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2019 IL App (3d) 170664-U

Order filed March 1, 2019

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2019

BEATRIZ ADAME, as the Independent	)	
Administrator of the Estates of ABIGAIL	)	
ARROYO, Deceased, and EDER E. ARROYO,	)	Appeal from the Circuit Court
Deceased,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois.
	)	
Plaintiff-Appellee,	)	Appeal No. 3-17-0664
	)	Circuit No. 16-L-789
v.	)	
	)	The Honorable
THE CITY OF WILMINGTON,	)	Raymond E. Rossi,
	)	Judge, presiding.
Defendant-Appellant.	)	
	)	

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JUSTICE McDADE delivered the judgment of the court.  
Justices Carter and Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held:* This court declines to answer the certified question because any answer would be advisory and provisional.

¶ 2 Plaintiff filed a complaint against defendant alleging wrongful death claims and survival actions after the drowning deaths of her two children in the Kankakee River. Defendant filed a

motion to dismiss, claiming that it did not owe a duty to plaintiff and asserting absolute immunity. The trial court denied the motion. Thereafter, defendant filed a motion to reconsider, claiming that it was entitled to absolute immunity, which the trial court also denied. Defendant submits a certified question pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), which we find we are precluded from answering. We dismiss the appeal and remand this case for further proceedings.

¶ 3

### FACTS

¶ 4

In May 2016, Plaintiff Beatriz Adame's two children, Abigail and Eder Arroyo, entered the Kankakee River and were pulled beneath the river surface by the Wilmington Dam's underwater vortex and drowned. Adame filed an amended complaint<sup>1</sup> against defendant City of Wilmington alleging two counts of wrongful death and two counts of survival action. The complaint stated the following factual allegations. The City owned, possessed, maintained, controlled, and operated South Island Park, which was adjacent to the Wilmington Dam; the land that abuts the dam; and the dam itself. As the owner of the dam and the adjacent park, the City also had control, supervision, maintenance, and management over the Kankakee River. The park had trails leading to the river and did not have barriers around the dam. The City offered fishing licenses to be used at the dam and the City knew individuals were entering the river from the park. Because the City knew individuals entered the river, it placed warning signs at certain spots in the park. The City knew that the dam caused an underwater vortex beneath the surface of the river adjacent to the park and knew that several individuals had died in or had had to be rescued from the river.

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<sup>1</sup> The original complaint is not a part of the record.

¶ 5 In March 2017, the City filed a motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2016)) asserting failure to state a cause of action and absolute immunity. Specifically, the City claimed that it did not owe a duty to Adame, as the administrator of her children’s estates, because she failed to show that the children were “intended” users of the river and the underwater vortex was an open and obvious danger. The City also alleged that it was entitled to absolute immunity under section 3-110 of the Tort Immunity Act (745 ILCS 10/3-110 (West 2016)). The trial court denied the motion to dismiss, stating:

“municipal dam owners are removed from the liabilities – from the immunities imposed, afforded pursuant to the Tort Immunity Act. And 3-110 is not applicable at least for now. Open and obvious didn’t apply because of the underwater vortex. And the Plaintiffs, I think were intended and permitted users. I am going to deny the motion \*\*\* Because the City owned the park and the dam and the waterway, not the water.”

¶ 6 The City filed a motion to reconsider, which was also denied. The City submitted a motion to certify a question pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017) and the trial court granted the motion. The certified question asks:

“Does the immunity set forth in Section 3-110 of the Tort Immunity Act (745 ILCS 10/3-110) provide an immunity for two drownings that occurred in a river where the public entity owns property adjacent to the river and owns the dam in the river, or do

Sections 23(a) and 23(b)(e) of the Rivers, Lakes and Streams Act  
(615 ILCS 5/23(a), (b)(e)) prevail over the immunity?”

¶ 7

#### ANALYSIS

¶ 8

Adame argues that it would be improper for this court to answer the certified question as presented. She alleges that we would be required to make proscribed factual findings about whether the City owns or controls the Kankakee River in order to determine whether the statutes addressed in the certified question were applicable to this case. The City asserts that the certified question is limited to two undisputed facts: whether section 3-110 applies when (1) the City owns the park adjacent to the river and (2) the City owns the dam. The City claims that, therefore, the issue before this court is whether the statutes are applicable, not whether the City owns or controls the river.

¶ 9

Certified questions are governed by Illinois Supreme Court Rule 308 (eff. July 1, 2017). Rule 308 allows for permissive appeal of an interlocutory order certified by the trial court as involving a “question of law as to which there is a substantial ground for difference of opinion” and where an immediate appeal may “materially advance the ultimate termination of litigation.” *Id.* This court is limited to answering the specific certified question. *Spears v. Association of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15. This court should not look beyond the question to consider the propriety of the court’s underlying order. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Certified questions must not seek an application of the law to the facts of a specific case. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. If reviewing a certified question will result in an answer that is advisory or provisional, or if the answer is dependent upon the underlying facts of a case, the certified question should not be

reached. *Id.* “Appeals under Rule 308 should be reserved for exceptional circumstances and the rule should be sparingly used.” *Id.* A certified question is reviewed *de novo*. *Id.*

¶ 10 Adame cites *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460 (1998), to support her argument that this court cannot consider the certified question. In *Gleason*, the plaintiffs sued the defendants for numerous tortious violations including breach of fiduciary duty and the defendants filed a motion for summary judgment. *Id.* at 466. The trial court partially denied the motion and certified a question of law pursuant to Rule 308(a) pertaining to the breach of fiduciary duty issue. *Id.* at 467. Our supreme court held that its answer would only be advisory and provisional because (1) factual issues remained in the case and (2) the certified question did not “represent the full range of allegations underlying the count.” *Id.* at 469-70. Those same two factors prevent us from answering the certified question in this case.

