NOTICE
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2019 IL App (5th) 180044-U

NO. 5-18-0044

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SHIRLEY RUNYON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Richland County.
	)	
v.	)	No. 08-L-10
	)	
EMILY GALLOWAY,	)	Honorable
	)	Larry D. Dunn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justice Cates concurred in the judgment.
Justice Moore dissented.

ORDER

¶ 1 *Held*: Leave to file an interlocutory appeal was improvidently granted where our determination would be dependent upon the specific underlying facts of this case.

¶ 2 This appeal arises from the circuit court's denial of the appellant's, Emily Galloway's, motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). Because this cause comes before us pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), our review is strictly limited to the certified questions presented on appeal. The circuit court certified the following questions on January 9, 2018: (1) whether the circuit court abused its discretion in denying Galloway's motion to dismiss,

which argued that the appellee, Shirley Runyon, had delayed service by more than eight years following an automobile collision on September 8, 2006, and (2) whether Galloway established that the eight years between the filing of the original pleading and actual date of service was indicative of lack of reasonable diligence. Galloway filed an application for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), which this court granted on March 14, 2018. For the reasons hereinafter set forth, we vacate our order allowing leave to appeal as having been improvidently entered and dismiss this appeal.

¶ 3 I. Background

¶ 4 On August 28, 2008, Runyon filed a complaint against Galloway alleging negligence for injuries sustained in an automobile accident on September 8, 2006. On September 2, 2008, the complaint and attached service of summons were forwarded to the Jasper County sheriff's department.

¶ 5 On October 21, 2009, a case management conference was held. Following the case management conference, no activity was reflected in the trial court file until February 13, 2015, when the circuit court entered a show cause order directing Runyon's counsel, Stephen Hough (Hough), to appear on March 4, 2015, to show cause why the case should not be dismissed for want of prosecution. Despite the court's order, Hough failed to appear. On March 25, 2015, a case management conference was held.

¶ 6 On November 11, 2016, an alias summons and affidavit of service were issued for service on Galloway as "Emily M. Galloway, n/k/a Emily M. Landreth, 1045 E. 3rd

Street, Flora, IL." The Clay County sheriff's office received the alias summons on November 15, 2016.

¶ 7 The record reveals there were four unsuccessful attempts to serve Galloway on November 19, 2016, November 26, 2016, December 15, 2016, and December 20, 2016. On December 21, 2016, Runyon achieved service on Galloway. Shortly thereafter, Galloway filed a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007).

¶ 8 On March 6, 2017, the circuit court held a hearing on Galloway's motion to dismiss. Galloway's attorney stated that "for a period of six years there was no activity on the file whatsoever as noted in the court record." In response, Hough offered several reasons to explain why service was unattainable until approximately eight years and three months after the complaint was filed on August 28, 2008. First, Hough indicated that he had attempted to contact the Jasper County sheriff's department several times regarding service of summons but never received proof of service. Next, Hough stated that he had attempted to serve the original summons on Galloway at the address listed in the police report, specifically, 4878 North 725th Street, Newton, Illinois, but he "never received anything else back from the Jasper County Sheriff's office." Hough also alleged that client files and records were lost after his firm moved buildings in 2010 and his firm caught fire in 2014. Lastly, he indicated that he could not serve Galloway because "we had no idea this lady moved." In particular, Hough asserted the following:

> "She has moved numerous times. She moved from her parents' home. She moved to Cisne, Illinois. She resided for about six or seven months on Fifth Street in Flora, in 2008. She resided at 1045 East Third Street, Flora, Illinois from July

2008 to August 2016. The Court file will show that's where we attempted to serve the summons. She married in October 21, 2011. Her affidavit does not say when she married nor were we ever advised that she had changed her name."

¶ 9 Next, the following discussion took place regarding pertinent dates of service:

"THE COURT: So Mr. Hough, again, on this record, what can I find happened between—with regard to service, other than the issuance of the summons?"

