No. 126101

In the Supreme Court of Illinois

STANLEY EIGHNER,

Plaintiff-Appellant,

v.

PATRICIA J. TIERNAN,

Defendant-Appellee.

Appeal from the Appellate Court of Illinois,
First Judicial District, Case No. 19-1369.
There heard on Appeal from the Circuit Court of Cook County,
Illinois, County Department, Law Division 18 L 11146.
The Honorable **Moira S. Johnson**, Judge Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT STANLEY EIGHNER

JOHN P. DEROSE (#0620300)
DEROSE & ASSOCIATES
615 N. YORK ROAD
HINSDALE, ILLINOIS 60521
(630) 920-1111
john@johnderoselaw.com

Attorney for Plaintiff-Appellant
Stanley Eighner

E-FILED
12/2/2020 2:22 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT

Tiernan separates Eighner's two initial arguments into five sections. For convenience, Eighner responds to each as Tiernan has chosen to organize them.

I. Eighner raises two points in consideration of how to answer the certified question, not separate issues; the third and fourth points address a matter of judicial economy addressed by the Appellate Court.

Tiernan first attempts to deflect the arguments Eighner raises by casting them as either misstated or lying outside the scope of the question certified to the Appellate Court. In so arguing, Eighner fails to distinguish between a point, an issue, and a question. What Tiernan calls "issues" are actually points Eighner relies upon in addressing the question certified by the Circuit Court. Supreme Court Rule 315(e)(3) explicitly permits more than one point to support an argument in all appeals, including review of certified questions. And indeed, the first two of Eighner's points both address how the Circuit Court's certified question should be resolved. The last point addresses the Appellate Court's remand order in light of judicial economy, and the fourth addresses a further matter of consideration for the propriety of the Circuit Court's order.

Accordingly, all points Eighner raises address the certified question and are therefore properly within this Court's consideration.

II. No authority addresses the question certified, let alone justifies an answer of "no" without examining the scope and effect of the Circuit Court's order.

Tiernan claims that no authority "allows a [p]lainitff to refile a complaint within a previously dismissed lawsuit," but fails to acknowledge that no authority forbade it, either, until the holding of the Appellate Court in this case. Indeed, the entire reason the question was certified was to resolve the ambiguity surrounding the word "may" as used in 735 ILCS 5/13-217 and "reinstate" as used in the Circuit Court's dismissal order in the context of its jurisdiction.

Tiernan does not address these arguments but instead relies upon *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, as though it disposed of the question. *Richter*, however, is inapposite. That case involved a filing of a new action following a voluntary dismissal. 2016 IL 119518 ¶1. The question this Court addressed there was whether res judicata and related doctrines barred the subsequent action. *Id.*, ¶17. That case is silent as to whether and under what circumstances a voluntarily dismissed claim may be reinstated under the same case number. Thus, it provides no guidance one way or another.

Tiernan's urging an answer of "no" to the certified question, therefore, relies on no authority.

III. The statutory language of both 735 ILCS 5/2-1009 and 5/13-217, read in light of the expansive nature of circuit court jurisdiction, mandates an answer of "yes" to the certified question.

The Circuit Court's retention of jurisdiction is the key to answering the certified question: if Section 13-217 does not operate as a jurisdictional bar to a circuit court retaining jurisdiction to allow reinstitution of a voluntarily dismissed case, the answer must be "yes." Tiernan attempts to brush away this issue as "seeking application of the law to the facts of a specific case," as though that were somehow improper. All cases apply the law to specific facts – that is why a case exists to begin with.

But Tiernan misstates the law. The authority she cites states, "[I]f an answer *is dependent upon* the underlying facts of a case, the certified question is improper." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21 (emphasis added). That is quite different from Tiernan's proposition. Eighner seeks no such thing in this appeal. The answer to the certified question depends upon whether Section 13-217 is read to impose a limit on a circuit court's ability to retain jurisdiction after a voluntary dismissal. This is not a fact-dependent question, but rather one of straightforward statutory interpretation. The Circuit Court's disposition below was merely the fact that triggered the question coming before this Court.

Tiernan's analysis of the text of the Circuit Court's order also falls short. She makes much of *Brigando v. Republic Steel Corp.*, 180 Ill. App. 3d 1016 (1st Dist. 1989), but that case stands only for the proposition that a circuit court's intent must be examined from the language it uses in its

orders. The actual order in *Brigando* could not be more different from that here. There, the circuit court's order provided for a simple dismissal with prejudice – no additional language. 180 Ill. App. 3d at 1021. From that, it was easy for the Appellate Court to conclude it was "clear" that the order "was an order of dismissal" without any "special circumstances . . . which could have extended the [circuit] court's jurisdiction." *Id.*

Here, however, the Circuit Court's order granted dismissal "with leave to reinstate within one year." C5; A2. If the order were merely a dismissal, as Tiernan would read it, the language "with leave to reinstate" would be superfluous, as Section 13-217 already provides the ability to file a new action. Nor, if the order were a mere dismissal, would the Circuit Court have the ability to grant leave for anything beyond the thirty days for which it would retain jurisdiction after a mere dismissal. This provision of the order must be read to have meaning, and for it to have any meaning at all, the only logical conclusion is that the court retained jurisdiction to allow for reinstatement of the claims under the existing case number.

Nor does Tiernan's reliance on the language of 735 ILCS 5/2-1009 operate to restrict the Circuit Court's ability to retain jurisdiction for the action to be reinstated under the same case number. Her argument that the only conditions imposed by the statute on dismissal are notice and payment of costs, as well as her argument that the statute provides no "conditions for reinstating a case," fail to analyze the statutory language properly. Section 2-1009 allows for voluntary dismissal only "by order" –

that is, on terms fixed by the circuit court in a dismissal order. 735 ILCS 5/2-1009(a). Nothing in the statutory language forbids a court from retaining jurisdiction, and the specification that dismissal occur "by order" gives circuit courts the discretion to do so.

