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## The Vagaries of Rule 103(b)

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# The Vagaries of Rule 103(b)

Robert G. Johnston\* and Iain D. Johnston\*\*

## I. INTRODUCTION

Illinois Supreme Court Rule 103(b) allows a court to dismiss an action for a plaintiff's failure to use reasonable diligence to obtain service of process.<sup>1</sup> The rule helps prevent delays and circumvention of the applicable statute of limitations.<sup>2</sup> A plaintiff bears the burden of showing reasonable diligence in effecting service.<sup>3</sup> The test of reasonable diligence is an objective test measured by the totality of circumstances, traditionally tested by six factors.<sup>4</sup> The defendant need not suffer any prejudice by the lack of diligence,<sup>5</sup> and, under certain circumstances, the defendant can waive the defense.<sup>6</sup> Whether the dismissal under Rule 103(b) is with or without prejudice depends on whether the failure to obtain service of process occurred before or after the expiration of the statute of limitations.<sup>7</sup>

Rule 103(b) has a troubled history of application both when used in isolation and when used in conjunction with other provisions of the Illinois Code of Civil Procedure. In particular, Rule 103(b) has had a problematic interplay with sections 2-1009<sup>8</sup> and

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1. ILL. REV. STAT. ch. 110A, para. 103(b) (1989).

2. *Greenwood v. Blondell*, 85 Ill. App. 3d 186, 406 N.E.2d 204 (1st Dist. 1980). See *infra* note 18 and accompanying text.

3. *Dawson v. St. Francis Hosp.*, 174 Ill. App. 3d 351, 528 N.E.2d 362 (1st Dist. 1988) (placing the burden of proof on the plaintiff). See *infra* note 24 and accompanying text.

4. *Hanna v. Kelly*, 91 Ill. App. 3d 896, 414 N.E.2d 1262 (1st Dist. 1980) (identifying the six factors measuring the test of reasonable diligence). See *infra* notes 25-27 and accompanying text.

5. *Kappel v. Errera*, 164 Ill. App. 3d 673, 674, 518 N.E.2d 226, 227 (1st Dist. 1987). See *infra* note 28 and accompanying text.

6. *Daily v. Hartley*, 77 Ill. App. 3d 697, 704, 396 N.E.2d 586, 591 (3d Dist. 1979) ("It is only where it is obvious that defendant's participation and utilization of available pre-trial discovery procedures are in anticipation of a defense on the merits that . . . waiver . . . should be applied.") See text accompanying notes 72-89.

7. ILL. REV. STAT. ch. 110A, para. 103(b) (1989). Rule 103(b) allows for dismissal with prejudice only after the expiration of the statute of limitations. *Id.* See *infra* note 112 and accompanying text.

8. ILL. REV. STAT. ch. 110, para. 2-1009 (1989). Section 2-1009 allows a plaintiff to

13-217,<sup>9</sup> which allow a plaintiff to dismiss a complaint voluntarily and then to refile the claim. The Illinois Supreme Court has evaluated the use and application of Rule 103(b) in light of these two sections four times in as many years.<sup>10</sup>

In order to develop a greater understanding of Rule 103(b) and its interaction with the rules governing voluntary dismissals and refilings, this Article begins with a general discussion of Rule 103(b) and the standard used in determining a Rule 103(b) motion.<sup>11</sup> Part III analyzes the interplay between Rule 103(b) and sections 2-1009 and 13-217 of the Illinois Code of Civil Procedure.<sup>12</sup> Part IV concludes with a discussion of the impropriety of giving retroactive application to the rule of *O'Connell v. St. Francis Hospital*.<sup>13</sup>

## II. ILLINOIS SUPREME COURT RULE 103(B)

### A. *In General*

Illinois Supreme Court Rule 103(b) states,

If the plaintiff fails to exercise reasonable diligence to obtain service prior to the expiration of the applicable statute of limitations, the action as a whole or as to any unserved defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice. In either case the dismissal may be made on the application of any defendant or on the court's own motion.<sup>14</sup>

The purpose of Rule 103(b) is to protect defendants from unneces-

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dismiss its claim voluntarily prior to a trial or hearing or the filing of a counterclaim. *Id.* See *infra* note 133 and accompanying text.

9. ILL. REV. STAT. ch. 110, para. 13-217 (1989). Section 13-217 allows a plaintiff to refile an action that has been voluntarily dismissed or dismissed for want of prosecution within the statute of limitations' remainder or one year, whichever is greater. *Id.* See *infra* notes 133-37 and accompanying text.