MR. HOUGH [(COUNSEL FOR RUNYON)]: We looked, your Honor—

THE COURT: From '08, from August 28th of '08 until—I will just go with March 2015, which is six and a half years.

MR. HOUGH: Thank you. Once we came to court, we did not have a summons, after my move from 305 East Main to 308 South Kitchell, and then the fire in October of 2014.

* * *

MR. HOUGH: *** So I went and tried to find any receipts or anything that I could find to show—I remember signing a check to the Jasper County Sheriff's office. I don't have a copy of any document that shows that it, A, was not served or they couldn't find her. That's why I started talking with the sheriff's office. I continued to try to talk to the insurance company, they wouldn't talk to me. They had made an offer. I talked to my client about that offer. She refused it prior to filing. Then we had the fire in October of 2014—'15, I guess it was.

* * *

THE COURT: *** [W]hy not come in earlier and ask for an alias summons? Why not ask for an alias summons in the first, I don't know, 24 months, let's say?

MR. HOUGH: Because we were still trying to get things worked out. My client was still treating. My client is still treating."

Hough then called Runyon's daughter, Marjorie Probst (Probst), who testified that she located Galloway in October 2016 through a Facebook search.

¶ 10 On October 26, 2017, the circuit court entered an order dismissing Galloway's motion to dismiss. The court, in considering the "totality of the circumstances, including all applicable facts and factors," determined that Runyon had shown reasonable diligence in serving Galloway with the "First Alias Summons and within 23 days of Attorney

Hough/the Plaintiff having all of the information it needed to identify and locate the Defendant."

¶ 11 On November 3, 2017, Galloway moved for leave to file a motion to certify question for an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017). On January 9, 2018, the circuit court granted Galloway's motion, certifying the following questions for appeal:

> "1. Whether the trial court abused its discretion in denial of defendant's Motion to Dismiss Pursuant to Supreme Court Rule 103(b) where plaintiff delayed more than eight years in serving defendant in a motor vehicle accident and whether that delay was justified or reasonably diligent.
>
> 2. Where [*sic*] defendant established that the time between the filing of the pleading and actual date of service was indicative of lack of diligence. Whether plaintiff demonstrated with specificity and in conformity with the Rules of Evidence that reasonable diligence was exercised and offered an explanation to satisfactorily justify delay in service and that delay in service was reasonable and justified under the circumstances."

¶ 12 On February 6, 2018, Galloway filed an application for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), which this court granted on March 14, 2018. The parties subsequently filed briefs and this court heard oral argument on August 23, 2018.

¶ 13 II. Analysis

¶ 14 As stated above, Galloway raises two certified questions before this court, specifically, whether the circuit court abused its discretion in denying Galloway's motion to dismiss, and whether Galloway established that the eight years between the filing of the pleading and actual date of service was indicative of lack of reasonable diligence. Although this court previously granted Galloway's application for leave to appeal

pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017) in an order entered on March 14, 2018, this court, having now considered the parties' briefs and arguments, concludes that leave to appeal was improvidently granted as our answer to the certified questions requires review of the circuit court's application of the facts to the law.

¶ 15 Illinois Supreme Court Rule 308(a) provides in pertinent part:

> "When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order." Ill. S. Ct. R. 308(a) (eff. July 1, 2017).

As such, a review of Rule 308 sets forth the notion that "the appellate court serves as a gatekeeper and must carefully question whether the case before it warrants consideration outside the usual process of appeal." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 23.

¶ 16 By definition, certified questions are questions of law subject to *de novo* review. *Id.* ¶ 21. "Certified questions must not seek an application of the law to the facts of a specific case." *Id.* (citing *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 557 (2009)). Likewise, if an answer is dependent upon the underlying facts of a specific case, the certified question is improper. *Id.* (citing *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 32).

