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## Appellate Practice Corner

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# *Rozsavolgyi*, Part Two: Supreme Court Curtails Use of Certificates of Importance Under Rule 316

In the last issue of the *IDC Quarterly*, the Appellate Practice Corner addressed the Illinois Supreme Court's decision in *Rozsavolgyi v. City of Aurora*, 2017 IL 121048. *See* "Supreme Court Refines Rule 308 Requirements in *Rozsavolgyi v. City of Aurora*," IDC Quarterly, Vol. 28, No. 1 (First Quarter 2018). The appeal in *Rozsavolgyi* was initiated under Supreme Court Rule 308, which allows appeals of otherwise unappealable orders raising legal questions certified by the circuit court. The supreme court had a lot to say about Rule 308, sharply dividing over the proper scope of review under that rule—chiefly, what sorts of questions are appropriate. A narrow majority endorsed a restrictive view of appellate jurisdiction under Rule 308, effectively rejecting the more liberal view set forth by the three dissenting justices.

The supreme court was also closely divided over whether the appellate court had properly used Supreme Court Rule 316 to issue a certificate of importance, the basis for the supreme court's jurisdiction. This edition of the Appellate Practice Corner continues to examine the supreme court's decision in *Rozsavolgyi*, this time focusing on the court's interpretation of Rule 316 in an interlocutory appeal under Rule 308.

## *Rozsavolgyi*'s Path to the Supreme Court

As recounted in the last edition of this column, the circuit court in *Rozsavolgyi* certified three questions for interlocutory review under Rule 308, and the appellate court granted leave to appeal as to all three. *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493, ¶ 1. The first two questions concerned whether and to what extent the plaintiff's civil-rights claims were recognized under the Illinois Human Rights Act; the third concerned whether the defendant City was immune under the Tort Immunity Act. *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶ 1. The appellate court held, with one justice dissenting in part, that while the plaintiff's claims were legally valid, the City was immune to her claim for damages but not her claim for equitable relief. *Id.* ¶ 2.

The plaintiff petitioned for rehearing as to the third certified question, concerning the City's immunity; in the alternative, it requested a certificate of importance under Rule 316. *Id.* ¶ 9. The appellate court granted the certificate of importance, requiring the supreme court to consider the plaintiff's appeal. *Id.* While only the appellate court's answer to the third certified question was at issue in the plaintiff's appeal, the City cross-appealed, challenging the appellate court's answer to the first certified question. *Id.* ¶¶ 12-13.

Note that the appellate court played an unusually significant role in bringing the *Rozsavolgyi* appeal to the supreme court. The appellate court's consent was necessary for appellate jurisdiction in the first place, allowing leave to appeal a trio of certified questions under Rule 308—in effect, endorsing the circuit court's finding that the summary judgment raised legal questions that were open to reasonable dispute on several grounds. Moreover, after answering those questions, the appellate court issued the certificate of importance that forced the supreme court to consider the plaintiff's

further appeal, effectively declaring that one of the certified questions was significant enough to require such review. That certificate, in turn, enabled the City to cross-appeal the appellate court's answer to another certified question.

## The Majority View of Rule 316

The appellate court's two jurisdictional rulings are important because a majority in the supreme court disagreed on both counts, refusing to answer the certified question that had led to the certificate of importance or even to address the cross-appeal concerning the other certified question. The majority held that the third certified question satisfied neither of the Rule 308 criteria and should not have been answered. *Id.* ¶ 26. In addition—and seemingly related to its dim view of the third certified question—the majority was critical of the appellate court for issuing the certificate of importance that enabled both sides to appeal further. *Id.* ¶¶ 34, 38.

The majority acknowledged the appellate court's authority to issue such a certificate under both the Illinois Constitution and Rule 316. *Id.* ¶ 16. Moreover, it acknowledged that Rule 316 was a procedurally proper basis for going beyond the issues that prompted the appellate court to issue a certificate: "[U]nder Rule 316, the whole case comes before the supreme court." *Id.* ¶ 13 (citing *Hubble v. Bi-State Dev. Agency of the Illinois-Missouri Metro. Dist.*, 238 Ill. 2d 262, 267 (2010); Ill. S. Ct. R. 318(a) (eff. Feb. 1, 1994)).

