IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATSY LEVANG, CHERYL TUCK-SMITH, SUSAN JENNINGS, MARGO KNORR, KAREN POPE, and ANN WITT,	:	
Plaintiffs,	:	**Case No. 2:24-cv-00316-MHW-KAJ**
v.	:	**Judge Michael H. Watson**
KAPPA KAPPA GAMMA FRATERNITY, et al.	:	**Magistrate Judge Kimberly A. Jolson**
Defendants.	:	

PLAINTIFFS' BRIEF REGARDING PRECLUSIVE EFFECT OF *WESTENBROEK V. KAPPA KAPPA GAMMA FRATERNITY, ET AL.*

Per the Court's July 3, 2024 Order (ECF 30), Plaintiffs respectfully submit their brief regarding whether the Wyoming District Court's dismissal without prejudice of *Westenbroek v. Fraternity*, 2023 WL 5533307 ("*Westenbroek*"), carries any res judicata or other preclusive effect on this action. As set forth below, under Wyoming law, federal court holdings applying Wyoming law, and the well-established judicial policies on which those decisions are based, it does not.

A. Wyoming Law Holds That Dismissals Without Prejudice Carry No Preclusive Weight as to the Merits of the Case.

The Wyoming Supreme Court has held—without qualification—that "a dismissal without prejudice has no preclusive effect." *Rawlinson v. Wallerich*, 2006 WY 52, ¶ 10, 132 P.3d 204, 207 (Wyo. 2006). Indeed, *Rawlinson* shows that Wyoming courts have been hesitant to find res

judicata even where a court's dismissal was made expressly *with* prejudice. In *Rawlinson*, the plaintiff purchased a house from a Mr. and Mrs. Wallerich. After discovering water intrusion issues, Ms. Rawlinson filed suit against the Wallerichs as well as several other defendants. The Wallerichs moved to compel arbitration based on their sales contract with Rawlinson, which required binding arbitration to resolve all disputes. *Id.* at ¶ 3. While the motion was pending, Rawlinson and the Wallerichs stipulated to a dismissal as to the claims between them but did not specify whether that dismissal was with or without prejudice. *Id*. The court granted a dismissal *with* prejudice. Subject to the stipulation, the court dismissed the case against the Wallerichs and Rawlinson continued her litigation against the other defendants. After that litigation concluded, Rawlinson filed suit again against the Wallerichs, this time seeking to compel arbitration. The Wallerichs moved to dismiss based on res judicata and the court's prior dismissal with prejudice.

When the case made its way to the Wyoming Supreme Court, the court began its analysis by explaining that, as in this case "the character of the dismissal is important because a dismissal with prejudice operates as an adjudication on the merits and precludes subsequent action. Conversely, a dismissal without prejudice has no preclusive effect." *Id.* at ¶ 10 (Internal quotes omitted). The *Rawlinson* court went on to apply Wyoming's Rule 41, which like the federal rules and the rules of most states, provides that a voluntary dismissal, unless otherwise stated, is always without prejudice. *Id*. And because the dismissal should have been without prejudice, had no preclusive effect.

More recently, in *Casiano v. State ex rel. Wyoming Dept. of Trans.,* 2019 WY 16, 434 P.3d 116, ¶¶10-16, the Wyoming Supreme Court, quoting *Rawlinson*, re-affirmed that "a dismissal without prejudice has no preclusive effect." 2019 WY 16, 434 P.3d 116, ¶¶ 10-16. In *Casiano*, the appellant challenged an administrative suspension of his driver's license on the basis that the

prosecutor had dismissed the parallel criminal proceeding against him without prejudice, and the administrative charges were thus barred by collateral estoppel. The *Casiano* Court, applying the same black-letter rule that a case is dismissed without prejudice has not been "actually litigated," held that there was no collateral estoppel. *Id.* at ¶14.