Rather, certified questions must involve a question of law for which there is substantial ground for difference of opinion and for which an immediate appeal from the interlocutory order may materially advance the ultimate termination of the litigation. See Ill. S. Ct. R. 308(a) (eff. July 1, 2017); see also *Rozsavolgyi*, 2017 IL 121048, ¶ 31. However, Rule 308 was not intended to be a mechanism for parties to gain expedited review of an order that merely applies the law to the facts of a particular case. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17 (citing *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (2008)). "Appeals under Illinois Supreme Court Rule 308 should be reserved for exceptional circumstances, and the rule should be sparingly used." *Rozsavolgyi*, 2017 IL 121048, ¶ 21 (citing *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 450 (1988)).

¶ 17 Illinois Supreme Court Rule 103(b) states "[i]f the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant ***." Ill. S. Ct. R. 103(b) (eff. July 1, 2007). Our supreme court has held that Rule 103(b) is an objective standard that was adopted to prevent delays in service of summons and to promote expeditious handling of suits by giving circuit courts the ability to dismiss a cause when service is not affected by reasonable diligence. *Segal v. Sacco*, 136 Ill. 2d 282, 286 (1990). Because the rule does not provide a specific time by which a defendant must be served, a court must consider the amount of time that has passed in relation to all the other factors and circumstances of each individual case. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 213 (2007); see also *Segal*, 136 Ill. 2d at 287 (when

determining whether a plaintiff lacked reasonable diligence in achieving service, a court may consider seven factors).

¶ 18 In the instant case, Galloway has requested this court to review and answer certified questions which would require us to provide an answer that is dependent upon the specific underlying facts of this case. As such, this court's answer would be improper. Because the certified questions cannot be answered without resolving a host of factual issues, this court should refrain from answering. We cannot conclude that the certified questions before us present such exceptional circumstances, as required by Illinois Supreme Court Rule 308 (eff. July 1, 2017), to warrant consideration outside of the usual appeal process.

¶ 19 III. Conclusion

¶ 20 Accordingly, our order of March 14, 2018, allowing leave to appeal in the instant case is vacated as improvidently having been entered, and this appeal is dismissed.

¶ 21 Order vacated; appeal dismissed.

¶ 22 JUSTICE MOORE, dissenting:

¶ 23 I respectfully dissent from the decision of my colleagues to vacate this court's prior order granting the defendant leave to appeal, pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), after the circuit court certified questions for appeal. For the reasons set forth below, I would reframe the certified questions in order to materially advance the termination of this litigation, finding the proper question presented by this

appeal to be whether, as a matter of law, there is a *per se* violation of the reasonable diligence requirement set forth in Illinois Supreme Court Rule 103(b) (eff. July 1, 2007), where no attempts at service are made for six years following the filing of a complaint and issuance of an original summons. Further, I would answer that question in the affirmative. The record is clear that, in this case, the failure to exercise reasonable diligence occurred for years after the expiration of the applicable statute of limitations. Accordingly, in accordance with this court's authority to reach the underlying order on appeal in the interests of judicial economy (see *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550 (2009)), I would reverse the circuit court's October 26, 2017, order denying Galloway's motion to dismiss and remand with directions that the circuit court dismiss this action with prejudice. See Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 24 In support of its decision to decline to answer the certified questions and dismiss this appeal, the majority cites to statements made by our supreme court in *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. Specifically, the majority posits that "[c]ertified questions must not seek an application of the law to the facts of a specific case" (*id.* (citing *De Bouse*, 235 Ill. 2d at 557)) and "if an answer is dependent upon the underlying facts of a specific case, the certified question is improper" (*id.* (citing *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 32)). *Supra* ¶ 16. In addition, the majority cites *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17 (citing *Walker v. Carnival Cruise Lines, Inc.*, 166 Ill. App. 3d 129, 133 (2008)), for the proposition that "Rule 308 was not intended to be a mechanism for parties to gain expedited review of an order that merely applies the law to the facts of a particular case." *Supra* ¶ 16. My review of these

authorities, however, leads me to conclude that these statements are either *dicta*, or are misapplied to the question of law presented in the case at bar, which admittedly was inartfully worded.

