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'Til Death Do Us Part: When a Plaintiff Dies During Jury Deliberations

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In a case of first impression, the First District Appellate Court in *Jefferson v. Mercy Hospital & Medical Center,* 2018 IL App (1st) 162219 held that where a plaintiff in a medical malpractice action dies after the case is submitted to the jury, but before the jury delivers a verdict, the case becomes a survival action and future damages are inappropriate. "In a typical Survival Act claim, the representatives of the decedent would have a cause of action for medical expenses and pain and suffering of the decedent up to the date of death." *Jefferson,* 2018 IL App (1st) 162219, ¶ 49 quoting *Rodgers v. Cook Cty, Ill.*, 2013 IL App (1st) 123460, ¶ 29. The purpose of compensatory damages is not to punish defendants, but to make plaintiffs whole. *Id*. ¶ 54 citing *Wills v. Foster*, 229 Ill. 2d 393, 401 (2008). An award of future damages for a plaintiff who is no longer living would run afoul of this principle and would have the unintended effect of punishing defendants. *Id*.

Facts of the Case

Jeanette Turner filed an action in which she alleged that she sustained permanent brain damage due to the medical negligence of Mercy Hospital ("Mercy") and its staff. *Id*. ¶ 1. After nearly a decade of litigation, the parties proceeded to trial. Two days before closing arguments, plaintiff's counsel advised the court that Ms. Turner had sustained an injury that required surgery and she was unlikely to regain competence. *Id*. Following closing arguments and after the case was submitted to the jury, Ms. Turner passed away. While the jury was deliberating, plaintiff's mother, Joi Jefferson, was appointed administrator of her estate. *Id*. The jury awarded plaintiff $22,185,598.90 in damages, $15,007,965.68 of which was allocated to future damages. *Id*. ¶ 28.

After trial, Mercy moved for a judgment *n.o.v.* on certain issues of liability and a vacatur of the future damages award. Mercy argued that future damages were inappropriate because by the time the jury delivered its verdict, the case had become a survival action, which limited the award to medical expenses and no future damages. Plaintiff, on the other hand, argued that once a case has been submitted to a jury, any "post-submission events" should not alter the recovery. *Id*. ¶ 50.

Appellate Court Decision

In support of her position, Plaintiff cited a decision from the Southern District of Mississippi which stood for the proposition that where a plaintiff dies after the case is submitted to the judge, but before the judge enters a verdict, the judge may

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enter a *nunc pro tunc* order where necessary to prevent prejudice. *Id*. ¶ 51 citing *West v. United States*, 2009 WL 2169852, * 5-6 (S.D. Miss. July 20, 2009). The *West* decision relied on a Supreme Court opinion from 1880 holding that "where the delay in rendering a judgment…arises from the act of the court, that is, where the delay has been caused…for its convenience…the judgment or the decree may be entered retrospectively, as of the time when it should or might have been entered." *Id*. quoting *Mitchell v. Overman*, 103 U.S. 62, 63-64 (1880). The Court further held that the plaintiff should not be prejudiced by a court's delay in rendering a judgment. *Id.*

Where *West* and *Mitchell* were bench trials, *Jefferson* was a jury trial—and this, the Appellate Court held, was the deciding distinction. In a bench trial, a case is ripe for judgment as soon as it is submitted to the judge. *Id*. ¶ 52. In a jury trial, however, a case is not ripe for judgment until the jury delivers a verdict. *Id*. Here, the jury returned its verdict on December 4—one day after Ms. Turner's death. *Id*. A *nunc pro tunc* order is "entry now for something that was done on a previous date and is made to make the record speak now for what was actually done then." *Id*. quoting *Pestka v. Town of Fort Sheridan Co.*, 371 Ill. App. 3d 286 295 (2007). Because no judgment could have been entered prior to December 4, the judge was incapable of entering a *nunc pro tunc* order to a time prior to Ms. Turner's death. *Id*. ¶¶ 52-53.

