THIRD DIVISION
December 26, 2018

No. 1-18-0747

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CREATAIL HK LIMITED and KWAN JOONG KIM,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 17 L 63075
	)	
TY, INC.	)	
	)	
Defendant-Appellee	)	
	)	
(H. TY WARNER,	)	Honorable
	)	Margaret Ann Brennan,
Defendant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting defendants' motion to dismiss plaintiffs' complaint as barred by *res judicata* under the rule against claim splitting is affirmed; the refiled count in the complaint arose from the same set of operative facts as the counts in plaintiffs' original complaint that were the subject of a final adjudication on the merits, the trial court did not expressly reserve plaintiffs' right to refile the count, and the policies favoring the application of the rule against claim splitting are not overcome in this case.

¶ 2 Plaintiffs, Creatail HK Limited, a Chinese corporation, and Kwan Joong Kim, filed a complaint in the circuit court of Cook County against Ty, Inc., an Illinois corporation (Ty), and H. Ty Warner in four counts based on a dispute arising from the parties' business relationship involving the manufacture and sale of plush toys. Ty and Warner filed a motion to dismiss the complaint based, in part, on *res judicata*, arguing the complaint involved the same parties and causes of action that were adjudicated on the merits in a case plaintiffs previously filed. At issue in this appeal is count I of the complaint and count I of the previously filed complaint, both alleging breach of contract. The motion to dismiss argued count I of the complaint at bar is barred by the rule against claim splitting. The trial court granted the motion to dismiss and denied plaintiffs' motion to reconsider the dismissal.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 The resolution of this appeal requires an examination of two complaints, one filed in a previously filed case and the complaint filed in this case. We begin with the former complaint. The parties stipulated to the inclusion of the former complaint in the record on appeal. The former complaint was between plaintiffs Creatail, LLC and Kwan Joong Kim and defendants Ty and H. Ty Warner. The former complaint alleged, and plaintiffs admit, Creatail, LLC is a wholly owned subsidiary of Creatail HK Limited. The entities will be jointly referred to as "Creatail" and the complaining parties in both the former complaint and the instant complaint will be jointly referred to as "plaintiffs."

¶ 6 1. The Former Complaint

¶ 7 The former complaint contained a section titled "Background and Factual Averments Common to All Counts." This section of the former complaint alleged that Creatail designs, markets, and distributes plush toys worldwide. Creatail showed and delivered sample plush toys

to defendants. Defendants gave Creatail purchase orders and Creatail delivered some plush toys to defendants for sale in the United States. The former complaint alleged defendants also market, distribute, and sell plush toys. Defendants requested cheaper plush toys so Creatail opened a manufacturing facility in the People's Republic of China (China). Thereafter, defendants cancelled the pending purchase orders and bought "cheaper counterfeit items" of Creatail from other manufacturers. The former complaint alleged defendants are continuing to market and sell or distribute the counterfeit plush toys of Creatail under the Ty brand name.

¶ 8 Count I of the former complaint was for breach of contract. Count I of the former complaint alleged defendants ordered and received plush toys from plaintiffs but did not pay and cancelled pending orders "without any compensation." The remaining counts in the former complaint were for violations of the Illinois Uniform Deceptive Trade Practices Act (count II), Illinois Consumer Fraud and Deceptive Practices Act (count III), federal and common law copyright violations (count IV), and common law unfair competition (count V). Defendants filed a motion to dismiss the former complaint. The motion to dismiss the former complaint alleged, *inter alia*, that the former complaint lacked sufficient allegations to support claims against H. Ty Warner individually and that plaintiffs lacked standing to bring the breach of contract claim. Following briefing by the parties the trial court granted the motion to dismiss counts II through V of the former complaint with prejudice. The court granted the motion to dismiss count I of the former complaint without prejudice and granted plaintiffs leave to replead by a date certain (July 14, 2017). (Plaintiffs did not replead count I but instead filed the complaint that is the subject of this appeal on the last day for repleading in the former case.) In the former case the trial court entered an order subsequent to the dismissal order stating plaintiffs informed the court they had elected not to replead count I, and "all claims asserted in this case have not been disposed of as a result of [the] dismissal order." The subsequent order states the

former case is voluntarily dismissed in its entirety. The subsequent order also contains the following language: "The court acknowledges the presence of Cook County case 2017-L-06075 (filed 7/14/17), as well as the representation by plaintiffs' counsel of a potential federal lawsuit."

