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Scott L. Howie
Pretzel & Stouffer, Chartered, Chicago

Supreme Court Refines Rule 308 Requirements in *Rozsavolgyi v.City of Aurora*

One of the few ways to obtain interlocutory review in the Illinois courts is to move the circuit court to certify a question of law under Supreme Court Rule 308. Such review requires the circuit court to find, and the appellate court to agree, that a previous interlocutory order "involves a question 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." Ill. S. Ct. R. 308(a) (eff. July 1, 2017).

The nuances of Rule 308 might be dry and fusty points of appellate procedure to some, but they made for high drama in *Rozsavolgyi v. City of Aurora*, 2017 IL 121048—where a four-justice majority of the Illinois Supreme Court declined to answer the certified questions and vacated the appellate court's decision in its entirety. The majority's rationale drew a sharp rebuke from the three dissenting justices, who took vehement issue with nearly every aspect of the majority decision.

The conflict starkly emphasizes the restrictive interpretation that governs Rule 308. This edition of the Appellate Practice Corner examines the differing procedural views that divided the *Rozsavolgyi* court. Rather than offering a point-by-point synopsis of the competing opinions, this column analyzes the major points of contention related to Rule 308 in an effort to refine the understanding of that rule's procedural requirements.

Procedural Background of *Rozsavolgyi*

The plaintiff in *Rozsavolgyi* sued the City of Aurora under the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (2014), claiming she had suffered employment discrimination on the basis of disability. *Rozsavolgyi*, 2017 IL 121048, ¶ 3. The City moved to dismiss, arguing that disability harassment is not recognized as a cause of action under the Human Rights Act. *Id.* ¶ 4. The circuit court initially dismissed two counts of the plaintiff's four-count complaint on that ground, but on the plaintiff's motion to reconsider it reversed itself and reinstated those counts. *Id.* It also granted the plaintiff's motion to strike the City's affirmative defenses claiming immunity under the Tort Immunity Act, 745 ILCS 10/1 *et seq.* (2014). *Id.* ¶ 6.

On the City's motion, the circuit court certified three questions, each containing alternate or subordinate questions, for interlocutory review under Rule 308. *Id.* The first and second certified questions concerned the scope of the Human Rights Act—whether the plaintiff's allegations of disability harassment made for a recognized civil-rights violation under that statute, and if so, whether and to what extent an employer can be held liable for the actions of nonemployees or nonmanagerial and nonsupervisory employees. *Id.*

The third certified question concerned the City's affirmative defenses under the Tort Immunity Act—whether that statute applied to civil actions under the Human Rights Act seeking damages, attorneys' fees, and costs, and if so, whether the appellate court should "modify, reject or overrule" three prior decisions in which the appellate court had found the

Tort Immunity Act applicable only to tort actions and not to actions for constitutional violations. *Rozsavolgyi*, 2017 IL 121048, ¶ 6.

The appellate court granted leave to appeal as to all three certified questions, but it was divided in resolving them. *Id.* ¶ 7 (citing *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493). As to the first two questions, the majority held that the Human Rights Act prohibits disability harassment, but that the employer can be responsible for the actions of nonemployees or nonmanagerial and nonsupervisory employees only if it becomes aware of such conduct and fails to take reasonable corrective measures—and that the employee always bears the ultimate burden of persuasion in such cases. *Id.* (citing *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶¶ 77, 95). As to the third certified question, the appellate court's majority held that the Tort Immunity Act applies to actions under the Human Rights Act, but provides immunity only against damages and not against a request for equitable relief. *Id.* (citing *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶ 115). The court acknowledged previous decisions holding that the Tort Immunity Act applied only to tort actions and not to other types of claims, but chose not to follow those decisions, contending that the supreme court had "impliedly rejected" them. *Id.* (citing *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶ 97).

One justice dissented in part, expressing the view that the legislature did not intend the relevant section of the Human Rights Act to apply to anything other than sexual harassment. *Id.*, ¶ 8 (citing *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶¶ 121–24 (McLaren, J., concurring in part and dissenting in part)). He also disagreed that the Tort Immunity Act applied to the plaintiff's claim under the Human Rights Act, and disagreed that the supreme court had "impliedly rejected" decisions holding otherwise. *Id.* (citing *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶¶125–28 (McLaren, J., concurring in part and dissenting in part)). Pointing to those decisions, he reasoned that there were not reasonable grounds for a difference of opinion on that issue, and thus disagreed that the third question was proper under Rule 308. *Id.* (citing *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶127 (McLaren, J., concurring in part and dissenting in part)).