Conclusion

Had Ms. Turner died one minute after the jury returned its verdict, plaintiff would have been able to recover future damages. *Id*. ¶ 53. But ultimately, the court held that because the case became a survival action upon Ms. Turner's death, and because the court was incapable of entering a *nunc pro tunc* order to a date preceding her death, plaintiff was not entitled to an award of future damages. ■

Selby v. O'Dea: The Common-Interest Exception Comes to Illinois

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The First District Illinois Appellate Court recently considered whether co-defendants waived the protections of the attorney-client and work-product privileges with respect to information disclosed between the co-defendants pursuant to a joint defense agreement. *Selby v. O'Dea*, 2017 IL App (1st) 151572, ¶ 2. As a matter of first impression, the appellate court recognized a common-interest exception to the waiver rule and held that parties on the same side of a case who share information pursuant to their common interest in defeating their litigation opponent, do not waive these privileges by the disclosure. *Selby*, 2017 IL App (1st) 151572, ¶ 2.

Common-Interest Exception to the Waiver Rule

Privileges are the exception to the general rule requiring disclosure of information in Illinois; accordingly, privileges are narrowly construed. *Id.* ¶ 60. Ordinarily, disclosure of privileged information to a third party constitutes a waiver of the attorney-client and work-product privileges. *Id.* ¶ 34 (citations omitted). But there are exceptions. For example, privileged statements disclosed to certain agents of the attorney or client, such as investigators and consultant experts, remain privileged. *Id.* ¶ 53. And the dual-representation doctrine permits a single attorney who acts for both an insured and insurer to disclose privileged communications from the insured without waiving the privilege, provided that the information is disclosed to the insurer in furtherance of their mutual benefit. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 194 (1991).

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The common-interest doctrine of *Waste Management*, on the other hand, provides that the dual-representation doctrine does not necessarily protect the same disclosures from discovery during a subsequent action between the insurer and insured. *Selby*, 2017 IL App (1st) 151572, ¶ 21 citing *Waste Management*, 144 Ill. 2d at 193. The appellate court in *Selby* explained that the *Waste Management* common-interest doctrine defeats a claim of privilege, whereas the common-interest exception to the waiver rule asserts a claim of privilege. *Selby*, 2017 IL App (1st) 151572, ¶¶ 28-29.

So what exactly is the common-interest exception? Black's Law Dictionary defines the common-interest exception to the waiver rule, also known as the common-interest privilege and joint-defense privilege, as the "rule that a defendant can assert the attorney-client privilege to protect a confidential communication made to a codefendant's lawyer if the communication was related to the defense of both defendants." *Privilege, Black's Law Dictionary* (10th ed. 2014). The Restatement of the Law Governing Lawyers states that the exception applies where "two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter ***." Restatement (Third) of the Law Governing Lawyers § 76 (2000). The appellate court in *Selby* interpreted this section to mean that "lawyers and parties on the same side of a lawsuit (or potential lawsuit) may converse together and may share work product" without waiving any privilege. *Selby*, 2017 IL App (1st) 151572, ¶ 35 citing Restatement (Third) of the Law Governing Lawyers § 76. Yet, the appellate court declined to adopt Section 76 of the Restatement, deciding that the issue would be best left to the Illinois Supreme Court. *Id.* ¶ 74.

The common-interest exception adopted by the appellate court provides that "coparties in a case who agree to share information pursuant to their common interest in defeating their litigation opponent do not waive either the attorney-client or work-product privilege when they do so." *Id.* ¶ 4. This allows similarly-situated parties to coordinate their litigation position, which will result in better representation and improved cooperation. *Id.* ¶¶ 51-52. Significantly, the exception does not preclude an opposing party from discovering the underlying facts or evidence relevant to the lawsuit. *Id.* ¶ 68. So what exactly is covered by the common-interest exception?