10. See *Martinez v. Erickson*, 127 Ill. 2d 112, 535 N.E.2d 853 (1989) (remanding for further consideration of plaintiff's diligence in obtaining service of summons on refiling); *O'Connell v. St. Francis Hosp.*, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986) (if a Rule 103(b) motion is made before a plaintiff's motion to voluntarily dismiss, the Rule 103(b) motion will be heard on the merits prior to consideration of plaintiff's motion to dismiss voluntarily). See also *Muskat v. Sternberg*, 122 Ill. 2d 41, 521 N.E.2d 932 (1988) (holding that *O'Connell* was to be applied retroactively); *Catlett v. Novak*, 116 Ill. 2d 63, 506 N.E.2d 586 (1987) (reaffirming *O'Connell*, 112 Ill. 2d 273, 492 N.E.2d 1322). For a complete discussion of the aforementioned cases, see *infra* notes 148-90 and accompanying text.

11. See *infra* notes 14-132 and accompanying text.

12. See *infra* notes 133-190 and accompanying text.

13. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986). See *infra* notes 191-212 and accompanying text.

14. ILL. REV. STAT. ch. 110A, para. 103(b) (1989).

sary<sup>15</sup> or intentional<sup>16</sup> delays and stale claims,<sup>17</sup> to prevent the circumvention of the statute of limitations,<sup>18</sup> and to promote expeditious handling of suits.<sup>19</sup> Although the purposes of Rule 103(b) are valid, courts have warned that it should be applied with judicial restraint,<sup>20</sup> that it should not be used to dispose conveniently of litigation,<sup>21</sup> and that it should not be used as a device to reduce a backlog of cases.<sup>22</sup>

### B. Standard

Once the defense of lack of diligence has been raised, either by the defendant or the court,<sup>23</sup> the plaintiff bears the burden of proving that it exercised reasonable diligence in effecting service of process.<sup>24</sup> The test of reasonable diligence is an objective test<sup>25</sup>

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15. *Hanna v. Kelley*, 91 Ill. App. 3d 896, 900, 414 N.E.2d 1262, 1266 (1st Dist. 1980). In *Hanna*, the appellate court affirmed a dismissal when the plaintiff's only efforts included moving for a stay of discovery until all the parties appeared and serving interrogatories. *Id.* at 899, 414 N.E.2d at 1264.

16. *Margetich v. McCarrol*, 97 Ill. App. 3d 502, 423 N.E.2d 266 (3rd Dist. 1981). In *Margetich*, the court held that Rule 103(b) is a jurisdictional limitation. *Id.* at 504, 423 N.E.2d at 267. The court therefore applied Rule 103(b) to this paternity action in which twenty-seven months passed between the service and the filing of the complaint, and there was no evidence to show that the delay was reasonable. *Id.*

17. *Meyer v. Wardrop*, 37 Ill. App. 3d 243, 345 N.E.2d 762 (1st Dist. 1976). In *Meyer*, the appellate court affirmed dismissal for lack of reasonable diligence, when despite the listing of defendant's residence and business in a local directory, service was not obtained until four years after the cause of action. *Id.* at 247-48, 345 N.E.2d at 766.

18. ILL. REV. STAT. ch. 110, para. 2-201(a) (1990) provides that an action is commenced by filing. If an action is filed even one day before the statute of limitations runs, it is timely. Rule 103(b) requires reasonable diligence in obtaining service of process so as not to unduly delay notice to the defendant that an action was filed. *See Wallace v. Smith*, 75 Ill. App. 3d 739, 394 N.E.2d 665 (1st Dist. 1979) (affirming a dismissal when there was no attempt to serve a defendant-agent for two and a half years after the complaint was filed, and the plaintiff knew the defendant's location); *Faust v. Michael Reese Hosp.*, 61 Ill. App. 3d 233, 377 N.E.2d 1040 (1st Dist. 1978). *But see Aranda v. Hobart Mfg. Corp.*, 66 Ill. 2d 616, 363 N.E.2d 796 (1977) (Dooley, J., concurring) (diligence is immaterial to actions refiled under section 24 (current section 13-217)).

19. *Margetich*, 97 Ill. App. 3d at 504, 423 N.E.2d at 267.

20. *Wallace*, 75 Ill. App. 3d at 743, 394 N.E.2d at 668.

21. *Aranda*, 66 Ill. 2d 616, 363 N.E.2d 796 (Dooley, J., concurring). *See infra* notes 138-47 and accompanying text.

22. *Galvan v. Morales*, 9 Ill. App. 3d 255, 258-59, 292 N.E.2d 36, 38-39 (1st Dist. 1972) ("Rule 103(b) is not used merely as a device to reduce the backlog of cases, but consideration of the competing factors inherent in ruling on a Rule 103(b) motion should be given to each case in which such a motion arises.").

