2020 IL App (1st) 191553-U

No. 1-19-1553

Third Division

July 2, 2020

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOSE E. MADERA, Independent Administrator of the Estate of LEOPOLDO MADERA, Deceased, Plaintiff-Appellee, v. ADVOCATE HEALTH AND HOSPITALS CORP., a corporation, d/b/a ADVOCATE CHRIST HOSPITAL AND MEDICAL CENTER, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 17 L 12127 Honorable Christopher E. Lawler, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Interlocutory appeal raising three certified questions under Illinois Supreme Court Rule 308 is dismissed where there are no grounds for a substantial difference of opinion as to one of the questions, and the remaining questions require a mere application of the law to the particular facts of the case.

¶ 2 In August 2014, Leopoldo Madera ("Leopoldo") filed an initial complaint against defendant, Advocate Christ Hospital and Medical Center ("Advocate"), alleging that Advocate

and two of its nurses provided negligent care following his spinal surgery at Advocate in September 2012. After Leopoldo's death in 2015, his son, Jose Madera ("Jose") became the independent administrator of Leopoldo's estate. In 2017, Jose voluntarily dismissed the case against Advocate and its nurses and then instituted a re-filed action pursuant to section 13-217 of the Code of Civil Procedure ("Code") (735 ILCS 5/13-217 (West 1994)).[1] The re-filed complaint added new allegations that Advocate was responsible for the negligent conduct of Dr. Caleb Lippman, the neurosurgeon who performed Leopoldo's surgery.

¶ 3 Advocate moved to dismiss the allegations involving Dr. Lippman as barred by the statute of limitations. The circuit court ultimately denied Advocate's motion, but certified three questions for review pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017): (1) whether the allegations against Dr. Lippman are barred by the four-year statute of repose, (2) whether the relation back doctrine of section 2-616(b) of the Code "saves" those allegations from the statute of repose, and (3) whether the allegations are "saved" by "the single filing rule's *res judicata* transactional test." We dismiss the appeal because (1) there are no substantial grounds for a difference of opinion as to whether section 2-616(b) applies here and (2) the remaining certified questions require an application of the law to the particular facts of this case.

¶ 4 I. BACKGROUND

¶ 5 On August 30, 2012, Leopoldo was admitted to Advocate as a trauma patient for injuries he sustained from falling off a ladder and hitting his head. Tests revealed a high-grade stenosis of

[1] Public Act 89-7, which amended section 13-217 of the Code effective March 1995 (Pub. Act. 89-7 (eff. Mar. 9, 1995)), was held to be unconstitutional in its entirety by our supreme court in *Best v. Taylor Machine Works*, 179 Ill. 2d. 367 (1997). Accordingly, the effective version of section 13-217 is the version in effect prior to the March 1995 amendment. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (2008).

his right internal carotid artery. The next day, Dr. Lippman evaluated Leopoldo for a spinal cord injury and cervical spine fracture. On September 6, 2012, Dr. Lippman performed a cervical discectomy and fusion surgery on Leopoldo.

¶ 6 After the surgery, Leopoldo was placed under the care of Advocate nurses Christina Niemiec and Erin Eldridge. At some point on either September 6 or 7, 2012, Leopoldo suffered a middle cerebral artery stroke.

¶ 7 On September 9, 2012, Leopoldo underwent a CT scan of his brain that showed worsening cerebral edema. Dr. Lippman performed an emergency craniectomy to alleviate the edema.

¶ 8 Leopoldo was transferred to RML Specialty Hospital on September 18, 2012. He passed away on September 7, 2015.

¶ 9 On August 25, 2014, Leopoldo filed a complaint against Advocate, Niemiec, and Eldridge, alleging one count of medical negligence and one count of institutional negligence. Count I alleged that Niemiec and Eldridge were negligent in their post-operative care in that they failed to properly monitor Leopoldo's blood pressure and mean arterial pressure, failed to timely report his status change to a physician, "failed to activate the chain of command and ensure that a physician came to the bedside," and "failed to call a stroke code." Count II alleged that Advocate was negligent in for failing to "implement and enforce a stroke assessment protocol," "establish appropriate policies and procedures to identify and reduce the risk of stroke post-operatively," and "properly train nurses to monitor stroke symptoms, activate the chain of command, and call a stroke code."

