶ 27 In this case, the circuit court dismissed plaintiff's complaint in Robinson II on grounds of *res judicata* based on the court's previous disposition of plaintiff's claims in Robinson I, in that it granted summary judgment on count I of plaintiff's complaint before plaintiff voluntarily dismissed counts II and III. Plaintiff now contends, *inter alia*, that the doctrine of *res judicata* was inapplicable to this case because the circuit court in Robinson I reserved her right to refile her voluntarily dismissed counts, as evidenced by an entry in the docket sheet. Thus, similarly to *Thomas*, the docket sheet in Robinson I is of special significance to plaintiff's current appeal because the correctness of the circuit court's judgment depends on whether the court in Robinson I reserved plaintiff's right to refile the voluntarily dismissed counts in her complaint. Accordingly, our previous order is modified to allow plaintiff to submit the record of Robinson I.

¶ 28 In any event, regardless of whether the docket sheet may be included in the record on appeal, we may take judicial notice of it. Section 1002 of the Illinois Code of Civil Procedure provides that "[u]pon the review by any court of appellate jurisdiction of a judgment or order of the circuit court the court of appellate jurisdiction shall take judicial notice of all matters of

which the circuit court was required to take judicial notice." 735 ILCS 5/8-1002 (West 2009). Furthermore, circuit courts may take judicial notice of matters of record in other cases in the same court. *All Purpose Nursing Service v. Illinois Human Rights Com'n*, 205 Ill. App. 3d 816, 823 (1990) (citing *People v. Davis*, 65 Ill. 2d 157 (1976)); *Boston v. Rockford Memorial Hosp.*, 140 Ill. App. 3d 969, 972 (1986). Accordingly, we take judicial notice of the docket sheet that plaintiff has attached to her brief because it is a matter of record which the circuit court may take judicial notice, and its contents are not difficult to ascertain.

¶ 29 With the foregoing in mind, we turn back to plaintiff's contention that the circuit court erred in dismissing plaintiff's complaint in Robinson II on grounds of *res judicata*. We first consider the general applicability of the doctrine of *res judicata* and the exceptions thereto. With respect to the general rule, "[t]he 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." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). Three requirements must be met for *res judicata* to apply: (1) a final judgment on the merits must have been rendered by a court of competent jurisdiction; (2) an identity of cause of action must exist; and (3) the parties or their privies must be identical in both actions. Id.

¶ 30 The second and third requirements of *res judicata* are met in this case. There is certainly an identity of the causes of action, since plaintiff sued defendant in Robinson II for damages incurred as a result of defendant's refusal to indemnify her for a judgment in the present action which is based on the very same facts that gave rise to her complaint in Robinson I.

Furthermore, the parties in both actions are identical. Thus, the second and third requirements are met. See e.g. *Rein*, 172 Ill. 2d at 330.

¶ 31 Plaintiff nevertheless appears to contend that the first requirement is not met because while the circuit court granted summary judgment on count I of her third amended complaint in Robinson I, it did not render a final judgment on the merits on the remaining counts of that complaint.

¶ 32 However, it is well established that *res judicata* bars not only issues that were actually decided in the first action, but also any additional issues that could have been decided in that action. *Hudson*, 228 Ill. 2d at 467. As our supreme court has explained, the principle that *res judicata* prohibits a party from seeking relief on the basis of issues that could have been resolved in a previous action serves to prevent litigants from splitting their claims into multiple actions. *Hudson*, 228 Ill. 2d at 471-72 (citing *Rein*, 172 Ill. 2d at 341). Thus, the court noted that "a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense." *Hudson*, 228 Ill. 2d at 473 (citing *Rein*, 172 Ill. 2d at 341-43). For instance, in *Hudson*, 228 Ill. 2d at 470-74, our supreme court affirmed the dismissal of a complaint for wrongful death based on willful and wanton conduct, which plaintiff had voluntarily dismissed in a previous action where the trial court had involuntarily dismissed a count of negligence arising out of the same operative facts. In doing so, it found that *res judicata* operated as a bar to the refiled counts that were voluntarily dismissed because they could have been litigated and resolved in the previous action. Id; see also *Rein*, 172 Ill. 2d at 341-43 (*res judicata* applied not

only to counts which were involuntarily dismissed in a prior action, but also to counts of that same complaint which the plaintiff voluntarily dismissed).