The majority also observed, however, that neither Rule 316 nor the constitution supplies any guidance in how to exercise the appellate court's authority to issue certificates of importance. *Id.* ¶ 16 (citing Ill. Const. 1970, art. VI, § 4; Ill. S. Ct. R. 316). The majority suggested that Rule 315, which sets forth the criteria the supreme court considers when it determines whether to grant leave to appeal, offered "some illumination" as to what the appellate court might consider when asked to issue a certificate of importance: "In deciding whether to grant a certificate of importance, an appellate court may do well to look to the factors set forth in Rule 315." *Id.* ¶¶ 16, 17 (citing *Johnson v. Ames*, 2016 IL 121563, ¶ 26 (Thomas, J., specially concurring)). In effect, *Rozsavolgyi* interprets Rule 316 according to the same nonexclusive list of criteria as Rule 315—except that under Rule 316 it is the appellate court, not the supreme court, that is charged with determining if an appeal calls for further review.

But though it described the Rule 315 criteria as suitable for Rule 316, the majority did not expressly apply those criteria in holding that the appellate court had improperly issued the certificate of importance. Instead, the majority set forth a new dictate: that it is improper to issue such certificates when the initial jurisdictional basis for the appeal is Rule 308. *Id.* ¶ 38. This limitation appears to be rooted in the extraordinary nature of Rule 316, which "provides for an exceptional avenue of appeal" to the supreme court, and which "should therefore be exercised rarely and only when unequivocally warranted." *Id.* ¶ 18 (collecting cases). Further emphasizing that interlocutory review is disfavored generally, and that certificates of importance under Rule 316 should be issued only "sparingly," the majority declared that further review of appellate decisions issued pursuant to Rule 308 should be sought only under Rule 315—allowing the supreme court, not the appellate court, to determine if such further review is warranted. *Id.* ¶¶ 34, 38. "Rule 315 is the procedural avenue that should be followed where, as here, a litigant seeks review of an appellate court's ruling on a certified question under Rule 308." *Id.* ¶ 38.

## The Dissenting View

The dissenters vehemently objected to the majority's holding that the appellate court may not issue a certificate of importance in an appeal under Rule 308, calling that holding "absolutely incorrect." *Id.* ¶ 48 (Burke, J., dissenting). Describing this interpretation of the rules as unsupported by precedent and at odds with historical practice, they observed that the supreme court had previously answered Rule 308 certified questions in appeals under Rule 316 without commenting on the procedure. *Id.* ¶ 77 (Burke, J., dissenting) (citing *Hubble*, 238 Ill. 2d 262; *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72 (1995)). The dissenters complained that the majority cited no precedent for requiring that a party invoke the supreme court's leave-to-appeal jurisdiction under Rule 315 in such circumstances, nor any logical reason for restricting the use of certificates of importance in that way. *Id.* ¶¶ 77–78 (Burke, J., dissenting).

The dissenters also criticized the majority for failing to address the City's cross-appeal. They observed, as the majority had, that the certificate of importance under Rule 316 brought the entire appeal before the supreme court. *Id.* ¶ 71 (Burke, J., dissenting). But they parted company over what that meant for the City's cross-appeal once the original appeal was dismissed. The majority apparently felt that the dismissal of the plaintiff's appeal called for the dismissal of the cross-appeal as well, and did not even discuss the cross-appeal, let alone decide it. The dissenters, however, felt that even if the court were justified in not answering the third certified question, Rule 316 did not give the court discretion to refuse to address other parts of the case that were properly before it. *Id.* (Burke, J., dissenting).

## Why the Disagreement?

The conflicting views on this subject reflect a disagreement over the supreme court's role in setting its own docket—perhaps prompted by the appellate court's outsized role in forcing the supreme court to hear an appeal that the majority regarded as fundamentally improper. Just as the dissenters considered the first certified question suitable under their broader view of Rule 308, they also viewed Rule 316 more liberally, and saw no reason to exclude Rule 308 appeals from the constitutional provision that enables the appellate court to force an appeal into the supreme court. The majority, however, interpreted the rules in a way that does just that—requiring the supreme court's consent when a party seeks further review of a certified question under Rule 308, and effectively enlarging the supreme court's power to deny such review at the expense of the appellate court's power to grant it.