Permitted Disclosures under the Exception

To offer guidance, the appellate court identified four types of protected disclosures: "statements made to further the parties' common interest, pursuant to a common-interest agreement, (1) by the attorney for one party to the other party's attorney, (2) by one party to the other party's attorney, (3) by one party to its own attorney, if in the presence of the other party's lawyer, and (4) from one party to another, with counsel present." *Id.* ¶ 105. The rule appears to apply equally to both defendants and plaintiffs, meaning that multiple plaintiffs with different counsel could likewise coordinate a strategy against defendant. *Id.* ¶ 4. Principals and agents, as well, will typically have sufficiently aligned interests to meet the requisite standard, as the parties' interests need not be common on every issue. *Id.* ¶¶ 79, 84.

But not every communication is covered. Importantly, even when parties or attorneys communicate as part of a joint defense agreement, the common-interest exception does not apply to statements that are not made in furtherance of the common interest. *Id.* ¶ 109. Additionally, if persons other than the parties or attorneys are present, then the statements could still be subject to waiver. *Id.*

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The appellate court observed that other courts have disagreed on the scope of the exception and consequently left certain factual scenarios undecided. *Id.* ¶¶ 45, 104. In particular, the court declined to decide: (1) whether the exception applies to communications before a lawsuit has been filed, (2) whether a written or advance agreement is required, and (3) whether the exception applies beyond litigation to other common interests. *Id.* ¶ 74. Likewise, the court did not decide whether written communications, such as e-mails, would also be covered. *Id.* ¶ 104.

Another area left undecided by the appellate court concerns whether a plaintiff and defendant (and their attorneys) can coordinate to further their common interest against a potentially liable co-defendant. The appellate court explained that the parties do not need to be fully aligned in all aspects of litigation in order to assert the common-interest exception. ¶ 79. However, given that the appellate court repeatedly used the phrase "same side" in reference to the exception, communication between a plaintiff and defendant might not be covered. These uncertainties, along with others sure to arise, are likely to be clarified in future opinions establishing the boundaries of the common-interest exception now adopted in Illinois. ■

STATUTORY CONSTRUCTON AND MUNICIPAL IMMUNITY: The Supreme Court Employs Cannons of Statutory Construction to Interpret the Local Governmental and Governmental Employees Tort Immunity Act

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Introduction

The Illinois Supreme Court recently took up the question of the interpretation of The Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/3-107(b) as it applies to bike paths in *Corbett v. The County of Lake, et. al.* 2017 IL 121536. In coming to its unanimous opinion, the Court employed several rules of statutory construction that may be helpful to practitioners who are faced with issues involving statutory interpretation.

Facts of Case

Plaintiff Kathy Corbett sued The County of Lake and the City of Highland Park for injuries she received when riding her bicycle on the Skokie Valley Bike Path. Corbett, 2017 IL 121536, ¶ 4. Corbett alleged that prior to the date of the accident, Lake County and The City of Highland Park had been informed of a dangerous condition on that section of the path in which "weeds and other vegetation were growing up through the asphalt ***, causing portions of the of the path to be broken, bumpy and elevated." *Id*. She alleged that she was thrown off her bicycle while riding over a defective portion of the path, causing her to sustain severe injuries and that her injuries were proximately caused by the willful and wanton acts or omissions of the defendants. *Id*.

Lake County was a party to a recreational lease agreement with Commonwealth Edison (ComEd) for the path. *Id*. ¶ 5. ComEd was the owner of the right-of-way encompassing the path, and the County was a tenant. *Id*. The County and the City of Highland Park were also parties to a maintenance agreement, which provided that Highland Park was responsible for routine maintenance on the portion of the path within the corporate limits of the city. *Id*.