¶ 10 The complaint also named Dr. Lippman, Dr. Chike Gwam, and nurses Kevin Mooth and Shellie Chambers as respondents-in-discovery. However, Drs. Lippman and Gwam were

dismissed as respondents-in-discovery in May 2015, and no respondent-in-discovery was added as a defendant.

¶ 11 Jose, as independent administrator of Leopoldo's estate, filed a first amended complaint on March 2, 2016. The amended complaint re-framed the action as one count of wrongful death and one count of a survival action, but the allegations of negligence remained substantively identical to those in the original complaint.

¶ 12 On May 1, 2017, Jose voluntarily dismissed the amended complaint. On November 28, 2017, Jose re-filed the lawsuit pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)). The re-filed complaint mirrored the allegations in the former complaints, but also added new allegations that Advocate was liable for Dr. Lippman's negligence before and during the spinal surgery. Specifically, the re-filed complaint alleged that Dr. Lippman was negligent for (1) performing the fusion surgery despite knowing that Leopoldo had an unreasonable risk of post-operative stroke due to the high-grade stenosis, (2) failing to remedy the stenosis before the surgery, and (3) failing to obtain Leopoldo's informed consent prior to the surgery. Plaintiff voluntarily dismissed Niemiec and Eldridge as defendants on May 18, 2018.

¶ 13 On May 29, 2018, Advocate moved to dismiss the new allegations based on Dr. Lippman's conduct, arguing that they were barred by the statute of limitations. The circuit court denied Advocate's motion, finding that the re-filed complaint was timely filed within one year of the dismissal of the 2016 complaint and related back to the original 2014 complaint. Advocate filed a motion to reconsider, arguing that *Wilson v. Schaefer*, 403 Ill. App. 3d 688 (2009) required dismissal of the allegations pertaining to Dr. Lippman. After a hearing, the court granted Advocate's motion to reconsider and struck the allegations involving Dr. Lippman. In particular,

the court found that those allegations did not relate back to the original complaint under section 2-616(b) of the Code "because there's absolutely nothing in the original complaint that discusses the preoperative care or the intraoperative care, and it all focuses on the two nurses, what they did or didn't do that led to the stroke."

¶ 14 On December 11, 2018, Jose filed a motion to reconsider, arguing that the court erred in determining that section 2-616(b) applied to the re-filed action and, alternatively, in finding that the allegations against Dr. Lippman did not relate back to the original complaint. The court granted Jose's motion to reconsider. In so ruling, the court stated that section 13-217 of the Code, not the relation back doctrine of section 2-616(b), governs new claims and allegations included in re-filed complaints. The court determined that the relevant question was therefore whether the re-filed complaint stated the same cause of action as the original complaint under *res judicata* principles. The court ultimately concluded that *res judicata* did not preclude the allegations against Dr. Lippman because (1) the order voluntarily dismissing plaintiff's original complaint was not a final judgment on the merits, and (2) Dr. Lippman's conduct occurred "close in time and location" to that of Niemiec and Eldridge and thus fell "within the broad circumstances, treatments, and care Plaintiff alleged in the original action."

¶ 15 On May 20, 2019, Advocate filed a motion for certification of the following three questions for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017):

> "1. Are Plaintiff's new pre-operative and intra-operative claims arising out of the conduct of Dr. Lippman barred by the four year statute of repose?

2. Does the relation-back doctrine found in section 2-616(b) (735 ILCS 5/2-616 (West 2012)) save Plaintiff's new pre-operative and intra-operative claims, arising out of the conduct of Dr. Lippman, from the statute of repose?

3. Does the single re-filing rule's *res judicata* transactional test save Plaintiff's new pre-operative and intra-operative claims related to the conduct of Dr. Lippman from the statute of repose?"

¶ 16 The circuit court certified the questions, and this court granted Advocate's application for interlocutory appeal.