23. ILL. REV. STAT. ch. 110A, para. 103(b) (1989).

24. *Kappel v. Errera*, 164 Ill. App. 3d 673, 679, 518 N.E.2d 226, 230 (1st Dist. 1987) ("It is plaintiff's burden to show that he has exercised reasonable diligence to obtain service of process on a defendant."); *Gatto v. Nelson*, 142 Ill. App. 3d 284, 287, 492 N.E.2d 1, 4 (1st Dist. 1986) ("The burden is on the plaintiff to show that he has exercised reasonable diligence to obtain service."); *Montero v. University of Ill. Hosp.*, 57 Ill. App.

measured by the totality of the circumstances.<sup>26</sup> Under the totality of the circumstances standard, courts have considered several factors when determining whether the plaintiff used reasonable diligence in obtaining service after the statute of limitations expired. The six factors are (1) the length of time used to obtain service of process; (2) the activities of the plaintiff; (3) any knowledge on the part of the plaintiff of the defendant's location; (4) the ease with which the defendant's whereabouts could have been ascertained; (5) the actual knowledge by the defendant of the pendency of the action as the result of ineffective service; and (6) special circumstances which would affect the efforts made by the plaintiff.<sup>27</sup> Prejudice to the defendant is not included among the factors considered in determining reasonable diligence. The courts have consistently held that the defendant need not show prejudice resulting from a plaintiff's lack of reasonable diligence in obtaining service.<sup>28</sup>

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3d 206, 210, 372 N.E.2d 1010, 1013 (1st Dist. 1978) ("The burden was clearly on plaintiff.").

25. *Dawson v. St. Francis Hosp.*, 174 Ill. App. 3d 351, 356, 528 N.E.2d 362, 366 (1st Dist. 1988) ("The determination of what constitutes reasonable diligence under Supreme Court Rule 103(b) has been addressed by the courts, who [sic] use an objective standard."); *Semersky v. West*, 166 Ill. App. 3d 637, 642, 520 N.E.2d 71, 74 (2d Dist. 1988) ("The standard for determining whether reasonable diligence has been exercised is an objective one."); *North Cicero Dodge v. Victoria Feed Co.*, 151 Ill. App. 3d 860, 863, 503 N.E.2d 868, 870 (3d Dist. 1987) ("The standard for determining reasonable diligence is an objective one.").

26. *Martinez v. Erickson*, 127 Ill. 2d 112, 122, 535 N.E.2d 853, 858 (1989) ("The determination of diligence must be made in light of the totality of the circumstances."); *Penrod v. Sears, Roebuck & Co.*, 150 Ill. App. 3d 125, 129, 501 N.E.2d 367, 369 (4th Dist. 1986) ("Rule 103(b) is not based upon the subjective test of the plaintiff's intent but rather upon the objective test of reasonable diligence in effecting service."); *Faust v. Michael Reese Hosp.*, 61 Ill. App. 3d 233, 236, 377 N.E.2d 1040, 1043 (1st Dist. 1978) ("Each case must be judged and evaluated on its own facts and circumstances."); *Montero*, 57 Ill. App. 3d at 210, 372 N.E.2d at 1013 ("Each case will be decided on its own particular facts and circumstances."); *Alsobrook v. Cote*, 133 Ill. App. 2d 261, 264, 273 N.E.2d 270, 272 (1st Dist. 1971) ("There is no fixed rule or absolute standard which can be universally applied to determine whether a plaintiff has exercised reasonable diligence to obtain service; each case, of necessity, must be judged and evaluated on its own peculiar facts and circumstances.").

27. *Segal v. Sacco*, 175 Ill. App. 3d 504, 506, 529 N.E.2d 1038, 1039 (1st Dist. 1988); *Daily v. Hartley*, 77 Ill. App. 3d 697, 701, 396 N.E.2d 586, 589 (3d Dist. 1979); *Alsobrook*, 133 Ill. App. 2d at 264, 273 N.E.2d at 272.

28. *Kappel*, 164 Ill. App. 3d at 679, 518 N.E.2d at 230 ("defendant . . . has no obligation to establish that he has been prejudiced by the delay of service"); *Gatto*, 142 Ill. App. 3d at 287, 492 N.E.2d at 4 ("defendant need not establish that he has been prejudiced by the delay"); *Montero*, 57 Ill. App. 3d at 210, 372 N.E.2d at 1013 ("[d]efendants were under no obligation to show that they had been prejudiced by the complained of delays in service of process").

### 1. Time

While the length of time used to obtain service is an important factor in determining reasonable diligence, “[R]ule 103(b)] does not set a specific time limit within which a defendant must be served.”<sup>29</sup> The effect of the delay upon the reasonable diligence inquiry thus varies with the facts of each case. For example, in *Kappel v. Errera*,<sup>30</sup> in which seven years passed between the initial filing of the action and the service of process, the court stated, “[c]learly, absent a satisfactory explanation, the delay in effectuating service of process . . . was unreasonable.”<sup>31</sup> In comparison, in *Galvan v. Morales*,<sup>32</sup> a delay of less than thirteen months was not found unreasonable.<sup>33</sup> The *Galvan* court stated that, “[g]iven the period of time in which service was obtained, in light of the statute of limitations and plaintiff’s activities in attempting to locate and serve the defendants, we think that the plaintiff exercised reasonable diligence to obtain service on the defendants.”<sup>34</sup>