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The path was not located in a wooded, natural scenic area. *Id*. ¶ 12. The path crosses a city park but there are commercial and industrial businesses, parking lots and buildings abutting both sides of the path. *Id*. There are some large bushes and grass where the accident occurred but no trees. *Id*. Near the site of the accident, the path intersects with a busy street and there are stop signs for the bicyclists at that intersection. *Id*. The path is sandwiched between U.S Route 41 and a set of railroad tracks There are large ComEd utility poles that run alongside the path with multiple power lines overhead. *Id*.

Both defendants moved for summary judgment, arguing that they were absolutely immune from liability, including liability for willful and wanton acts pursuant to section 3-107(b) of the Local Governmental and Governmental Tort Immunity Act ("The Act") (745 ILCS 10/3-107(b) (West 2012)). Section 3 –107(b) of the Act provides, in its entirety:

> Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway. (b) Any hiking, riding, fishing or hunting trail." *Id*. ¶ 6.

In her response to the City's motion for summary judgment, the plaintiff argued that the path is not a "riding trail" under section 3–107(b) because it is paved and runs next to a busy, developed commercial and industrial area of the city rather than a forest or mountainous region. *Id*. ¶ 11. In its reply, the City did not dispute the facts averred by the plaintiff but argued that the decisions of neighboring landowners to develop their property and the fact that the path runs adjacent to a road did not defeat the immunity conferred by that section of the Act. *Id*. ¶ 13. The City argued that the nature of the path itself is determinative of whether it is a "riding trail" as contemplated by the statute. *Id*. ¶ 11.

Summary judgment was granted for both defendants. *Id*. ¶ 14. Lake County was not a party to the appeal. *Id*. The appellate court reversed the circuit court's order granting summary judgment. The appellate court relied on *Brown v. Cook County Forrest Preserve*, 284 Ill. App 3d 1098, 1101 (1996) to determine if the bike path was a "trail" within the meaning of the statute. In determining what constituted a, "trail", the Brown court relied on the definition of the word, "trail" as found in Webster's Third New International Dictionary 2423 (1981), which defines "trail" as "a marked path through a forest or mountainous region". *Id*. ¶ 15. The court concluded that the presence of industrial and residential development surrounding the path defeated the City's argument that the path runs through a forest or mountainous region and therefore, the immunity provided by section 3-107(b) did not apply. *Id.*

Decision of the Illinois Supreme Court

The Supreme Court initially noted that there is no question that if section 3-107(b) applies, the City is completely immune from liability, even for willful and wanton conduct. *Id*. ¶ 20. The court relied on *Desmet v. County of Rock Island,* 219 Ill. 2d 497, 514, (2006) which held that when the plain language of an immunity provision in the Act contains no exception for willful and wanton conduct, it means that the legislature intended to immunize both negligence and willful and wanton conduct. *Id*.

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The Supreme Court ultimately affirmed the appellate court's decision but did so on completely different grounds, as it felt that the appellate court's analytical framework in *Brown* was misguided. *Id*. ¶ 25.

The Court noted that the Skokie Family Bike Path is considered a "shared-use trail" as defined by the Illinois Department of Transportation (IDOT) which is the state agency responsible for officially designating bike-ways throughout the state. *Id*. ¶ 21. The Court noted that the trail is known as a "rail-with-trail." *Id*. ¶ 22. Along its 10-mile length, there are several major road crossings and that the trail is paved and has a yellow, painted line dividing the path into two lanes with mile marker signs for users of the path. *Id*. Nevertheless, the Court felt that the appellate court's reliance upon *Brown v. Cook County Forrest Preserve Id*. and the reliance upon the definition of a word as found in Webster's Third New International Dictionary was misplaced. *Id*. ¶ 25. The court noted that when using a dictionary to help determine statutory meaning, it is appropriate to use one in existence at the time of the statute's enactment. *Sayles v. Thompson*, 99 IL. 2d 122, 125 (1983). *Id*. The *Brown* court used a definition from a dictionary published in 1981, which was well after the 1965 enactment of section 3-107(b). *Id*.