The plaintiff requested that the appellate court certify the third certified question as being sufficiently important to be decided by the supreme court under Supreme Court Rule 316. *Id.* ¶ 9; *see also* Ill. S. Ct. R. 316 (eff. July 1, 2017). The appellate court issued a certificate of importance, requiring the supreme court to hear the case. *Rozsavolgyi*, 2017 IL 121048, ¶ 9.

Competing Views in the Supreme Court

Justice Garman authored the supreme court's majority opinion, holding that the third certified question had improperly been certified and declining to answer it. *Id.* ¶¶ 26, 34. Though the City had cross-appealed, asking the supreme court to reverse the appellate court's decision as to the first two certified questions, the majority expressly chose not to address those questions—but it vacated the appellate court's decision in its entirety. *Id.* ¶ 41.

The three dissenting justices, in an opinion authored by Justice Burke, criticized nearly every aspect of the majority's opinion, including its refusal to address the City's cross-appeal. *Id.* ¶¶ 47-48. Though their criticism did not muster enough votes to carry the day, their contrasting views underscored the implications of the majority opinion and explicitly described several principles that the majority implicitly rejected.

Proper Breadth of a Certified Question

The majority and dissenting opinions chiefly clashed over whether the third certified question was proper under Rule 308. The initial point of contention concerned a factor not found in the language of the rule: whether the third certified question was "improperly overbroad," as the majority described it. *Id.* ¶ 26; see also *Id.* ¶¶ 53-54 (Burke, J., dissenting).

While *Rozsavolgyi* involved alleged actions in the employment setting, the majority observed, that the third certified question was framed generally in terms of the Human Rights Act, "which provides for numerous types of civil actions for unlawful conduct in a variety of contexts." *Id.* ¶ 26 (citing 775 ILCS 5/1-101 *et seq.* (2014)). Because the question implicitly embraced types of actions other than the one at issue, the majority held, an answer would necessarily bear on situations not before the court "and would therefore result in an advisory opinion." *Id.*

The dissenters found it "simply incorrect" to reject the question as overbroad. *Id.* ¶ 48 (Burke, J., dissenting). They were unpersuaded by the possibility that an answer would apply to other situations, observing that any question properly certified under Rule 308 would be a question of law, and would "obviously bear on factual situations other than the one before the reviewing court." *Id.* ¶ 55 (Burke, J., dissenting) (citing *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (1st Dist. 2008)). Because the applicability of the Tort Immunity Act to actions under the Human Rights Act would have an effect on the parties' rights, they believed, it would not result in an advisory opinion. *Id.* ¶ 57 (Burke, J., dissenting).

While the breadth of a certified question is not among the factors set forth in Rule 308, the supreme court's conflicting views reflect a disagreement as to how that concern should be applied to a proposed certified question. The dissenters felt that review is suitable for questions that indirectly invoke similar or related issues; they appear to have reasoned that a decision answering such a question might be persuasive authority in another case, even if the decision is potentially distinguishable or not squarely on point. But the majority opinion carried the day, setting the precedent that a certified question must be narrowly limited to the specific circumstances of the case, and that a question should not be certified or answered if it might suggest an application to disparate situations.

"Substantial Ground for Difference of Opinion"

In addition to disagreeing over whether the third certified question was too broad, the court also split over whether the question met the requirements of Rule 308. The majority was skeptical that the question involved a matter on which there was "substantial ground for difference of opinion," and held that the appeal would not "materially advance the ultimate termination of the litigation." *Id.* ¶¶ 31-33. The dissenters believed that the question satisfied both criteria. *Id.* ¶¶ 59-61 (Burke, J., dissenting).

As to the difference of opinion, the majority stopped short of holding that that there was no substantial ground for such a difference—but found it "questionable at best" that the third certified question met this requirement. *Id.* ¶ 32. Observing that the certified question itself cited three decisions of the appellate court that might effectively be overruled by the answer to the question, the majority concluded that this uncontradicted case law suggested that there was no meaningful difference of opinion. *Id.* ¶¶ 31-32. This prong may be satisfied when an issue has not been decided at all, the majority held, but it does not refer to a mere disagreement with existing case law unless that case law conflicts with decisions from other appellate districts or the supreme court. *Id.*

This holding implicitly rejected the more liberal interpretation contained in the dissenting opinion. Despite the cases cited in the third certified question, the dissent observed, the matter at issue in that question—whether the Tort Immunity Act applies to claims under the Human Rights Act—was a matter of first impression in the supreme court, and was "far

from settled." *Id.* ¶ 59 (Burke, J., dissenting). The dissent further noted that the Tort Immunity Act itself appears to abrogate the line of cases cited by the majority as evidence that there was no difference of opinion, and observed that other courts have applied the Tort Immunity Act in non-tort settings. *Id.* (Burke, J., dissenting). Because "the state of the law on this issue is uncertain and lacking in clear direction," and the question "involves statutory construction, a proper subject for certification under Rule 308," the dissent described the third certified question as "ideally suited" for review. *Id.*, ¶ 60 (Burke, J., dissenting).