Although the temporal component of the totality of circumstances test involves no fixed standard or rule, the period of time used to obtain service of process can be dispositive. In *Segal v. Sacco*,<sup>35</sup> for example, almost five months passed between the filing and the service, and the plaintiff made no attempt to have process served during that time. In ruling on the defendant’s Rule 103(b) motion, the court stated, “The first factor, length of time used to obtain service of process, is determinative here.”<sup>36</sup> The court noted that, “the time here was simply too short to permit dismissal with prejudice of the entire action.”<sup>37</sup> Thus, despite the plaintiff’s complete lack of effort to obtain service during the five-month period, the court held that the plaintiff had exercised reasonable diligence. The holding in *Segal* is perplexing because under a totality of the

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29. *Jarmon v. Jinks*, 165 Ill. App. 3d 855, 861, 520 N.E.2d 783, 786 (1st Dist. 1987) (reasonable diligence was found when plaintiff made numerous efforts to locate the defendant, although over three years passed between the filing and the service); *Faust*, 61 Ill. App. 3d at 236, 377 N.E.2d at 1042.

30. 164 Ill. App. 3d 673, 518 N.E.2d 226 (1st Dist. 1987).

31. *Id.* at 679, 518 N.E.2d at 231.

32. 9 Ill. App. 3d 255, 292 N.E.2d 36 (1st Dist. 1972).

33. *Id.* at 258, 292 N.E.2d at 38.

34. *Id.* In *Galvan*, a dram shop case, the plaintiff’s efforts included searching records of the Liquor Commission and tax records of the Cook County collector’s office pertaining to the property on which the tavern was located. *Id.* at 257, 292 N.E.2d at 37.

35. 175 Ill. App. 3d 504, 529 N.E.2d 1038 (1st Dist. 1988).

36. *Id.* at 506, 529 N.E.2d at 1040.

37. *Id.* *Segal* cites a long list of cases discussing the permissible and impermissible length of time between the filing or running of the statute of limitations and the service of process. *Id.* at 507-08, 529 N.E.2d at 1040.

circumstances standard all the facts must be examined; thus, the court should have considered the plaintiff's inactivity during the five-month period as well as the other factors involved in the reasonable diligence inquiry.<sup>38</sup> The *Segal* court apparently disregarded these other factors and allowed the time factor to be dispositive of the reasonable diligence issue.

## 2. Activities of the Plaintiff

Generally, to avoid a Rule 103(b) dismissal, the plaintiff must have made some attempt to serve the defendant.<sup>39</sup> In those cases in which the plaintiff has made a minimal attempt to serve the defendant, however, the courts' analyses border on "Monday morning quarterbacking."<sup>40</sup> The court essentially allows hindsight to determine the reasonableness of the plaintiff's efforts to serve the defendant with process.

In *Alsobrook v. Cote*,<sup>41</sup> an auto accident case, the court held that the plaintiff failed to use reasonable diligence, despite the plaintiff's rather concerted efforts to serve process. The plaintiff took the following actions: (1) wrote to the Secretary of State, Auto Registration Division, to obtain the defendant's address; (2) checked with the county clerk, marriage license division, to determine whether the defendant had her name changed by marriage; (3) examined area telephone directories; and (4) visited the defendant's last-known address.<sup>42</sup> The court held that these actions did not amount to reasonable diligence because the plaintiff used a two-year-old accident report to retrieve the address.<sup>43</sup> Additionally, the court noted that "for a period of almost two years, the inspection of four 1967 and four 1968 telephone directories was the only effort made on behalf of the plaintiff to locate the defendant."<sup>44</sup> Finding an

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38. See *supra* text accompanying note 27 (six factors comprising the totality of circumstances test set forth).

39. *Kruk v. Birk*, 168 Ill. App. 3d 949, 957, 523 N.E.2d 93, 99 (1st Dist. 1988) ("Here the record is clear that the plaintiff made no attempt to serve any of the defendants in the first action.").

40. *Faust v. Michael Reese Hosp.*, 61 Ill. App. 3d 233, 237, 377 N.E.2d 1040, 1043-44 (1st Dist. 1978) ("[A]lthough we realize hindsight is normally excellent, it is obvious that even as a matter of foresight anyone diligently searching for a physician would be expected to contact one of several medical societies . . .").

41. 133 Ill. App. 2d 261, 273 N.E.2d 270 (1st Dist. 1971).

42. *Id.* at 263, 273 N.E.2d at 271.

43. *Id.* at 265, 273 N.E.2d at 272.