Moreover, the court felt that *Brown* misquoted the dictionary's definition of the word, "trail." *Id*. ¶ 26. The entire definition is "a blazed or otherwise marked path through a forest or mountainous region." *Id*. From the same dictionary, "blazed" is a "blazed or otherwise marked path" made by chipping pieces out of trees. *Id*. Therefore, the definition used by *Brown* has nothing to do with shared-use trails or designated bicycle paths. *Id*.

Additionally, the Supreme Court felt that the *Brown* court erred in viewing the word "trail" outside the context of the statute in order to determine its meaning. *Id*. ¶ 27. The court noted that it is a "fundamental principle of statutory construction (and, indeed of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used". *Deal v. United States*, 508 U.S. 129, 132 (1993)." *Id*. The terms of a statute are not to be considered in a vacuum." *M.I.G Investments, Inc. v. Environmental Protection Agency*, 122 Ill. 2d 392,400 (1988). *Id*. Rather, the words and phrases in a statute must be construed in light of the statute as a whole, "*with each provision construed in connection with every other section." *Eden Retirement Center, Inc. v. Department of Revenue*, 213 Ill. 2d 273, 291 (2004) (quoting *Harris v. Feder,* 179 Ill. 2d 173, 177 (1997). *Id*. Dissecting an individual word or phrase from a statutory provision and mechanically applying it to a dictionary definition is clearly not the best way of ascertaining legislative intent. *Whelan v. County Officers' Electoral Board,* 256 Ill. App. 3d 555, 558 (1994). *Id*. ¶ 28.

The Court held that when construing a series of terms such as the ones in section 3-107(b), they were guided by the common-sense principle that "words grouped in a list should be given related meaning." *Id*. ¶ 31 citing *Third National Bank in Nashville v. Impac Ltd.,* 432 U.S. 312, 322 (1977). This principle is related to the cannon of statutory construction known as *noscitur a sociis* ,i.e., "a word is known by the company it keeps". *Id*. ¶ 32. The canon of *noscitur a sociis* is particularly useful when construing one term in a list, in order "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to legislative acts.'" *Id*. citing *Gustafson v. Alloyd Co*. 513 U.S. 561, 575 (1995).

Applying the canon of *noscitur a sociis, the* court founds that the words "hiking," "fishing," and "hunting" dictate a narrower construction of the term "trail." *Id*. ¶ 33. The inclusion of the words "hiking," "fishing," and "hunting" in the same sentence as "riding" indicates that the legislature intended to apply blanket immunity only to primitive, rustic, or unimproved trails. *Id*.

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The Supreme Court found additional support in its conclusion by employing the doctrine of *in pari materia*. *Id*. ¶ 34. Under that doctrine, two sections of the same statute "will be considered with reference to each other, 'so that they may be given harmonious effect.'" *Id*. quoting *Collinsville Community Unit School District No. 10 v. Regional Board of School Trustees,* 218 Ill. 2d 175, 185 (2006).

Finally, the Supreme Court noted that in construing statutory language, they could consider the consequences that would result in interpreting the statute one way or the other. *Id*. ¶ 35 citing *County of DuPage v. Illinois Labor Relations Board,* 231 Ill. 2d 593, 604 (2008). It also presumed that the legislature did not intend absurdities, inconvenience, or injustice. *Id*. citing *Brucker v. Mercola,* 227 Ill.2d (502, 514 (2007). The court noted that under section 3-106 of the Act, injuries occurring due to a condition of recreational land are subject to immunity only for negligent conduct and not for willful and wanton conduct. *Id*. Consequently, if a bicycle path winding through a public park was subject to blanket immunity under section 3-107(b), a plaintiff would be barred from suing for an injury caused by a condition of the path, while being able to sue for the exact same injury occurring on park grounds next to the path. *Id*. The court held that this inconsistent treatment could be avoided by construing the Act so that a shared-use trail in a public park or recreational area is subject to section 3-106 of the Act rather than section 3-107(b) of the Act. *Id*.