¶ 9 Count II of the former complaint for violation of the Illinois Uniform Deceptive Trade Practices Act alleged as follows:

> "Defendants' unauthorized selling or distributing of the counterfeit plush toys, or approximations of [*sic*] simulations thereof, trades on the business reputation and goodwill of CREATAIL with the intention of deceiving the public into believing that defendants' are owners of CREATAIL plush toys in violation of the Illinois Uniform Deceptive Trade Practices Act."

Count III of the former complaint for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act alleged as follows:

> "Defendants' continuing unauthorized selling or distributing of the counterfeit plush toys or approximations or simulations thereof, so as to mislead and deceive the public by suggesting an ownership of CREATAIL plush toys is an unfair method of competition and a deceptive act or practice in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act."

Count IV of the former complaint for copyright violation under federal and common law alleges, in part, as follows:

> "CREATAIL has reserved all rights in the intellectual property of the plush toys, which have been created or published before CREATAIL provides any pictures of the toys or physical samples to Defendants and CREATAIL has registered the copyrights in China and in the U.S. ***. Defendants' infringement and selling of the toys in retail stores worldwide and from the websites which are essentially

> identical to or based on CREATAIL's intellectual property are illegal in the U.S and in other countries. Defendants neither asked for nor received permission to sell the toys in writing. Defendants have never been granted the license to make or sell copies of CREATAIL's intellectual property in writing. Getting a free physical sample, pictures, or even buying millions of the plush toys from CREATAIL neither grant nor transfer CREATAIL's intellectual property in the plush toys to Defendants."

Finally, count V of the former complaint for unfair competition realleges all of the preceding allegations and asserts that as a result defendants have misappropriated Creatail's property rights, is trading on Creatail's goodwill, and "is thereby likely to further confuse and deceive members of the purchasing public in violation of the common law of unfair competition of the State of Illinois."

¶ 10 2. The Instant Complaint

¶ 11 The instant complaint also contains a section titled "Background and Factual Averments Common to All Counts." In it, plaintiffs allege Creatail designs, markets, and distributes plush toys; Creatail showed and delivered sample plush toys to defendants; and Creatail received purchase orders from defendants for plush toys for sale in the United States. The instant complaint alleges defendants requested cheaper plush toys, and Creatail set up a manufacturing facility in China. The instant complaint alleges defendants cancelled pending purchase orders and bought cheaper counterfeit items of Creatail from other manufacturers. Count I alleges defendants ordered and received plush toys; defendants have refused to settle outstanding invoices; and defendants cancelled pending orders without compensation and purchased counterfeit toys from plaintiffs' competition. Count II of the instant complaint for violation of the Illinois Uniform Deceptive Trade Practices Act alleges, in part, as follows:

> "Defendants' ordering of Creatail's plush toys for sampling purpose [*sic*] and canceling in bad faith, asking for lower price while buying cheaper counterfeits from the competition and not paying for the outstanding invoices is in violation of the Illinois Uniform Deceptive Trade Practices Act."

Count III of the instant complaint for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act alleges, in part, as follows:

> "Defendants' ordering of Creatail's plush toys for sampling purpose [*sic*] and canceling in bad faith, asking for lower price while buying cheaper counterfeits from the competition and not paying for the outstanding invoices is an unfair method of competition and a deceptive act or practice in violation of the Illinois Consumer Fraud and Deceptive Business Practice Act."

Count IV of the instant complaint for common law unfair competition realleges all of the preceding allegations in the instant complaint and alleges those acts, specifically ordering plush toys for sampling purposes, cancelling in bad faith, and asking for a cheaper price while buying counterfeits, are an unfair method of competition.

¶ 12 Plaintiffs filed the former complaint in the Law Division of the Circuit Court of Cook County. Plaintiffs initially filed the instant complaint in the Third Municipal District of the Circuit Court of Cook County. Defendants moved to reassign the case from the Third Municipal District to the Law Division trial judge who heard the former complaint pursuant to Circuit Court of Cook County General Order 22.1 which reads as follows: "In order to conserve judicial resources and promote efficiency in the administration of the Circuit Court, upon motion of any party or upon the court's own motion, the Circuit Court may assign or reassign related cases to a single judge wherever it serves the convenience of interested parties and the court." After briefing, the trial court granted the motion and the case was reassigned.