44. *Id.* The court did recognize, however, that "there is no indication in the record of where the defendant resided between December 1963 and June 1968, . . . [or] of whether the defendant's address was readily available in the telephone directories or otherwise." *Id.*

absence of reasonable diligence, the court therefore affirmed the trial court's dismissal under Rule 103(b).<sup>45</sup>

In *Faust v. Michael Reese Hospital*,<sup>46</sup> a medical malpractice suit against a defendant doctor and a codefendant hospital, the plaintiff's first service was quashed.<sup>47</sup> The plaintiff then deposed the codefendant hospital to acquire the defendant doctor's home address. The hospital supplied the wrong street name, substituting an "a" for an "i" in the street name "Bissell."<sup>48</sup> Following the deposition, the plaintiff waited eleven months to serve the defendant doctor at the address obtained. The letter was returned marked, "Not deliverable." In granting the Rule 103(b) motion, the court noted that the plaintiff's delay of almost one year in attempting service at the incorrect address showed a lack of diligence.<sup>49</sup> The court reasoned that although an attempted service at the wrong address would have been ineffectual, it would have put the plaintiff on notice that the address was wrong.<sup>50</sup> The plaintiff then could have used other diligent methods to find the defendant.<sup>51</sup> The plaintiff's untimely service therefore evidenced a lack of reasonable diligence.<sup>52</sup>

In *Montero v. University of Illinois Hospital*,<sup>53</sup> the court held that the plaintiff failed to use reasonable diligence in obtaining service of process.<sup>54</sup> In this medical malpractice case against the hospital and several doctors, the plaintiff attempted to serve three alias summonses; it made inquiries to the post office, the hospital where the doctor worked and the American Medical Association; it also published notice and checked the new telephone directory for each year.<sup>55</sup> Despite these rather significant efforts to locate the individual defendants, the court held that the plaintiff did not exercise reasonable diligence.<sup>56</sup> The court's conclusion was based on plaintiff's failure to use discovery procedures against the codefendant hospital to gain information regarding the whereabouts of the indi-

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45. *Id.*

46. 61 Ill. App. 3d 233, 377 N.E.2d 1040 (1st Dist. 1978).

47. *Id.* at 235, 377 N.E.2d at 1042.

48. *Id.*

49. *Id.* at 237, 377 N.E.2d at 1043.

50. *Id.*

51. *Id.* at 238, 377 N.E.2d at 1044.

52. *Id.*

53. 57 Ill. App. 3d 206, 372 N.E.2d 1010 (1st Dist. 1978).

54. *Id.* at 210, 372 N.E.2d at 1013.

55. *Id.* at 208, 372 N.E.2d at 1012.

56. *Id.* at 210, 372 N.E.2d at 1013.



vidual doctor defendants.<sup>57</sup>

In contrast, in *Licka v. William A. Sales, Ltd.*,<sup>58</sup> the court held that the plaintiff, who also did not use discovery procedures to gain information regarding the defendant's whereabouts, exercised reasonable diligence to obtain service of process.<sup>59</sup> In this case, the plaintiff searched telephone directories and contacted the American Medical Association.<sup>60</sup> The plaintiff later obtained service on the defendant thirteen months after the first amended complaint naming the hospital and doctor as codefendants was filed.<sup>61</sup> Despite the thirteen-month delay and the failure to use discovery procedures to facilitate locating the defendant doctor, the court ruled that the plaintiff exercised reasonable diligence.<sup>62</sup>

As evidenced by the different weight placed on the importance of using discovery procedures by the courts in *Montero* and *Licka*, the totality of circumstances standard allows the court wide discretion in determining whether the plaintiff's activities constituted reasonable diligence. This broad range of discretion permits the courts to focus on one or more factors while giving other factors less weight. Although this discretion is necessary, it poses the risk of allowing trial courts to dispose of litigation that may have substantive merit.

### 3. Knowledge of the Defendant's Location

Generally, if a plaintiff knows a defendant's location, yet fails to obtain service within a reasonable period of time, the defendant's motion for dismissal for lack of reasonable diligence will be granted.<sup>63</sup> In *Penrod v. Sears, Roebuck & Co.*,<sup>64</sup> the plaintiff attempted service of process with the filing of the complaint and attached the name and address of the registered agent. The court concluded that the plaintiff "conclusively showed that he knew how to locate the defendant for service by setting forth the name and address of the registered agent in his request for summons . . . attached to the complaint."<sup>65</sup> The plaintiff, however, failed to ex-

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57. *Id.*

58. 70 Ill. App. 3d 929, 937-38, 388 N.E.2d 1261, 1267-68 (1st Dist. 1979).

59. *Id.* at 938, 388 N.E.2d at 1268.

60. *Id.* at 931-32, 388 N.E.2d at 1263.

61. *Id.* at 932, 388 N.E.2d at 1263. The delay in service resulted from the existence of two doctors with the same name. *Id.*

62. *Id.* at 938, 388 N.E.2d at 1268.

63. *Penrod v. Sears, Roebuck & Co.*, 150 Ill. App. 3d 125, 129, 501 N.E.2d 367, 369 (4th Dist. 1986).

64. *Id.* at 125, 501 N.E.2d at 367.