Conclusion

While the interpretation of this statute may not have a great deal of significance other than to those who regularly practice municipal law, the Illinois Supreme Court has provided us with some valuable reminders of cannons of statutory construction that can aid us in interpreting problematic statutes. ■

Supreme Court Declines to Answer Certified Question In Case Involving Interplay between Tort Immunity Act and Human Rights Act

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Introduction

In *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, the Illinois Supreme Court declined to answer a certified question on appeal pursuant to Rule 316 from the Appellate Court for the Second District of Illinois. The certified question before the court was whether The Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1, *et seq*., applied to a civil action under the Illinois Human Rights Act where the plaintiff sought damages and attorneys' fees. The Court held that the certified question was too broad and failed to meet the criteria necessary for a certificate of importance under Rule 316. *Rozsavolgyi*, 2017 IL 121048.

Facts of the Case

The case involved the termination of Patricia Rozsavolgyi from her employment with the City of Aurora (the City). *Id.* ¶ 1. Rozsavolgyi filed a charge of discrimination against the City with the Illinois Department of Human Rights (IDHR) claiming disability discrimination. *Id.* After the IDHR issued a right to sue letter, Rozsavolgyi brought a four-count complaint under the Illinois Human Rights Act, 776 ILCS 5/1-101 *et seq*. *Id.* The City raised affirmative defenses based on the Local Governmental and Governmental Employees Tort Immunity Act. 745 ILCS 10/1 *et. seq*. *Id.* ¶ 4. Rozsavolgyi filed a motion to strike the City's affirmative defenses. *Id.* ¶ 6. The circuit court granted the motion to strike four out of six of the City's affirmative defenses. *Id.* The circuit court granted

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the City's Rule 308 motion and certified three questions of law for permissive interlocutory appellate review. *Id.* Only the third question is relevant. The third certified question of law read as follows:

> Does the Local Government[al] and Governmental Employees Tort Immunity Act, 745 ILCS 10/1, *et seq.*, apply to a civil action under the Illinois Human Rights Act where the plaintiff seeks damages, reasonable attorneys' fees and costs?
> If yes, should this Court modify, reject or overrule its prior holdings in *Streeter v. County of Winnebago*, 44 Ill. App. 3d 392, 394–95 [2 Ill.Dec. 928, 357 N.E.2d 1371] (2nd Dist. 1976), *Firestone v. Fritz*, 119 Ill. App. 3d 685, 689 [75 Ill.Dec. 83, 456 N.E.2d 904] (2nd Dist. 1983), and *People ex rel. Birkett v. City of Chicago*, 325 Ill. App. 3d 196, 202 [259 Ill.Dec. 180, 758 N.E.2d 25] (2nd Dist. 2001) that 'the Tort Immunity Act applies only to tort actions and does not bar actions for constitutional violations'?"

Id. ¶ 6.

Opinion of Appellate Court

In answering this question, the Second District Appellate Court held that the Tort Immunity Act applied to claims under the Human Rights Act and the City could assert immunity with respect to plaintiff's claim for damages, but not plaintiff's claim for equitable relief. *Id.* ¶ 7. The Appellate Court did not follow appellate precedent, but rather based its decision on language contained in the Illinois Supreme Court's opinion in *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261, 282 Ill.Dec. 815, 807 N.E.2d 439 (2004). *Id.* In *Raintree Homes*, the Supreme Court noted that "[W]e do not adopt or approve of the appellate court's reasoning that the Tort Immunity Act categorically excludes actions that do not sound in tort." *Id.* ¶ 8. The appellate court interpreted this language to mean that the Supreme Court impliedly rejected the appellate court's prior rulings on this issue. *Id.* ¶ 7. Justice McLaren of the appellate court dissented in regard to the third certified question. *Id.* ¶ 8. Justice McLaren argued that the appellate court should not depart from previous appellate precedent because the Supreme Court's decision in *Raintree Homes* did not specifically overrule the court's prior holdings in *Streeter*, *Firestone*, and *People ex. Rel Birkett*. *Id.*