¶ 13 After the reassignment defendants filed a motion to dismiss the instant complaint. Defendants argued the complaint was barred by *res judicata*, plaintiffs lack standing to bring count I, and the complaint fails to state a claim against H. Ty Warner individually. As to count I of the instant complaint, defendants argued the complaint is barred by *res judicata* pursuant to the rule against claim splitting stated in *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008). Plaintiffs responded to defendants' motion to dismiss by arguing the dismissal of count I in the former complaint was not on the merits, therefore, *res judicata* does not apply; the rule stated in *Hudson* does not apply because count I of the instant complaint does not arise from the same set of operative facts as the counts in the former complaint that were adjudicated on the merits; and defendants sufficiently established standing to bring count I. In its argument that the dismissal of count I of the former complaint was not on the merits, plaintiffs argue that defendants "conveniently omit the fact that when the previous court disposed of the case on July 27, 2017, the order specifically noted that the dismissal of Count I was voluntary." (Emphasis omitted.) Plaintiffs then cite exhibit A to their response to defendants' motion to dismiss, which is a printout of the Case Information Summary from the office of the Clerk of the Circuit Court for the former case. Plaintiffs pointed out that this summary contains the following entry for the July 27, 2017 order dismissing the former case in its entirety: "VOLUNTARY DISMISSAL W/LEAVE TO REFILE-ALLOWED."

¶ 14 After the motion to dismiss the instant complaint was fully briefed the trial court entered a written order granting the motion to dismiss. The court granted the motion to dismiss the claims against H. Ty Warner individually. The court also granted the motion to dismiss as to counts II through IV because those "counts are refiled counts that have already been dismissed with prejudice." The court noted that plaintiffs "admitted these counts were previously dismissed with prejudice." As for count I, the court found that count was barred by *res judicata*

pursuant to *Hudson*. The court rejected plaintiffs' argument *res judicata* does not apply because there was no final adjudication on the merits and found that under the transactional test the claims arise from the same series of connected transactions for purposes of *res judicata*. The court noted that plaintiffs did not argue that the parties in the former complaint and the instant complaint are not identical parties or privies. The court found all of the elements for *res judicata* were satisfied, dismissed count I on *res judicata* grounds, and found it was not necessary to reach the standing issue. Plaintiffs filed a motion to reconsider the trial court's order granting defendants' motion to dismiss the instant complaint. The motion to reconsider confirmed that the only contested issues were whether *res judicata* and the rule against claim splitting barred count I and whether plaintiffs had standing to bring count I.

¶ 15 Plaintiffs' motion to reconsider argued the trial court misapplied the transactional test to find that the counts arise from the same series of connected transactions because the trial court focused on plaintiffs' allegations that defendants cancelled pending but unfulfilled orders of plush toys for the purpose of purchasing cheaper counterfeit items. Plaintiffs' motion to reconsider argued the claim they sought to reinstate was their claim for nonpayment of fulfilled orders of plush toys. Plaintiffs argued that "Ty's failure to pay its balance [for the orders plaintiff fulfilled] was unrelated to its counterfeiting activities, but instead was simply an effort by Ty to avoid paying what it owed to Plaintiffs and wrongfully receive products for free." Plaintiffs argued "the non-payment of fulfilled invoices does not arise from the same set of operative facts as the counterfeiting claims when applying the transactional test." Plaintiffs' motion to reconsider also argued the rule against claim splitting does not apply because the trial court expressly reserved plaintiffs' right to refile. Plaintiffs relies on the language in the order dismissing the former case stating that the court "acknowledges the presence of" the instant case

and the case information summary for the former case with the entry "VOLUNTARY DISMISSAL W/ LEAVE TO REFILE-ALLOWED."

¶ 16 Following arguments on the motion to reconsider, the trial court denied the motion.