¶ 33 Similarly, in this case, the circuit court entered a final judgment on count I of plaintiff's third amended complaint in Robinson I by granting summary judgment in favor of defendant. Plaintiff later voluntarily dismissed the remaining counts in that complaint on the date when counts II and III were set for trial.

¶ 34 With regard to counts IV through VII of her complaint, we note the circuit court's order of September 23, 2003, denied defendant's motion to dismiss the complaint pursuant to section 2-615, but stated that defendant was not to file an answer to those counts, and that they were "to be treated as if filed only to preserve the right to appeal." While the circuit court did not explicitly dismiss those counts, that language in its written order indicates that those counts were effectively dismissed at that time. As this court has held, "[o]rders must be construed in a reasonable manner so as to give effect to the apparent intention of the trial court." *Williams ex rel. Beaton v. Ingalls Memorial Hosp.*, 408 Ill. App. 3d 360, 372-73 (2011) (internal citations omitted). Here, the circuit court's order that counts IV through VII be treated as if filed only to preserve plaintiff's right to appeal is consistent only with involuntary dismissal of those counts, since plaintiff would have been able to seek a ruling on them if they had remained pending. In fact, plaintiff herself has treated those counts as if she recognized that they had been dismissed when she refiled them in Robinson II as part of her new complaint. Since plaintiff does not claim that she voluntarily dismissed those counts, she recognizes that it was the circuit court who dismissed them, making such dismissal involuntary. Accordingly, when plaintiff refiled those counts in Robinson II, all three requirements under the general rule of *res judicata* were present.

¶ 35 Furthermore, while plaintiff argues that the general doctrine of *res judicata* is inapplicable to this case because, according to plaintiff, the circuit court erred in granting summary judgment in favor of defendant on count I of her third amended complaint, that contention lacks merit. As discussed above, this court lacks jurisdiction to entertain plaintiff's challenge to the circuit court's order in Robinson I granting summary judgment, and in any event such an alleged error would not now affect the applicability of the doctrine of *res judicata*.

¶ 36 Moreover, plaintiff's argument that this case does not meet the requirements of the general rule of *res judicata* because there was no final ruling in the citation proceeding is also unpersuasive. First, we note that the circuit court did, in fact enter a final judgment on that case when it dismissed it pursuant to the settlement agreement between Chicago Motor Company and Safeway. Further, the circuit court's disposition of Robinson I is in and of itself sufficient to satisfy the requirements of *res judicata* as it applies to Robinson II, without regard to the circuit court's disposition in the citation proceeding.

¶ 37 However, plaintiff contends, and we agree, that even if the doctrine of *res judicata* is applicable, counts II and III of Robinson II fall into at least one exception to the doctrine because the trial court expressly reserved the right to refile the voluntarily dismissed counts. In doing so, plaintiff acknowledges that the voluntary dismissal order contains no reference to refiling, but notes that the docket sheet entry for January 29, 2007, states: "voluntary dismissal with leave to re-file – allowed."

¶ 38 Our supreme court has adopted the exceptions to the rule against claim-splitting set forth in section 26(1) of the Restatement (Second) of Judgments (1982). *Hudson*, 228 Ill. 2d at 472. Under one of those exceptions, *res judicata* does not bar a second action where "[t]he court in

the first action expressly reserved the plaintiff's right to maintain the second action." Id. (quoting *Rein,*172 Ill. 2d at 341. In *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324, 330-33 (2009), this court held that where a voluntary dismissal order was silent on plaintiff's right to refile, but the corresponding docket sheet entry stated "voluntary dismissal w[ith] leave to refile – allowed," the court had expressly reserved plaintiff's right to refile. In doing so, 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 written order and no transcript of the hearing. *Quintas,* 395 Ill. App. 3d at 330. The court further explained that where the written order was silent on the issue of refiling, it did not conflict with the language of the docket entry, which expressly stated that plaintiff was allowed to refile. Id. at 331. The court then concluded that since the express language of the docket sheet entry unmistakably grants plaintiff leave to refile, the exception to *res judicata* applied and his second lawsuit was not barred. Id. at 333.