This difference of opinion may reflect the unusually discretionary nature of review of certified questions, and the role that such discretion plays in appellate jurisdiction under Rule 308. While the constitution expressly empowers the appellate court to force a case into the supreme court, such a case still must meet the criteria for review, and the supreme court has the power to determine that those criteria are not met—that appellate jurisdiction is lacking, for instance, or that the doctrines of mootness, ripeness, standing, or procedural default call for the appeal to be dismissed. *See O'Brien*, 2011 IL 109039, ¶ 58 (Garman, J., specially concurring). Similarly, the certification of a question to the supreme court does not require the court to answer the question if it is not squarely raised in the case. *Id.* (Garman, J., specially concurring). While the supreme court may be required to hear an appeal under Rule 316, it is not necessarily required to dispose of such an appeal on its merits if the appeal is procedurally defective in some way.

Indeed, the supreme court is precluded from deciding such an appeal if the defect deprives it of appellate jurisdiction, as the majority seems to have concluded in *Rozsavolgyi*. In describing the third certified question as "improperly

overbroad," such that it "should not have been answered" by the appellate court because it did not satisfy the requirements of Rule 308, the supreme court's majority questioned the jurisdictional basis for the appeal. *See id.* ¶ 26. Since the dissenters felt that the third certified question was a proper basis for jurisdiction under Rule 308, they believed that the supreme court had no power to decline to address the merits of the appeal. *Id.* ¶ 71 (Burke, J., dissenting).

## What *Rozsavolgyi* Mean for Rule 316

The majority's rejection of Rule 316 as a basis for further review in Rule 308 appeals has the virtue of clarity, a valuable commodity when appellate jurisdiction depends on using the right procedure. *Rozsavolgyi* should be taken as a warning in other cases where a party might consider seeking a certificate of importance in an appeal that was discretionary in the appellate court—say, under Supreme Court Rule 306, which allows the appellate court to hear appeals of several kinds of orders. *See* Ill. S. Ct. R. 306(a) (eff. Nov. 1, 2017). The understanding of Rule 316 set forth in *Rozsavolgyi* suggests that the supreme court might not recognize the appellate court's authority to issue a Rule 316 certificate in such an appeal.

Indeed, *Rozsavolgyi* illustrates the principle that you should be careful what you wish for, because you might get it. A losing party in the appellate court might be tempted to ask that court to issue a certificate of importance, perhaps by including such a request in a petition for rehearing, even if the chance of obtaining one is slim. The party might simply be exhausting all available options, even the long shots—figuring that if the appellate court doesn't issue the certificate, the party still can petition the supreme court for leave to appeal. But especially after *Rozsavolgyi*, this can be needlessly risky. If a request for a certificate of importance is granted, and the party who made the request chooses not to also petition for leave to appeal under Rule 315—which might seem like a reasonable choice after obtaining a certificate of importance—that party runs the risk that the supreme court could deem the certificate improper.

Rule 316 contains an implicit caveat to this effect, warning that "[a]n application for a certificate of importance does not extend the time for filing a petition for leave to appeal to the Supreme Court." Ill. S. Ct. R. 316. This is not generally a concern if the application for a certificate of importance is included in a petition for rehearing, which does extend the time for a petition for leave to appeal. But it does mean that a petition for leave to appeal may be filed before the appellate court has ruled on an application for a certificate of importance not made in a petition for rehearing—and therefore, in some cases, *must* be filed then to preserve the party's option to seek further review under Rule 315.

There is nothing in *Rozsavolgyi* to prevent a party from filing a petition for leave to appeal even after obtaining a certificate of importance under Rule 316, perhaps as belt-and-suspenders insurance against the possibility that the supreme court will reject the certificate as improper. As a practical matter, however, it is hard to imagine pursuing both avenues—especially since doing so almost suggests that the validity of the certificate is uncertain. Indeed, if the certificate is questionable enough to justify also filing a petition for leave to appeal, then it may not be worth the trouble of asking for the certificate at all (and having to decide what to do with one that is granted). In most cases it will be better to carefully consider whether Rule 316 is a proper avenue for further review.

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## Conclusion

It is tempting to think of the restrictive interpretations in *Rozsavolgyi* as products of the unusual procedural posture of that case. The majority may have chafed at the notion that Rule 316 had allowed the appellate court to usurp the supreme court's control over its own docket, forcing it to review an appeal that it thought the appellate court should have rejected in the first place. But the restrictive view of Rule 316 is consistent with the court's precedents, even if the new prohibition on its use in Rule 308 appeals makes it considerably narrower. *Rozsavolgyi* signals an even greater aversion to the use of Rule 316, suggesting that parties should avoid it not just in Rule 308 appeals, but in any appeal where it is not obviously appropriate.

## About the Author

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