¶ 17 This appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal, plaintiffs argue count I is not barred by *res judicata* because count I does not arise from the same set of operative facts as the counts the trial court involuntarily dismissed with prejudice, the trial court expressly reserved its right to refile, and the policies favoring preclusion are overcome in this case. Plaintiffs do not challenge the order dismissing H. Ty Warner from this case in his individual capacity, thus he is not a party to this appeal. This case turns on the application of our supreme court's decision in *Hudson*. In *Hudson*, our supreme court held that its earlier decision in *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325 (1996), "stands for the proposition 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. For *res judicata* to apply there must be "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of cause of action; and (3) identity of parties or their privies. [Citation.]" *Id.* at 470. "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. [Citation.]" *Id.* at 471. A matter "might have been raised and determined" in a prior suit if the matter "arise[s] out of the same set of operative facts" as the prior suit. *Id.* "Illinois courts apply the 'transactional test' in determining whether the subsequent action arises from the same set of operative facts as the original action. [Citation.] Thus, in deciding whether two suits involve the same cause of action for purposes of

res judicata, the court considers the facts that give rise to the claim for relief. [Citation.] A subsequent claim predicated on a different theory of relief constitutes a single cause of action if a single group of operative facts gave rise to the assertion of relief in both actions. [Citation.]" *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 617 (2007) (citing *River Park Inc. v. City of Highland Park*, 184 Ill. 2d 290, 307-09 (1998)). However, " the rule against claim-splitting would not bar a second action if:

> '(1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.' [Citation.]" *Hudson*, 228 Ill. 2d at 472-73.

"Whether a subsequent claim is barred by the doctrine of *res judicata* is a question of law which is reviewed *de novo*. [Citation.]" (Internal quotation marks omitted.) *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1, 7 (2009).

¶ 20 In this case there is no dispute the dismissal of counts II through V of the former complaint was an adjudication on the merits of those claims (*Chapman v. Engel*, 372 Ill. App. 3d 84, 88 (2007), citing *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill. App. 3d 362, 374 (2005) (when an involuntary dismissal is 'with prejudice,' the judgment is a final adjudication on the merits under Supreme Court Rule 273 (134 Ill. 2d R. 273))), and there is no

dispute there is an identity of parties. Plaintiffs argue count I of the former complaint and of the instant complaint did not arise from the same operative facts as counts II through V of the former complaint that were dismissed with prejudice. Plaintiffs argue count I seeks payment for orders it fulfilled whereas counts II through V of the former complaint sought damages for defendant's decision to purchase counterfeits of its plush toys from someone else. Plaintiffs argue "[n]either claim depends upon the other, and both certainly could have occurred independently." Plaintiffs assert the only commonality between the counts is that the same parties are involved; otherwise they are "completely distinct temporally, in their underlying facts, and in their legal theory."

¶ 21 We find that the claim in count I of the instant complaint and the claims in the involuntarily dismissed counts arise from a single group of operative facts for purposes of *res judicata*.

> "Claims may be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction. [Citation.] The *River Park* court explained that, in the transactional analysis, the claim is viewed in factual terms and considered coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; *** and regardless of the variations in the evidence needed to support the theories or rights. Additionally, a final judgment will bar a plaintiff's claim to all or any part of a transaction or series of connected transactions from which the action arose. [Citations.]" (Internal quotation marks omitted.) *Tebbens v. Levin & Conde*, 2018 IL App (1st) 170777, ¶ 33 (citing *River Park*, 184 Ill. 2d at 309 (quoting Restatement (Second) of Judgments § 24, cmt. a, at 197 (1982))).

¶ 22 The Restatement (Second) of Judgments (Restatement) states as follows with regard to connected transactions:

> "The expression 'transaction, or series of connected transactions,' is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. And underlying the standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim.
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> * * *
>
> In general, the expression connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series." Restatement (Second) of Judgments § 24, cmt. b (1982).

The Restatement goes on to state: "When a defendant is accused of successive but nearly simultaneous acts, or acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience

may require that they be dealt with in the same action. The events constitute but one transaction or a connected series." Restatement (Second) of Judgments § 24, cmt. d (1982).