¶ 25 First, a reading of our supreme court's decision in *Rozsavolgyi* reveals that the court made the quoted statements regarding certified questions by way of an introduction to Rule 308 generally. However, it did not decline to answer the certified question before it on the basis that the question sought an application of the law to the facts of the case or was otherwise dependent on the facts. 2017 IL 121048, ¶ 26. Rather, the court declined to address the certified question presented in the *Rozsavolgyi* appeal because it was improperly overbroad, and would necessarily bear on situations not before the court and would therefore result in an advisory opinion. *Id.* As such, the quoted statements in *Rozsavolgyi* are *obiter dicta* and are generally not binding as authority or precedent within the *stare decisis* rule. *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). In any event, the *Rozsavolgyi* decision provides no guidance on the application of a blanket rule, to the extent one exists, that a certified question may not request application of law to facts.

¶ 26 Moving to *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 557 (2009), which the *Rozsavolgyi* court cited for the statement that "[c]ertified questions must not seek an application of the law to the facts of a specific case," I find that the substance of the discussion of this principle in *De Bouse* actually supports a decision to reframe the certified question in the manner that I suggest. The question at issue in *De Bouse* was "whether the act of offering a product for sale in Illinois is a representation that the product is reasonably safe for its intended and ordinary use, such that a failure to disclose

risks is a violation of the [Consumer Fraud and Deceptive Business Practices] Act." 235 Ill. 2d at 556. The supreme court noted that the appellate court had determined this question to be "a mixed question of fact and law not suitable for review under Rule 308, but did not elaborate on [that] point." *Id.* The supreme court stated that if the question was intended to specifically address the defendant's conduct, rather than the actions of defendants in general, then it would involve a "factual inquiry." *Id.* at 557. In other words, the court would have had to make findings of fact regarding the defendant's conduct in order to answer the question as certified. However, because it read the question to be addressed to the actions of defendants who are marketing their products in general, the court concluded that it was a question of law properly certified under Rule 308. *Id.*

¶ 27 In the case at bar, there is no dispute as to the fact that there was absolutely no activity in this case for six years after the filing of the complaint and initial issuance of summons. In my view, whether, as a matter of law, there could be a finding of due diligence under these undisputed facts requires no factual inquiry. Thus I find support in *De Bouse* for the proposition that, when reframed in this manner, an answer to the question presented by this appeal is appropriate. In addition, the *De Bouse* court reframed the certified question before it by considering the question in the context of prescription medications specifically, rather than products generally, because answering the question as written would not materially advance the termination of the litigation. *Id*. Thus, the *De Bouse* decision provides this court the authority to reframe the certified question on appeal as I have suggested and to answer it accordingly. This court has cited *De Bouse* in

support of its authority to reframe certified questions in precisely this manner. See, *e.g.*, *Crawford County Oil, LLC v. Weger*, 2014 IL App (5th) 130382, ¶ 11; see also *Williams v. Athletico, Ltd.*, 2017 IL App (1st) 161902, ¶ 9. In fact, the supreme court in *Rozsavolgyi* itself acknowledges a reviewing court's authority to modify a certified question or read a certified question in such a way as to bring it within the ambit of a proper question of law. 2017 IL 121048, ¶ 15.

¶ 28 As in *Rozsavolgyi*, the court in *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17, appears to state the general proposition that Rule 308 "was not intended to be a mechanism for expedited review of an order that merely applies the law to the facts of a particular case," as an introduction to Rule 308 without any particular context. Nowhere in the decision does the court apply the principle, again making it general *obiter dicta*. See *Cates*, 156 Ill. 2d at 80. Although the *Estate of Luccio* court did decline to answer a part of the certified question set forth therein, it did so because that part of the question was "framed as a question of law, but the ultimate disposition depend[ed] on 'the resolution of a host of factual predicates.' " 2012 IL App (1st) 121153, ¶ 32 (quoting *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 469 (1998)). I submit that the questions certified in the case at bar have the exact opposite problem—they are framed in terms of a host of factual predicates, but the ultimate disposition of this appeal can be framed as a question of law. As explained above, I would reframe the question appropriately, and I find no authority in *In re Estate of Luccio* requiring this court to do otherwise.