¶ 17 II. ANALYSIS

¶ 18 The presentation of certified questions under Rule 308 is a limited exception to the general rule that our jurisdiction extends only to final judgements. *Abrams v. Oak Lawn-Hometown Middle School*, 2014 IL App (1st) 132987, ¶ 5. Appeals under Rule 308 "should be reserved for exceptional circumstances, and the rule should be sparingly used." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. A certified question must present a question of law as to which there is substantial ground for a difference of opinion and for which an immediate appeal would materially advance the end of the underlying litigation. *Id.* ¶ 31. When considering certified questions under Rule 308, our jurisdiction is limited to answering the specific questions certified by the circuit court. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Because certified questions present questions of law, our review is *de novo*. *Taylor v. Dart*, 2017 IL App (1st) 143684-B, ¶ 15.

¶ 19 A. The Relation Back Doctrine

¶ 20 We begin by addressing the second certified question, whether the relation back doctrine codified in section 2-616(b) of the Code "saves" the re-filed complaint from the statute of repose.

Under the relation back doctrine, an amended complaint "relates back" to a timely-filed original complaint and is therefore not barred by the statute of limitations if "the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading." *Lawler v. University of Chicago Medical Center*, 2017 IL 120745, ¶ 21.

¶ 21 Although the second certified question asks us to determine whether the allegations against Dr. Lippman relate back to the original complaint, we find no substantial grounds for a difference of opinion as to whether the relation back doctrine applies in this case. As we explained in *Apollo Real Estate Investment Fund IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 782 (2009), and *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 18, section 2-616(b) applies only to amended complaints, not to complaints re-filed under section 13-217. Here, the complaint at issue was filed pursuant to section 13-217 and never amended. Thus, section 2-616(b) and the relation back doctrine do not apply.

¶ 22 We acknowledge that Advocate relies on *Wilson v. Schaefer*, 403 Ill. App. 3d 688 (2009), in arguing that section 2-616(b) should apply to this case because the re-filing of the complaint "was in-and-of-itself an amendment of the original complaint." However, this argument does not raise substantial grounds for a difference of opinion because it ignores the fundamental principle that a re-filed action under section 3-217 "is not a restatement of the old action, but an entirely new and separate action." *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 48.

¶ 23 Moreover, *Wilson* is readily distinguishable. There, a divided panel of the Fourth District found that new claims raised for the first time in a re-filed complaint did not relate back to the original complaint. However, the court proceeded with a section 2-616(b) analysis only after accepting, without comment, the plaintiffs' concession that their new claims were time-barred

unless they related back. *Wilson*, 403 Ill. App. 3d at 690. Thus, neither the majority nor the dissent engaged in any analysis of whether section 2-616 was applicable in the first place. In any event, to the extent that *Wilson* implicitly signals that section 2-616(b) applies to non-amended re-filed actions, it is not binding on this court. See *O'Casek v. Children's Home and Aid Soc. of Illinois*, 229 Ill. 2d 421, 440 (2008) (the opinion of one district of the appellate court is not binding on another). Additionally, such an implicit holding is obviated by the more recent and directly applicable First District case law of *Gelber* and *Mabry*. Accordingly, we hold that leave to appeal with respect to the second certified question was improvidently granted because there are no substantial grounds for a difference of opinion as to whether section 2-616(b) applies to re-filed, non-amended actions.

¶ 24 B. Statute of Repose and *Res Judicata*

¶ 25 The answers to the remaining two certified questions are intertwined. The first question asks us to determine whether the new allegations pertaining to Dr. Lippman's conduct are "barred by the four-year statute of repose[.]" Section 13-212 of the Code provides that an action for injury or death against a hospital must be brought within two years of the date the claimant knew or should have known about the death or injury. 735 ILCS 5/13-212 (West 2016). Section 13-212 also provides, in what the parties refer to as the "statute of repose," that "in no event" may such an action be brought more than four years after the occurrence of the act or omission alleged to have caused the claimant's injury or death. *Id.*