In questioning whether the third certified question identified a substantial ground for difference of opinion, the majority did not expressly hold that this prong demands either a clean legal slate or a clear conflict of law. But its opinion, particularly in contrast to the dissenters' more liberal view, strongly suggested that a question should not be certified under Rule 308 if there is uncontradicted case law answering it—even if there are reasons to question that case law.

"Materially Advance the Ultimate Termination of the Litigation"

The majority and dissenting opinions differed further over what it means to "materially advance the ultimate termination of the litigation." The majority opinion held that the third certified question did not satisfy this requirement because it pertained only to the plaintiff's request for damages, attorneys' fees, and costs, and would not have resolved the other relief she requested. *Id.*, ¶ 33. "[R]egardless of how the third certified question is answered," the opinion observed, "the City's liability would still be at issue as to the other forms of relief sought." *Id.* Since the question could not be answered in a way that would terminate the litigation, the majority opinion held, it did not satisfy this prong of Rule 308. *Id.*

The dissenting opinion disagreed, unsuccessfully proposing the more expansive view that even if an answer to the third certified question could not bring the litigation to an end, "[r]emoving an entire category of damages from consideration obviously advances the course of litigation." *Id.*, ¶ 61.

This conflict, and the prevailing view of the majority, clarified that the "materially advance" prong of Rule 308 is to be strictly construed with an emphasis on "termination." Contrary to the dissent, it is not enough that a question can be answered in a way that will end the litigation sooner—perhaps by eliminating certain issues or streamlining the presentation of others. To "materially advance the ultimate termination of the litigation," the majority opinion held, means to conclude it.

Modifying a Certified Question

While both opinions agreed that the court has the power to "modify the certified question to correct any impropriety," such as the overbreadth of the third certified question, the justices disagreed over whether to do so in this case. *Id.* ¶ 28; *Id.*, ¶¶ 62–65 (Burke, J., dissenting). The majority acknowledged that in other cases the court has modified such questions, or read them in such a way as to make them proper under Rule 308—but despite a nod to "principles of judicial economy," it found that modification of the third certified question was not warranted. *Id.* ¶28.

The dissent criticized this refusal, complaining that the majority gave no reason not to tailor the certified question to the facts of the case. *Id.* ¶ 65 (Burke, J., dissenting). If the question was overbroad because it was not limited to the employment context, the dissent maintained, then modifying the question to apply to that context would allow the court to address the concern that prompted the appeal in the first place. *Id.* (Burke, J., dissenting).

Since the majority opinion drew no distinction between this case and those in which it was persuaded to modify certified questions—another omission the dissent criticized—it is hard to draw any lesson from its refusal to do so in *Rozsavolgyi*. *See Id.* ¶ 65 (Burke, J., dissenting). But at a minimum, this refusal reflected a general reluctance to modify a question even when principles of judicial economy might call for it, and further underscored the importance of drafting a suitable question in the first place.

Conclusion

In construing the criteria of Rule 308 so strictly, the majority opinion severely narrowed the scope of the rule and gave effect to the principle that interlocutory review is disfavored. The dissenting opinion further clarified that scope by setting forth alternate interpretations that, while well-reasoned and consistent with the language of the rule, reflected minority viewpoints. *Rozsavolgyi* makes it more difficult to obtain interlocutory review of a certified question, underscoring the importance of care, skill, and experience in the preparation of such questions. It also offers ample ways to challenge an adversary's attempt at obtaining such review.

About the Author

Scott L. Howie is a partner at *Pretzel & Stouffer, Chartered*, in Chicago, specializing in post trial and appellate practice in the state and federal courts. He received his undergraduate degree from Northwestern University in 1989 and his law degree from Chicago-Kent College of Law in 1994. Mr. Howie is a member and past director of the Illinois Appellate Lawyers Association, where he co-chairs the Moot Court Committee.

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