65. *Id.* at 129, 501 N.E.2d at 369.

ercise due diligence in assuring that the summons was issued by the clerk of the court and delivered to the sheriff for service.<sup>66</sup> Consequently, the court held that the plaintiff failed to exercise reasonable diligence and affirmed the trial court's dismissal under Rule 103(b).<sup>67</sup>

In contrast to *Penrod*, the plaintiff in *Jarmon v. Jinks*<sup>68</sup> "never ascertained where [the defendant] resided"<sup>69</sup> despite substantial and numerous efforts to locate the defendant. The plaintiff made several inquiries to the United States Post Office and the Illinois Secretary of State and also searched telephone directories.<sup>70</sup> The court concluded because the plaintiff made several concerted, yet unsuccessful, efforts to locate the defendant, the plaintiff used reasonable diligence and affirmed denial of the defendant's Rule 103(b) motion.<sup>71</sup>

#### 4. The Ease with Which Defendant's Location Could Have Been Ascertained

The importance of the ease with which the plaintiff could have located the defendant is exemplified in *Daily v. Hartley*.<sup>72</sup> In *Daily*, the plaintiff served the defendant eight years, seven months and twenty-seven days after the cause of action arose and six years, seven months, and twenty-eight days after the action was originally filed.<sup>73</sup> Although the court could have simply used the six and a half year delay to justify its finding of a lack of reasonable diligence, the court instead focused on the ease factor.<sup>74</sup>

The plaintiff in *Daily* was involved in an automobile accident with a fellow union pipefitter, Richard MacFarlane.<sup>75</sup> One day before the statute of limitations would have run, the plaintiff filed suit against MacFarlane, but the complaint referred to him as "MacFarland."<sup>76</sup> The plaintiff made several attempts to locate the

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66. *Id.* The plaintiff waited over four months after the complaint was initially filed to inquire at the clerk's office whether a summons had ever been issued. Upon learning that none had in fact been issued, the plaintiff waited an additional three months before making a second request for a summons. *Id.* at 126, 501 N.E.2d at 367.

67. *Id.* at 129, 501 N.E.2d at 369.

68. 165 Ill. App. 3d 855, 520 N.E.2d 783 (1st Dist. 1987).

69. *Id.* at 861, 520 N.E.2d at 786.

70. *Id.* After unsuccessfully serving two alias summons, the plaintiff finally effected service of the defendant through the Secretary of State. *Id.* at 858, 520 N.E.2d at 786.

71. *Id.* at 862, 520 N.E.2d at 787.

72. 77 Ill. App. 3d 697, 396 N.E.2d 586 (3d Dist. 1979).

73. *Id.* at 701, 396 N.E.2d at 589.

74. *Id.* at 701 396 N.E.2d at 589-90.

75. *Id.* at 698, 396 N.E.2d at 588.

76. *Id.*

defendant, including inquiries to acquaintances and the union.<sup>77</sup> Daily also searched area telephone directories. Daily's first attorney checked with both the Illinois State Police and the Will County Sheriff's Department, twice attempted to obtain the defendant's address from the union, hired a private investigator and examined area telephone directories. Daily's second attorney, hired in 1975, five years after the filing, exerted similar efforts.<sup>78</sup> Finally, in 1976, Daily discovered that MacFarlane had been killed in a snowmobile accident.<sup>79</sup> The plaintiff then filed a petition to appoint the public administrator of Will County as administrator of MacFarlane's estate and subsequently obtained service on the administrator.<sup>80</sup>

Despite the substantial delay in effecting service, the court focused on the ease with which the defendant's location could have been ascertained.<sup>81</sup> The court stated that "[t]he plaintiff could have *easily* discovered MacFarlane's real name and address by subpoenaing the records of the pipefitters union local."<sup>82</sup> The court also noted that the plaintiff could have obtained the accident report from the state police.<sup>83</sup> Because the plaintiff failed to utilize these relatively simple means of discovering the defendant's location, the court held that the plaintiff failed to exercise reasonable diligence.<sup>84</sup>

It is curious to note that despite the great amount of time between filing and service, the court focused on the ease factor to justify its dismissal pursuant to Rule 103(b). In so doing, the court suggests that even an enormous amount of time between filing and service will not be sufficient grounds for Rule 103(b) dismissal if reasonable diligence to effect service during this period can be shown. The court seemingly utilized the ease factor to find an absence of reasonable diligence and to dismiss the plaintiff's claim. *Daily* plainly demonstrates that, under the Rule 103(b) totality of cir-

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77. *Id.* at 699, 396 N.E.2d at 588.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 701, 396 N.E.2d at 590.

82. *Id.* (emphasis added).

83. *Id.* The court stated that, "the *ease* with which Mrs. MacFarlane obtained the report from the State Police makes it evident that plaintiff should have obtained the report with equal *ease*." *Id.* (emphasis added). Yet, the court apparently overlooked that the plaintiff "[had] checked with both the Illinois State Police and the Will County Sheriff's Department to ascertain if an accident report had been filed, and was informed that none had." *Id.* at 699, 396 N.E.2d at 588. Thus, the plaintiff's efforts to obtain service of process were arguably more reasonable than the court stated.