¶ 23 In this case, despite plaintiffs' argument there are two sets of "operative facts" in this case, one being the order and delivery of plush toys without payment and the second being the cancellation before delivery of future orders of plush toys and the move to counterfeits[1], these events are part of a series of connected transactions for purposes of *res judicata*. The facts are related in time. Count I of both the former and instant complaint alleges that defendant ordered and received plush toys while at the same time defendant cancelled pending orders without compensation. The cancellation of the pending orders is an operative fact in plaintiffs' claims defendant is violating its copyright. The origin and motivation for the claim in count I and the involuntarily dismissed claims is the same: defendant's contracting with plaintiffs to manufacture plush toys for defendant to sell. From that relationship grew plaintiffs' claim for plush toys it delivered but defendant did not pay for and plaintiffs' claim defendant counterfeited its plush toys, and both are motivated by defendant's alleged failure to fulfill the parties' agreements. The claims all form a convenient trial unit. Plaintiffs admitted as much by twice filing all of the claims in a single complaint. Finally, the treatment of these claims conforms to business understanding or usage. All of the claims arise from the same transaction the parties entered when defendant initially contracted plaintiffs to manufacture plush toys for defendant and it is reasonable to expect that all claims arising from that original engagement would be tried

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[1] In its motion to reconsider plaintiffs conceded the cancellation of the pending orders and the purchase of counterfeit goods of Creatail are part of the operative facts of plaintiffs' claims in counts II through V of the former complaint. The motion to reconsider states: "The [trial] Court was correct in noting that Plaintiffs allege, for example, that Defendants cancelled the pending, unfulfilled orders so that they could purchase cheaper counterfeit items, and correctly quote the [former] Complaint as stating that 'Defendants . . . cancelled the pending plush order with Plaintiffs without any compensation and . . . purchased the counterfeit toys from Plaintiffs' competition.' [Citation.]"

together. See *Altair Corp. v. Grand Premier Trust and Investment, Inc.*, 318 Ill. App. 3d 57, 61-62 (2000) (finding suits part of same transaction where both arose from need for construction of retention pond and concerned conduct related to the closing of the contract). Accordingly, we hold that under the rule against claim splitting *res judicata* applies to bar plaintiffs' refiling of count I in the instant complaint unless an exception to the rule applies.

¶ 24 Plaintiffs argues that an exception does apply, and in support of their argument the trial court expressly reserved plaintiffs' right to refile count I, plaintiffs rely on the language in the order dismissing the former complaint in its entirety stating: "The Court acknowledges the presence of Cook County case 2017-L-06075 (filed 7/14/17)" (the instant case) as well as an entry in the case information summary stating "VOLUNTARY DISMISSAL W/ LEAVE TO REFILE-ALLOWED."

¶ 25 The trial court's written order controls over the clerk's electronic docket. See *National Bank of Sullivan v. Bernius*, 127 Ill. App. 3d 193, 196 (1984) ("a docket entry would not control over the ultimate order even as to the filing date when a written order is required"). Here, the trial court's written order does not grant plaintiffs leave to refile any portion of the former complaint. We also find that the clerk's docket entry, assuming *arguendo* it can be considered by this court[2], is inconsistent with the trial court's written order and, therefore, the written order would control over the docket entry. *Cf*., *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324, 333 (2009). Here, the written order granting plaintiffs' motion to voluntarily dismiss the prior case does not state the dismissal is "without prejudice." Such language has been held to imply that the case could be refiled. *Id*. at 331. Nor are there any other indications, such as evidence of what the trial judge said when granting the voluntary dismissal or subsequent

[2] The document itself states: "This data is not an official record of the Court or the Clerk and may not be represented as an official court record."

orders, that "the court fully expected the case to be refiled." *Cf*., *id*. at 333. Plaintiffs' reliance on the "acknowledgement" language is misplaced. To invoke the exception to the application of *res judicata* the trial court must "*expressly* reserved the plaintiff's right to maintain the second action." (Emphasis added.) *Hudson*, 228 Ill. 2d at 472-73. That language is not an express reservation of plaintiffs' right to refile. *Quintas*, 395 Ill. App. 3d at 333 ("The word 'express' is defined as '[c]learly and unmistakably communicated; directly stated.' Black's Law Dictionary 620 (8th ed. 2004)."). We do not know why the "acknowledgement" language was included or what it means, and we will not speculate as to its meaning, particularly where the language was before the trial court on plaintiffs' motion to reconsider and the trial court did not reverse its prior judgment dismissing the instant case based on *res judicata* and we have no transcript of that proceeding. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (absent complete record to support claim of error this court will presume that trial court's order was in conformity with the law and had a sufficient factual basis). Because the trial court's written order controls and does not contain an express reservation of plaintiffs' right to refile, we find *res judicata* applies.