The Supreme Court's Opinion

Rozsavolgyi petitioned the appellate court for a certificate of importance for the third certified question, which was granted. *Id.* ¶ 9. Rozsavolgyi argued that the appellate court should not have answered the question because it was improperly certified by the circuit court. *Id.* ¶ 11. Alternatively, she argued that the question should be answered in the negative. *Id.* Justice Garman authored the Supreme Court's majority opinion, which was joined by Chief Justice Karmeier and Justices Kilbride and Theis. As a threshold matter, the Court began by determining whether the certified question was properly before the Court. *Id.* ¶ 14. Rule 316 provides "[a]ppeals from the Appellate Court shall lie to the Supreme Court upon the certification by the Appellate Court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court." *Id.* ¶ 16. Rule 316 is "an exceptional avenue of appeal" and should be used "rarely and only when unequivocally warranted." *Id.* ¶ 18.

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When the Court analyzed the merits of the certified question at hand, the Court determined that it would not review the question because it was overly broad, and the appellate court erred in answering it. *Id.* ¶ 26. The Court reasoned that because The Illinois Human Rights Act was very broad, opining on the question before it would affect situations not currently before the court, thus resulting in an advisory opinion. *Id.* The Court acknowledged that it had modified certified questions in the past; however, it determined that it was unnecessary to do so in this case. *Id.* ¶ 28. The Court agreed with Justice McLaren's dissent that the opinion in *Raintree Homes* did not impliedly overrule the appellate court's prior decisions, but merely signaled that it did not endorse the appellate court's reasoning in that case. *Id.* ¶¶ 31-32. Thus, the Court concluded that it was highly questionable whether a substantial difference of opinion existed that would warrant certification of the question and the appellate court's subsequent issuance of a certificate of importance. *Id.* ¶ 32. While Rule 316 allows the Court to take the whole case under review, the Court declined because doing so would mean addressing issues that were improperly before the Court. *Id.* ¶ 39.

According to the Court, Rozsavolgyi should have pursued her appeal under Rule 315 instead of Rule 316. *Id.* ¶¶ 37-38. The Court noted that even if the Rule 315 petition for leave to appeal had been denied, the Court may have utilized its supervisory authority to grant Rozsavolgyi recourse. *Id.* ¶ 37. Because the Court determined that the appellate court answered the certified question in error, the Court vacated the appellate court's decision and remanded the case back to the circuit court. *Id.* ¶ 39.

The Dissent

Justice Burke wrote a dissent, joined by Justices Freeman and Thomas. Justice Burke disagreed that the certified question was overly broad and believed that the question presented a matter of first impression on an issue that was currently uncertain. *Id.* ¶¶54 & 59. Additionally, the dissent argued that the Illinois Constitution authorized appellate courts to issue certificates for questions of such importance that they should be decided by the Supreme Court. *Id.* ¶ 76. The dissent warned that litigants should not be discouraged from seeking such a remedy when an issue fits this criteria. *Id.* ¶¶ 78-79.

Conclusion

Nonetheless, the *Rozsavolgyi* majority opinion serves as a reminder to both litigants and lower courts that, barring exceptional circumstances, the proper process to seek review of an appellate court's ruling on a Rule 308 certified question under is a petition for leave under Rule 315, not requesting certification under Rule 316. The issue of whether the Tort Immunity Act applies to claims under the Human Rights Act will likely be the subject of a future Supreme Court case. ■

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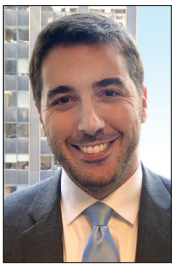

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