B. The Rule Applies to Involuntary Dismissals as Well as Voluntary Dismissals

To the extent that Defendants might argue that *Rawlinson* and *Cassiano* are not on point because they dealt with voluntary dismissals under Rule 41 rather than an involuntary dismissal under Rule 12(b), the Wyoming Supreme Court has never recognized such a distinction. For example, in *Bourke v. Grey Wolf Drilling Co.*, LP 2013 WY 93, 305 P.3d 1164 (2013), held that an involuntary dismissal based on improper venue was not a decision on the merits. Importantly, the *Bourke* court also pointed out that while a voluntary dismissal is presumptively without prejudice, a Rule 12(b) dismissal is presumptively prejudicial—unless the court expressly says otherwise. *See id* at ¶37("Under W.R.C.P. 41(b)(1), a dismissal for failure to state a claim is a dismissal on the merits, and it is with prejudice, unless the court otherwise specifies."). Likewise, in *Johnson v. Aetna Cas. & Sur. Co. of Hartford, Conn.*, 608 P.2d 1299 (Wyo. 1980), the Wyoming Supreme Court held that the appellate court properly affirmed the 12(b)(6) dismissal of a fraud claim for not being pled with sufficient particularity as without prejudice. This was based on the liberal policy of Wyoming's rules (which are in all relevant respects identical to the federal rules) *Id*. at 1303. In short, the Wyoming courts have recognized that a court has discretion to dismiss a case under Rule 12 without prejudice, allowing re-filing. *See, e.g. Fiscus v. Atlantic Richfield Co.*, 742 P. 2d 198 (Wyo. 1987)(Noting that original claim dismissed without prejudice as to all parties subject to 12(b)(6) motion based on statutory immunity, was refiled).

More to the point, a diligent review of Wyoming law reveals no example of a court applying res judicata or other preclusion doctrine based on a dismissal without prejudice.[1] And, federal courts applying Wyoming law have recognized this discretion to dismiss without prejudice pursuant to 12(b)(6) time and again. *See* *Mellon v. Internatl. Group for Historic Aircraft Recovery*, 2013 WL 12166238, *1 ("Whether to grant a 12(b)(6) motion to dismiss with or without prejudice is a matter within the discretion of the district court."); *Reynoldson v. Schillinger*, 907 F.2d 124 (10th Cir. 1990)(citing 6 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure,* Civil 2d § 1483 (West 1990)("[If] it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend.").

[1] Wyoming is hardly alone in treating dismissals without prejudice as having no preclusive effect. The rule appears to be universal. *See e.g.*, *Smith v. Union Bank & Tr. Co.*, 653 So.2d 933, 935 (Ala.1995)("When the words 'without prejudice' appear in an order or decree, it shows that the judicial act done is not intended to be res judicata of the merits of the controversy."); *Middleton v. Lockhart*, 344 Ark. 572, 578, 43 S.W.3d 113, 118 (2001)(No judgment on the merits where dismissal were without prejudice and "therefore, *res judicata* is not applicable.");*Merrill Lynch Business Financial Services, Inc. v. Nudell*, 363 F.3d 1072, 1076("As the Colorado Supreme Court held in *Wistrand,* dismissal without prejudice means not on the merits"); *Santorso v. Bristol Hosp.*, 308 Conn. 338, 352, 63 A.3d 940, 949–50("as a general proposition a judgment which by its terms purports to be 'without prejudice' does not operate as res judicata" (quoting 149 ALR 553, 557 (1944)); *Douglas v. Douglas*, 238 Ga. 452, 453, 233 S.E.2d 195, 196 (1977)(affirming that res judicata was not applicable because the prior adjudication ending in dismissal without prejudice was not on the merits."); *E. Idaho Agricultural Credit Ass'n v. Neibaur*, 133 Idaho 402, 408, 987 P.2d 314, 320 (1999)("A dismissal without prejudice usually does not result in issue preclusion."); *Eaton v. Marion Cnty. Fair Ass'n*, 172 F.Supp.2d 1184, 1188 (S.D.Iowa 2001)(There is a long-standing principle in Iowa law that a dismissal without prejudice is not res judicata."); *Ward v. Decatur Mem. Hosp.*, 2019 IL 123937, 160 N.E.3d 1 ("[I]nvoluntarily dismissing various counts without prejudice and with leave to appeal were not final decisions on the merits and, thus, had no res judicata effect"); *Batson v. Cherokee Beach & Campgrounds, Inc.*, 530 So.2d 1128, 1131 (La.1988)("The purpose of rendering an involuntary dismissal without prejudice is to enable the plaintiff to reinstitute his claim and insure that the new suit will not be barred by res judicata."); *Denk v. Detroit & Sec. Tr. Co.*, 288 Mich. 9, 14, 284 N.W. 625, 626 (1939)("Giving to the words 'without prejudice' the meaning which they ordinarily convey to the legal profession, we must hold that the former decree left the issues open to be again litigated in a subsequent proceeding."); *Landau v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13, 892 N.E.2d 380, 383, 862 N.Y.S.2d 316, 319 ("a dismissal "without prejudice" lacks a necessary element of res judicata—by its terms such a judgment is not a final determination on the merits"); *Goudlock v. Voorhies*, 119 Ohio St.3d 398, ¶ 10("A dismissal without prejudice constitutes an adjudication other than on the merits and prevents the dismissal from having res judicata effect"); *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 2014 S.D. 64, 853 N.W.2d 878, ¶ 11("an order to dismiss without prejudice does not constitute res judicata"); *Epps v. Fowler*, 351 S.W.3d 862 (Tex. 2011)("When a case is nonsuited without prejudice, res judicata does not bar relitigation of the same claims"). *Ostler Land & Livestock Co. v. Brough*, 111 Utah 336, 340, 178 P.2d 911, 913 (1947)("a dismissal of an action without prejudice does not operate as an estoppel or adjudication.").