¶ 39 Similarly in this case, the docket sheet entry for the date of the voluntary dismissal of the remaining counts of plaintiff's complaint clearly states that such dismissal was granted with leave to refile. Further, the written order from the circuit court is silent with respect to refiling, and therefore does not conflict with the language of the docket sheet. Thus, we conclude that this case falls into an exception to *res judicata* because the trial court expressly reserved plaintiff's right to refile.

¶ 40 Defendant nevertheless contends that the docket sheet in this case should not be used to clarify the order by the trial court because it was not an entry made by a judge. However, as

noted above, this court in *Quintas* has expressly rejected that argument in noting that docket sheets are part of the common law record and presumed to be correct.

¶ 41 Defendant next contends that this exception to *res judicata* is not applicable because the docket sheet entry provided in this case was only attached to plaintiff's brief and not part of the record on appeal. However, that contention is unpersuasive because, as explained above, we may take judicial notice of the circuit court's docket sheet in Robinson I, and in light of the fact that plaintiff made a good faith effort to include the records from Robinson I as part of the record on appeal from Robinson II, but was denied.

¶ 42 Lastly, with respect to all counts of Robinson II, plaintiff contends that they fall into two other exceptions to the doctrine of *res judicata*, namely: (1) that this case involved a continuing and recurring wrong; and (2) the policies favoring preclusion of a second action are overcome by an extraordinary wrong. However, while these exceptions are recognized by the Restatement (Second) of Judgments (1982), they have no applicability here.

¶ 43 With respect to plaintiff's argument that this case involves a continuing or recurring wrong, plaintiff appears to misapprehend this exception to the rule against *res judicata*. According to plaintiff, the continuing or recurring wrong committed by defendant consisted of its undertaking of plaintiff's defense in the underlying tort action when it did not intend to indemnify plaintiff for an adverse judgment. Plaintiff further argues that her representation provided by defendant in that action was inadequate, which was a fact known to defendant at the time. However, this exception is applicable to cases where the wrong continued after plaintiff has filed her first action. See Restatement (Second) of Judgments (1982), comments f-g. In this case, the alleged wrongs described by plaintiff, by her own account, occurred before she filed her

first action in Robinson I. In fact, plaintiff did not allege in her complaint in Robinson II any new facts which she had not alleged in her complaints filed in Robinson I. Thus, this exception is inapplicable to this case.

¶ 44 Similarly, plaintiff's argument that policies favoring preclusion of a second action are overcome by an extraordinary wrong in this case is misplaced. Plaintiff maintains that her action in Robinson II should not be barred because during the course of Robinson I, she diligently pursued discovery of unspecified facts which defendant had allegedly concealed, but was denied such discovery. She further argues that at the time when she filed Robinson II, *Hudson*, 228 Ill. 2d 442, had not been decided, and she therefore had no reason to know that the doctrine of *res judicata* was applicable to actions in which one or more counts were voluntarily dismissed. However, this exception to *res judicata* applies where "[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of prior litigation to yield a coherent disposition of the litigation." Restatement (Second) of Judgments (1982). This is a small category of cases, such as where a plaintiff fails to include a claim in her first action because defendant concealed facts giving rise to that claim. Here, however, plaintiff does not purport to have discovered facts giving rise to a new claim after she voluntarily dismissed Robinson I, but merely argues that the circuit court ruled unfavorably to her discovery requests while Robinson I was still pending.

¶ 45 Additionally, with respect to plaintiff's argument that *res judicata* is inapplicable because she did not have notice, at the time she voluntarily dismissed counts II and III of Robinson I, that *res judicata* is applicable to her case, her argument fails. Even if such lack of

notice were such an extraordinary reason to bring this case within an exception to the doctrine of res judicata, it would still not apply to this case because when plaintiff voluntarily dismissed counts II and III of Robinson I, our supreme court had already entered its opinion in *Rein*, 172 Ill. 2d 325, where it discussed the applicability of *res judicata* to cases such as the present one.

¶ 46 For the foregoing reasons, we dismiss plaintiff's appeal from Robinson I, affirm the judgment of the circuit court of Cook County in Robinson II with respect to counts I, IV, V, VI and VII of Robinson II, and reverse and remand it with respect to counts II and III.

¶ 47 Dismissed in part, affirmed in part, reversed in part.