84. *Id.* at 701, 396 N.E.2d at 590.

cumstances test, no one factor is determinative of a finding of reasonable diligence; rather, all factors interact and affect one another.

### 5. Defendant's Actual Knowledge of the Action

Actual knowledge of the suit by the defendant is another factor used to determine reasonable diligence under the totality of circumstances test. Although most courts tacitly recognize that under this test each factor has to be weighed in determining whether reasonable diligence was used, consideration of the actual knowledge factor *expressly* recognizes the importance of the totality of the circumstances. In *Gatto v. Nelson*,<sup>85</sup> for example, the court stated that, "a defendant's actual knowledge of the pendency of the action is only one factor to be considered."<sup>86</sup> Likewise, in *Faust*,<sup>87</sup> the court stated, "a defendant's actual knowledge of the suit will not prevent a dismissal under Rule 103(b) when, under all the circumstances, a trial court finds that a plaintiff has failed to exercise reasonable diligence in effecting service."<sup>88</sup> Thus, "even assuming that the record contains evidence sufficient to establish that [the defendant] possessed actual knowledge, such a factor is not dispositive of the [due diligence] issue."<sup>89</sup>

### 6. Special Circumstances

In determining reasonable diligence, the courts consider any special circumstances, such as a divorce, remarriage or change of surname, which would hinder a plaintiff's efforts to locate and serve a defendant.<sup>90</sup> Another example of special circumstances occurred in *Daily v. Hartley*, in which confusion existed as to the defendant's name. The court stated that, "the confusion involving the defendant's surname . . . certainly must be considered to be a 'special circumstance' affecting plaintiff's efforts."<sup>91</sup> In *North Cicero Dodge v. Victoria Feed Co.*,<sup>92</sup> however, the court ruled no special circumstances existed, even though the sheriff had returned the summons with a notation that "the [Victoria Feed Co.] was no

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85. 142 Ill. App. 3d 284, 492 N.E.2d 1 (1st Dist. 1986).

86. *Id.* at 291, 492 N.E.2d at 6.

87. 61 Ill. App. 3d 233, 377 N.E.2d 1040 (1st Dist. 1978).

88. *Id.* at 238, 377 N.E.2d at 1044.

89. *Kappel v. Errera*, 164 Ill. App. 3d 673, 680, 518 N.E.2d 226, 231 (1st Dist. 1987).

90. *Kusek v. Shamie*, 11 Ill. App. 3d 722, 298 N.E.2d 343 (1st Dist. 1973) (dismissal was reversed because the plaintiff made continuing efforts, including using a private investigator, to serve the defendant, who was divorced and remarried).

91. *Daily v. Hartley*, 77 Ill. App. 3d 697, 702, 396 N.E.2d 586, 590 (3d Dist. 1979).

92. 151 Ill. App. 3d 860, 503 N.E.2d 868 (3d Dist. 1987).

longer in operation," when in fact the company still existed.<sup>93</sup> The court asserted that the error "was not a sufficient special circumstance to excuse the delay."<sup>94</sup> It, therefore, granted the Rule 103(b) motion, holding that the plaintiff had not exercised reasonable diligence.<sup>95</sup> As evidenced by these cases, a finding of special circumstances lies within the discretion of the trial court and consequently varies with the facts of each case.<sup>96</sup>

### C. Waiver

A defendant waives the right to a dismissal under Rule 103(b) by actively participating in the defense of the action on its merits.<sup>97</sup> A plaintiff has the burden of establishing that the defendants waived their rights to the defense of Rule 103(b).<sup>98</sup> Additionally, a plaintiff cannot argue for the first time on appeal that the defendant waived a Rule 103(b) defense; it must be raised first at trial.<sup>99</sup>

*Lovell v. Hastings*<sup>100</sup> established the standard for determining when a defendant waives a Rule 103(b) defense. Under *Lovell*, a defendant waives the defense by participating in discovery.<sup>101</sup> For example, filing sworn answers to interrogatories or taking discovery depositions of the plaintiff may result in waiver of a Rule 103(b) defense.<sup>102</sup> Participation in discovery for the purpose of discovering if there are grounds for filing a motion to dismiss under Rule 103(b), however, does not constitute a waiver.<sup>103</sup> Further, a defendant must take part in discovery on its own behalf to constitute a waiver; a co-defendant cannot waive a defendant's right to

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93. *Id.* at 863, 503 N.E.2d at 870.

94. *Id.*

95. *Id.*

96. The Rule 103(b) motion's standard of review is abuse of discretion. *Miller v. Alexander*, 150 Ill. App. 3d 594, 502 N.E.2d 40 (2d Dist. 1986). *See infra* note 121 and accompanying text.

97. *Gatto v. Nelson*, 142 Ill. App. 3d 284, 292, 492 N.E.2d 1, 7 (1st Dist. 1986).