This, of course, is exactly what happened in *Westenbroek*. The district court expressly dismissed the action—in its entirety—without prejudice. See *Westenbroek*, 2023 WL 5533307 at *1, *18. In fact, the *Westenbroek* court expressly denied the Defendants' request for dismissal with prejudice, noting the Defendants had made "no effort to argue futility and [did] not otherwise explain why dismissal with prejudice is appropriate . . . ." *Id*. at *18. In other words, the district court recognized that *Westenbroek* plaintiffs could revise their complaint and refile. *Id*. And, at oral argument, the Tenth District Court of Appeals raised this issue throughout the argument, asking the appellants why they could not simply revise and refile their complaint. Oral Argument Transcript, May 14, 2024, ECF 36-1 at 7-11. And in dismissing the appeal for lack of finality, the Tenth District observed that "'when the dismissal order expressly *grants* the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss the complaint; the dismissal is thus not a final decision" and accordingly is not appealable.'" *Westenbroek v. Kappa Kappa Gamma Fraternity*, 2024 WL 2954705, *3 (internal citations omitted). The Tenth Circuit held that "although the district court did not expressly grant leave to amend, there is no ambiguity regarding the court's intent" and that the district court's order "'clearly shows that the district court did not consider its . . order to be a final order disposing of the entire action.'" *Id*. (internal citation omitted). The Tenth Circuit flatly rejected the idea that the dismissal had any prejudicial or preclusive effect, and expressly found that the plaintiffs could "amend the complaint and pursue further proceedings in the district court." *Id*. at *4.[2]

[2] There are limited circumstances where a dismissal without prejudice may result in collateral estoppel—typically when the dismissal is based on jurisdiction, standing, or similar threshold issues. *See Breton v. Bountiful City Corp*., 434 F.3d 1213 (10th Cir. 2006)("the district court's standing ruling precludes Mr. Brereton from relitigating the standing *issue* on the facts presented, but does not preclude his *claim* about the validity of the ordinance"); *see also, Steele v. Fed Bur. Of Prisons*, 355 F.3d 1204, 1215 (10th Cir. 2003)(" a dismissal without prejudice for, say, lack of subject-matter jurisdiction, would still preclude relitigation of the issue of subject-matter jurisdiction in the absence of newly arising facts or law.(citing 18 Wright, Miller & Cooper § 4418, at 467–69 (2002); Restatement (Second) of Judgments § 12 cmt. c (1982)). But none of these issues are present here.