¶ 26 Here, there is no dispute that the re-filed complaint was filed more than four years after Leopoldo was treated at Advocate. Thus, the new allegations are seemingly barred under section 13-212. However, the current action was filed pursuant to section 13-217, which grants a plaintiff

the "absolute right" to re-file a complaint within one year of its voluntary dismissal. 735 ILCS 5/13-217 (West 2016); *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 163 (1997). As Advocate concedes, this is so even where the normal period of limitations has otherwise expired. See *Richter*, 2016 IL 119518, ¶ 45 (where the statute of limitations expired in October 2010, a re-filed action initiated in September 2013 was nevertheless timely because it was filed within one year of the original action being voluntarily dismissed). The original action was voluntarily dismissed on May 1, 2017 and re-filed on November 28, 2017, well within the one-year limitations period of section 13-217. The question, then, becomes whether the re-filed complaint was a true "re-filing" within the meaning of section 13-217. If it was, then the re-filed complaint is not barred by the statue of repose. If it was not, then the re-filed complaint is time-barred because it was filed more than four years after the acts and omissions that allegedly caused Leopoldo's injuries.

¶ 27 This inquiry implicates the third certified question on appeal. A complaint is considered a "re-filing" of a previous complaint for purposes of section 13-217 if it contains the same cause of action as defined by principles of *res judicata*. *Mabry*, 2012 IL App (1st) 111464, ¶ 22. Our supreme court has adopted a "transactional test" for determining whether a re-filed complaint states the same cause of action as the original. *First Midwest Bank v. Cobo*, 2018 IL 123038, ¶ 18. Under the transactional test, two claims will be deemed to state the same cause of action if both arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Wells Fargo Bank, N.A., v. Norris*, 2017 IL App (3d) 150764, ¶ 21. Courts should approach the issue pragmatically, considering such factors as whether the facts underlying the claims are related in time, space, and origin, whether they form a convenient trial unit, and whether treating them as a single unit conforms to the parties' expectations. *Cobo*, 2018 IL 123038, ¶ 19.

¶ 28 Jose argues that the claims in the re-filed complaint arose from the same group of operative facts as the original complaint because both complaints concerned the same hospital stay and injury, and both complaints alleged that Leopoldo's injuries were caused by the negligence of Advocate and its agents or employees. He also observes that the original complaint named Dr. Lippman as a respondent-in-discovery, as an apparent agent or employee of Advocate, and as the surgeon who operated on Leopoldo.

¶ 29 Advocate argues that the claims do not arise from the same group of facts because the new allegations regarding Dr. Lippman involve only pre-operative and intra-operative conduct, whereas the original allegations concerned only Leopoldo's post-operative care. Advocate also maintains that the dissimilarity in the new and original allegations is underscored by the fact that the complaints were supported by completely different section 2-622 reports of merits authored by two different medical professionals with different areas of expertise.

¶ 30 We decline to answer the remaining certified questions, as they depend on the particular facts of this case. As noted, this interlocutory appeal comes to us in the form of certified questions under Rule 308, which must involve questions of law that will materially advance an end to the litigation. *Rozsavolgyi*, 2017 IL 121048, ¶ 21. "However, the rule was not intended to be a mechanism for expedited review of an order that merely applies the law to the facts of the case." *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Thus, "if an answer is dependent on the underlying facts of the case, the certified question is improper." *Rozsavolgyi*, 2017 IL 121048, ¶ 21; see also *Ray v. Beussink & Hickam, P.C.*, 2018 IL App (5th) 170274, ¶ 14 ("[C]ertified questions must be limited to legal issues and should not seek application of the answered legal question to the facts of the case."); *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶ 8 ("Rule 308

*** is not intended to address the application of the law to the facts of a particular case."); *Larsen v. Provena Hospital*, 2015 IL App (4th) 140255, ¶ 16 ("A reviewing court should restrict its review to certified questions of law and decline to answer when the ultimate disposition depends upon resolution of factual predicates.").

¶ 31 Here, the first and third certified questions on appeal involve deciding whether the new allegations about Dr. Lippman are permissible under the *res judicata* transactional test. Because such a determination depends on applying the law to the particular facts of this case, these questions fall outside the scope of our review, and we must therefore decline to provide answers.

¶ 32 III. CONCLUSION

¶ 33 In sum, we find that the interlocutory appeal under Rule 308 was improvidently granted, specifically, because certified question two does not present a question of law on which there are substantial grounds for a difference of opinion and, questions one and three require that we apply the law to a particular set of facts. Accordingly, we dismiss the appeal.

¶ 34 Certified questions not answered; appeal dismissed.