¶ 29 *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129 (2008), provides further authority for the disposition of this appeal in the manner I have suggested. As the

citation by the majority suggests, the court in *Walker* did find a certified question, as framed by the circuit court, to be inappropriate because it was "merely seeking a review of the trial court's application of the law to a given set of facts rather than a properly written certified question which articulates a specific question of law." *Id.* at 133. However, the court in that case, "despite the poorly drafted question," found it necessary to address the inappropriateness of the trial court's underlying order finding a forum selection clause to be unenforceable "in the interest of judicial economy and reaching an equitable result." *Id.* (citing *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 193 (1995)). It did so without reframing the question, finding the resolution of the issue at such an early stage in the litigation "would indeed materially advance the ultimate termination of the litigation." *Id.* at 134.

¶ 30 For all of these reasons, I would find that, although the certified questions presented by the circuit court may be inartfully worded so that they appear to address factual issues, the question presented by the instant appeal can be readily reframed to the following simple question of law, the answer to which will advance the ultimate termination of this litigation: whether it is a *per se* violation of the reasonable diligence requirement set forth in Illinois Supreme Court Rule 103(b) (eff. July 1, 2007), where no attempts at service are made for six years following the filing of a complaint and issuance of an original summons. For the following reasons, I would answer that question in the affirmative.

¶ 31 The purpose of Rule 103(b) is to protect defendants from unnecessary delays in the service of process and to prevent the circumvention of the statute of limitations.

Schusterman v. Northwestern Medical Faculty Foundation, 195 Ill. App. 3d 632, 637-38 (1990). The rule is not based on a subjective test of plaintiffs' intent but rather upon the objective test of reasonable diligence in effecting service. *Id.* at 638. The burden is on the plaintiff to show that he or she has exercised reasonable diligence to obtain service, and the defendant need not establish that he or she has been prejudiced by the delay. *Id.* A party to a lawsuit has a nondelegable duty to take all necessary steps to bring the case to a prompt conclusion. *Id.* at 639. It is a plaintiff's duty to have summonses issued by the clerk and delivered for service by the sheriff or a special process server and to see that a prompt and proper return was made by the process server. *Id*. Prior invalid service does not relieve the plaintiff from the burden to obtain valid service of process within the diligence requirements of Rule 103(b). *Id.*

¶ 32 I recognize that each case must be decided on its own particular facts and circumstances, and the court may consider a host of factors in determining whether to dismiss a case for a lack of diligence.[1] See *id.* at 638. However, I would find the length of time the case at bar sat in the circuit court with no attempts at service whatsoever, including no return of service on the original summons, shows a lack of reasonable diligence as a matter of law. The six years between the date the complaint and original request for summons to issue were filed and the circuit court's rule to show cause was issued is equivalent to three times the statute of limitations for claims of personal injury.

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[1]The factors include: (1) the amount of time taken to obtain service; (2) the efforts of the plaintiff; (3) the plaintiff's knowledge of the defendant's location; (4) the ease with which defendant's location could have been determined; (5) actual knowledge by the defendant of the pendency of the action; and (6) special circumstances affecting plaintiff's efforts. *Schusterman*, 195 Ill. App. 3d at 638.

See 735 ILCS 5/13-202 (West 2016) (actions for damages for an injury to a person shall be commenced within two years after the cause of action accrued). This length of time is so outrageous that no reported Illinois case can be found where a time frame even close to six years is considered under Rule 103(b). For these reasons, I would answer the question on appeal, as I would reframe it as explained above, in the affirmative. In addition, under this court's authority to reach the underlying order on appeal in the interests of judicial economy (see *De Bouse*, 235 Ill. 2d at 550), I would reverse the circuit court's October 26, 2017, order denying Galloway's motion to dismiss and remand with directions that the circuit court dismiss this action with prejudice.