The *Westenbroek* court could have chosen to dismiss some claims with prejudice or dismiss the entire action with prejudice. It deliberately chose to dismiss the entire action without prejudice, inviting the plaintiffs to refile—and denying any preclusive effect to the decision.[3]

C. The U.S. Supreme Court's Holding in *Semtek Intern. Inc. v. Lockheed Martin Corp.* Defines "Without Prejudice" as the Opposite of "On the Merits."

Although its holdings on federal procedural issues are not controlling authority on Wyoming's interpretation of its Civil Rules, the U.S. Supreme Court provided a simple analytical framework to understand when a judgment is on the merits for purposes of preclusion in *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505–06, 121 S.Ct. 1021, 1026–27, 149 L.Ed.2d 32 (2001). Writing for a unanimous Court, Justice Scalia explained the "with/without prejudice" distinction by noting that "'with prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits,' while "[b]oth parts of Rule 41 ... use the phrase 'without prejudice' as a contrast to adjudication on the merits." *Id*. at 505 (citing 18 Wright & Miller § 4435, at 329, n. 4, § 2373, at 396, n. 4):

> The primary meaning of "dismissal without prejudice," we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim. That will also ordinarily (though not always) have the consequence of not barring the claim from *other* courts, but its primary meaning relates to the dismissing court itself. Thus, Black's Law Dictionary (7th ed.1999) defines "dismissed without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim," *id.,* at 482, 92 P.2d 804, and defines "dismissal without prejudice" as "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period."

Id. at 505-506 (internal citations omitted).

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[3] On appeal, the *Westenbroek* appellants actually argued that amendment would be futile and the order should be treated as final. Since they lost on that argument, no estoppel attaches to having taken that position.

As the Court observes, because "without prejudice" is the opposite of "adjudication on the merits," if the initial plaintiff is not barred from refiling the same suit in the same suit, preclusion will not typically apply to prevent another party from filing another (even identical) suit in another forum. And while the *Semtek* Court looked at the with or without prejudice distinction in the context of Rule 41, it gave no indication that a different analysis should apply to other dismissals without prejudice.

A contrary reading would create something otherwise unknown in the law—a nonfinal, non-appealable order that can never become final or appealable but still functions as a dispositive rule of law for the parties and any other who might be bound by res judicata or collateral estoppel. This flies in the face of the goal of certainty in the law and would prevent important questions of law from ever reaching review. The appellate rule holding that only final orders are appealable is essentially the flipside of res judicata and other preclusion doctrines. Both promote certainty, judicial economy, and judicial accountability. A disappointed litigant who receives a dismissal with prejudice has a remedy on appeal. Likewise, a litigant who has his case dismissed without prejudice has the option to refile and litigate until he receives a final ruling on the merits. But applying preclusion doctrine to dismissals without prejudice would prevent the disappointed party himself—or in this case similarly situated plaintiffs in other jurisdictions, from either challenging the decision on appeal or litigating the issue on the merits through a re-filed suit or similar suit in another jurisdiction. A court could immunize a holding from appeal and make that decision binding on related parties as to any claim that could have been brought simply by dismissing without prejudice rather than with prejudice. Plainly, that is not the intent of judicial discretion to dismiss without prejudice.

CONCLUSION

The *Westenbroek* Court made a conscious decision to dismiss the entire action without prejudice. Plainly neither it—nor the Tenth District—saw any barrier to the original plaintiffs refiling. No Wyoming court has ever given a dismissal without prejudice preclusive effect. Indeed, to do so would rob trial judges of their discretion to dismiss without prejudice and support the well-established policy of deciding cases fully, finally, and on the merits. The law of Wyoming, and the federal courts that have interpreted and informed it, is thus plain that "a dismissal without prejudice has no preclusive effect." *Rawlinson v. Wallerich*, 2006 WY 52 at ¶ 10; *Casiano v. State ex rel. Wyoming Dept. of Trans.,* 2019 WY 16, 434 P.3d 116, ¶ 10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief was served on all counsel of record via the Court's electronic filing system this 2nd day of August, 2024.

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