¶ 26 Finally, plaintiffs' argument the policies favoring preclusion are "overcome by the realities of the case at bar" is not persuasive. The policies underlying *res judicata* in this context are judicial economy, protecting the defendant from harassment, and protecting the public from multiple litigation. *Hudson*, 228 Ill. 2d at 481.

> "The rule made clear in *Rein* and *Hudson* flows directly from the policy considerations behind the *res judicata* doctrine. *Res judicata* promotes judicial economy by preventing repetitive litigation and [additionally] protects parties from being forced to bear the unjust burden of relitigating essentially the same case. [Citations.] 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. [Citation.]" *Matejczyk*, 397 Ill. App. 3d at 9.

¶ 27 Plaintiffs argue that "[e]xtending the harsh penalties of *Hudson* to punish what comes down to a mere procedural error *** in no way advances the rationales that underpin *res judicata* and the rule against claim splitting." Even if we found plaintiffs' refiling of their entire complaint in a different court after an adverse judgment was "a mere procedural error," it would be insufficient to demonstrate that the policies favoring preclusion are overcome for an extraordinary reason. *Rein*, 172 Ill. 2d at 341 (citing Restatement (Second) of Judgements § 26(1) (1980)). The Restatement comments on this particular exception state as follows:

> "Extraordinary situations where merger or bar is inapposite (Subsection (1)(f)). In addition to cases falling within Subsections (a)-(e), there remains a small category of cases in which the policies supporting merger or bar may be overcome by other significant policies. Such an exception to the rules of merger and bar is not lightly to be found but must be based on a clear and convincing showing of need. ***
>
> One instance is a case in which the question at issue is the validity of a continuing restraint or condition having a vital relation to personal liberty. Although civil actions attacking penal custody resulting from criminal convictions are beyond the scope of this Restatement, such actions do illustrate the need to moderate conventional notions of finality when personal liberty is at stake. A similar need may be found in cases involving civil commitment of the mentally ill, or the custody of a child. And substantive policy may militate in favor of allowing one spouse to sue the other for divorce even though the grounds sued upon could fairly have been comprehended within the transaction, or nucleus of

facts, underlying a previous action between the same parties." Restatement (Second) of Judgments § 26 (1982).

¶ 28 The circumstances of this case do not rise to the level of extraordinary circumstances envisioned by the Restatement that would overcome the policies favoring preclusion. Further, the fact that plaintiffs filed the instant complaint within the time the trial court allotted them to replead count I of the former complaint does not immunize them from a *res judicata* defense and is not an extraordinary circumstance overcoming the policies supporting preclusion. See *Matejczyk*, 397 Ill. App. 3d at 6 ("Matejczyk was granted leave to refile count II if he wished to do so. Matejczyk elected, however, to file a second amended complaint with a single count. Upon the filing of the second amended complaint, Matejczyk was free to pursue that single-count complaint to a final judgment. However, Matejczyk was not free to voluntarily dismiss his second amended complaint without exposing his subsequently refiled complaint to a possible *res judicata* defense based on the prohibition against claim-splitting.")

¶ 29 Plaintiffs' argument that whether its replead is breach of contract claim in the former case or asserted it anew in the instant case "the trial court would expend the same judicial resources" ignores the fact that when plaintiffs filed the instant case, they did not just file the breach of contract claim, but effectively refiled the former suit in its entirety, despite the prior involuntary dismissal. Plaintiffs did not challenge the fact counts II through IV of the instant case were properly dismissed based on *res judicata*. Moreover, plaintiffs chose not to pursue count I in the former case, and count I in the instant complaint is the same claim stated in count I of the former complaint. Rather than merely continuing to litigate count I, here plaintiffs' filing of the instant case forced defendant to move to transfer the case then litigate the propriety of plaintiffs' conduct. Thus, despite plaintiffs' argument to the contrary defendant was subjected to the "burden of relitigating essentially the same case" and the policy of finality in litigation was

burdened. Accordingly, plaintiffs' argument the policies favoring preclusion are not applicable here fails.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 32 Affirmed.