¶ 11 Here, as in *Gleason*, the certified question does not take all of Adame’s allegations into consideration. *Id.* at 469. The certified question asks whether section 3-110 of the Local Governmental and Governmental Employees Tort Immunity Act Tort Immunity Act (745 ILCS 10/3-110 (West 2016)) provides immunity to the City based on the undisputed facts that the City owns the Wilmington Dam and owns the park adjacent to the river, but the question omits a critical disputed contention in Adame’s response to the City’s motion to dismiss—that the City also owned “the portion of the Kankakee River where the children drowned.”

¶ 12 Also, in this appeal as in *Gleason*, the actual focus of the parties’ dispute is not on the agreed facts presented in the certified question but, instead, is on the disputed question of whether the City owns the specified portion of the river. Adame asserts three bases for her claim that the City owns the relevant waterway: (1) the City’s ownership of the park adjacent to the river; (2) the City’s declaration of ownership in its zoning code; and (3) the City’s holding of

legal title to the pertinent part of the river. The City counters that the State of Illinois controls the river under section 5 of the Rivers, Lakes, and Streams Act (615 ILCS 5/5 (West 2016)), which states the Illinois Department of Natural Resources has jurisdiction and supervision over the river, and section 26 of the Rivers, Lakes, and Streams Act (615 ILCS 5/26 (West 2016)), which states that the Illinois Department of Natural Resources has “full and complete” jurisdiction<sup>2</sup> over every public body of water in Illinois subject to the authority of the federal government. Neither of these contentions addresses Adame’s assertions of the City’s ownership of the subject portion of the river.

¶ 13 Even if we were to find that the certified question took into consideration all of Adame’s allegations, “any answer here would be advisory and provisional, for the ultimate disposition \*\*\* will depend on the resolution of a host of factual predicates.” *Gleason*, 181 Ill. 2d at 469; *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 258 (2002) (finding that an answer to the certified question would be equivocal, as well as, advisory and provisional because it involves factual considerations); but see *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902 (2005) (finding that the certified question addresses only the legal effect of the statute and does not depend on any contested facts). This court would have to consider certain factual considerations concerning the City’s ownership of the river. For instance, Adame claims that the factual basis to support her argument that the City owned the river was (1) the City’s Municipal Code, which states that its territorial boundaries extend “on the West by the center thread of the main channel of the Kankakee River; and on the South by a line commencing at the intersection of the center line of

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<sup>2</sup> Section 26 makes clear that “jurisdiction” in the statute is not tantamount to ownership – “the jurisdiction of the Department of Natural Resources shall be deemed to be for the purpose of protecting the rights of the people of the State in the full and free enjoyment of all such bodies of water, and for the purpose of preventing unlawful and improper encroachment upon the same, or impairment of the rights of the people with reference thereto, and every proper use which the people may make of the public rivers and streams and lakes of the State of Illinois shall be aided, assisted, encouraged and protected by the Department of Natural Resources.” 615 ILCS 5/26 (West 2016).

Illinois Route 53/Baltimore Street with the center thread of the Kankakee River” and (2) the March 2001 title report issued by the Chicago Title Company that states the City owned Parcel IV, *e.i.*, the “River Parcel – Main Channel.” Adame also argues that it is well-established in Illinois that a riparian landowner holds title to the middle of the main channel. See *Allott v. Wilmington Light & Power Co.*, 288 Ill. 541, 550 (1919).

¶ 14 The City asserts that there is no factual dispute as to the City’s ownership of the river because the State of Illinois controls the river pursuant to section 5 and section 26 of the Rivers, Lakes, and Streams Act. However, while these sections grant the Department jurisdiction and supervision over the river, they neither refute nor confirm the Department’s *ownership* of the river—a factor critical to the City’s claim of absolute immunity. Section 3-110 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-110 (West 2016))—the statute this court is asked to interpret in the certified question—states:

“Neither a local public entity nor a public employee is liable for any injury occurring on, in, or adjacent to any waterway, lake, pond, river or stream not owned, supervised, maintained, operated, managed *or* controlled by the local public entity.” (Emphasis added.)

Stated another way, the City has immunity only if it does not own *or* supervise *or* maintain *or* operate *or* manage *or* control the covered waterway. See *Hedrick v. Bathon*, 319 Ill. App. 3d 599, 605 (2001) (generally, the term “or” is disjunctive and “indicates that in a sentence the various words which connects are to be taken separately” (citing *People v. Frieberg*, 147 Ill. 2d 326, 349 (1992))). Hence, the City’s lack of supervision and control of the Kankakee River does not establish its immunity under section 3-110 if it still has ownership of the river. Because

sections 5 and 26 of the Rivers, Lakes, and Streams Act do not either address or govern the State's ownership of the river, there remains a factual dispute which prohibits us from answering the certified question.

¶ 15 The City also argues that, according to *In re Marriage of Muruges & Kasilingham*, 2013 IL App (3d) 110228, ¶¶ 16-17, the facts of a case may be considered when determining a certified question. Unlike *Marriage of Muruges*, the pertinent facts within this case are *disputed* and they preclude this court from answering the certified question. In order to answer the question, we would be required to determine whether the City owned the identified part of the river. Rule 308 “was never intended to serve as a vehicle to appeal interlocutory orders involving little more than an application of the law to the facts of a specific case.” *Thomas v. Page*, 361 Ill. App. 3d 484, 494 (2005). Therefore, we decline to answer the certified question and remand this case for further proceedings.

¶ 16 CONCLUSION

¶ 17 The interlocutory appeal on the certified question is dismissed.

¶ 18 Appeal dismissed.