Tiernan's reading of Section 2-1009 would impose a jurisdictional bar on a circuit court just as much as the Appellate Court here read Section 13-217 to impose. Just like Section 13-217, however, nothing in Section 2-1009 restricts or is intended to restrict a circuit court's jurisdiction. Reading any such restriction into the statute would impermissibly venture far outside its plain language. *See*, *Krautsack v. Anderson*, 223 Ill. 2d 541, 553 (2006) ("The best indication of [legislative] intent is the language of the statute, which must be given its plain and ordinary meaning.").

Indeed, the constitutional nature of circuit court jurisdiction mandates otherwise. Circuit court jurisdiction as conferred by the Illinois Constitution is expansive, and the legislature may only limit it in the area of administrative review. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335–36 (2002). In keeping with this expansive nature and treatment of circuit court jurisdiction, neither Section 2-1009 nor Section 13-217 can be read to impose any limitations on a circuit court's ability to retain jurisdiction to allow reinstatement of a voluntarily dismissed action.

Accordingly, when a circuit court by its "order," as specified in Section 2-1009, retains jurisdiction to reinstate the action, a complaint

refiled under the same case number satisfies the language of Section 13-217.

IV. In addressing the propriety of the reinstated complaint in the original action, the Appellate Court issued a holding in a case over which it had no jurisdiction.

Despite its ostinato repetition of the maxim that review of certified questions is limited to the question certified, Tiernan seeks to apply the exception to the Appellate Court's instructions on remand when it works to her advantage. The problem with the Appellate Court's remand order, however, is that it does not only exceed the bounds of the question certified; it exceeds the bounds of the entire case before the court. In addressing the validity of the reinstated complaint in the original action, the Appellate Court issued a holding in a case over which it lacked jurisdiction.

V. Equitable tolling is an appropriate and permissible means to achieve an equitable result in light of the uncertainty in the state of the law.

Although review of certified questions is limited to the question certified, "once [the court] ha[s] answered the certified questions, in the interests of judicial economy *and the need to reach an equitable result*, [it] will consider the propriety of the circuit court order that gave rise to these proceedings." *De Bouse v. Bayer*, 235 Ill. 2d 544, 550 (2009) (emphasis added). If ever a situation justified expanding beyond the certified question for the sake of equity existed, it exists here. A lack of clarity in the law resulted in an injured plaintiff's claims being extinguished through

no fault of his own. Ensuring an equitable outcome is exactly the objective the equitable tolling doctrine seeks to achieve.

Tiernan's assertion that Eighner could have read the statutes is simplistic. At issue in this appeal is the *interpretation* of those statutes, which no Illinois appellate authority addressed at the time Eighner reinstated his complaint under the original case number in accordance with the Circuit Court's order. Indeed, the Circuit Court itself noted that reinstating a complaint under the existing case number of the voluntarily dismissed case was common practice in that court. Tiernan also overlooks that the Circuit Court certified and the Appellate Court accepted that very question. The only way Eighner could have known that what he did was improper at the time he filed it was to have a crystal ball revealing to him the Appellate Court's eventual ruling.

Whichever way this Court resolves the question, its unresolved nature at the time Eighner reinstated the voluntarily dismissed action strongly favors application of the equitable tolling doctrine to allow Eighner's claims to reach resolution in spite of the unresolved procedural issue that brought the case here.

CONCLUSION

For the foregoing reasons, Plaintiff-Petitioner Stanley Eighner respectfully requests that this Honorable Supreme Court reverse the judgment of the Appellate Court dated March 5, 2020 and answer the certified question in the affirmative. In the alternative, if this Court

answers the certified question in the negative, then Plaintiff requests this Court to apply the doctrine of equitable tolling to allow his refiled complaint to avoid the time bar imposed by the Appellate Court.

Dated: December 2, 2020

Respectfully submitted,

STANLEY EIGHNER, Plaintiff

By: */s/ John P. DeRose*
One of Plaintiff's Attorneys

John P. DeRose (#0620300)
John P. DeRose & Associates
615 N. York Road
Hinsdale, Illinois 60521
(630) 920-1111
john@johnderoselaw.com

SUPREME COURT RULE
341(C) CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 341(c), I certify that this Reply Brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Reply Brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the Reply Brief under Rule 342(a) is 1,750 words.

/s/ John P. DeRose

No. 126101

In the Supreme Court of Illinois

STANLEY EIGHNER,

Plaintiff-Appellant,

v.

PATRICIA J. TIERNAN,

Defendant-Appellee.

NOTICE OF FILING AND PROOF OF SERVICE

TO: Michael J. Ripes
Keith J. Rhine
RIPES, NELSON, BAGGOT & KALOBRATSOS, P.C.
205 W. Randolph St., Suite 2110
Chicago, IL 60606-1810
mripes@rnbk.com
krhine@rnbk.com

I hereby certify that on December 2, 2020, I electronically filed the foregoing **Reply Brief of Plaintiff-Appellant Stanley Eighner** with the Clerk of the Supreme Court using Odyssey eFileIL and served a copy thereof upon the attorneys of record listed above via electronic mail.

/s/ John P. DeRose

Under penalties as provided by law pursuant to Illinois Code of Civil Procedures (735 ILCS 5/1-109), I certify that the statements set forth herein are true and correct.

JOHN P. DEROSE (#0620300)
DEROSE & ASSOCIATES
615 N. YORK ROAD
HINSDALE, ILLINOIS 60521
(630) 920-1111
john@johnderoselaw.com
Attorney for Plaintiff-Petitioner