98. *Montero v. University of Ill. Hosp.*, 57 Ill. App. 3d 206, 211, 372 N.E.2d 1010, 1014 (1st Dist. 1978).

99. *Kruk v. Birk*, 168 Ill. App. 3d 949, 958, 523 N.E.2d 93, 100 (1st Dist. 1988) ("Plaintiff argues that defendants waived their rights under Rule 103(b) by answering her complaint and participating in discovery. The record reveals that this argument was not made to the trial court; consequently it is not properly before this court.").

100. 11 Ill. App. 3d 221, 296 N.E.2d 608 (5th Dist. 1973).

101. *Id.* at 223, 296 N.E.2d at 609.

102. *Id.* at 223, 296 N.E.2d at 610. No Illinois Supreme Court case has discussed waiver of a 103(b) motion. Subsequent cases have cited *Lovell* with approval and follow it as the appropriate standard. *See, e.g., Daily v. Hartley*, 77 Ill. App. 3d 697, 703-04, 396 N.E.2d 586, 591 (3d Dist. 1979).

103. *Daily*, 77 Ill. App. 3d at 703-04, 396 N.E.2d at 591.

raise a Rule 103(b) defense.<sup>104</sup> In sum, waiver occurs when a defendant participates in discovery for purposes of raising a defense on the merits.<sup>105</sup>

Currently, a division exists between the Illinois appellate districts concerning the relevance of the plaintiff's actions to the issue of waiver. In *Montero*, the first district distinguished the case at bar from *Lovell*, stating that unlike the plaintiffs in *Montero*, the *Lovell* plaintiffs "undertook considerable effort to serve the defendant."<sup>106</sup> The court therefore concluded that the plaintiff failed to establish that the defendants waived the Rule 103(b) defense.<sup>107</sup>

In contrast to the position adopted by the first district, in *Daily v. Hartley* the third district expressly denied the relevance of the plaintiff's activities in determining the issue of waiver.<sup>108</sup> The *Daily* court stated that,

It seems to us that when the issue before the court is waiver by the defendant, the particular activities of the plaintiff are irrelevant . . . . Whatever the plaintiff does . . . has no bearing in deciding whether the defendant, by full and voluntary participation in the initial stages of the litigation, has waived objection to defendant's lack of diligence under Rule 103(b).<sup>109</sup>

Thus, although the first district considers the plaintiff's efforts to serve the defendant to be of some importance to the waiver issue, the third district lends no weight to the plaintiff's activities.

#### *D. Dismissal With or Without Prejudice*

If a plaintiff's failure to exercise reasonable diligence in obtaining service of process occurs before the applicable statute of limitations has run, Rule 103(b) provides that the court may dismiss the action without prejudice.<sup>110</sup> Under such circumstances,

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104. *Montero*, 57 Ill. App. 3d at 211, 372 N.E.2d at 1014.

105. *See Semersky v. West*, 166 Ill. App. 3d 637, 642, 520 N.E.2d 71, 74 (2d Dist. 1988).

106. *Montero*, 57 Ill. App. 3d at 211, 372 N.E.2d at 1014 (citation omitted). *See also Meyer v. Wardrop*, 37 Ill. App. 3d 243, 247, 345 N.E.2d 762, 766 (1st Dist. 1976) (citing *Lovell v. Hastings*, 11 Ill. App. 3d 221, 296 N.E.2d 608 (5th Dist. 1973) ("In *Lovell*, the court observed that the 'plaintiffs undertook considerable effort in their attempt to serve the defendant.'")).

107. *Montero*, 57 Ill. App. 3d at 211, 372 N.E.2d at 1014. The determinative factor in the court's no waiver holding was the plaintiff's failure to show that the defendants either initiated or participated in discovery. *Id.* The level of the plaintiff's activities in attempting to serve process was of secondary importance. *Id.*

108. *Daily v. Hartley*, 77 Ill. App. 3d 607, 703, 396 N.E.2d 586, 591 (3d Dist. 1979).

109. *Id.*

110. ILL. REV. STAT. ch. 110A, para. 103(b) (1989).

the court has no authority to dismiss the action with prejudice.<sup>111</sup> If a plaintiff's failure to serve process occurs after the applicable limitations period has run, then the dismissal shall be granted with prejudice.<sup>112</sup>

### *E. Appeal and Review*

Plaintiffs and defendants must use different Illinois Supreme Court Rules in appealing the grant or denial of a Rule 103(b) motion. A plaintiff can appeal the grant of a Rule 103(b) motion with prejudice through either Supreme Court Rule 301<sup>113</sup> or 304.<sup>114</sup> Rule 301 allows for appeals as of right for final judgments.<sup>115</sup> Rule 304 allows for an appeal of a final order as to a party or claim in a case involving multiple parties or claims when the court finds that there is no just reason for delaying enforcement or appeal.<sup>116</sup> In

111. *Aranda v. Hobart Mfg. Co.*, 66 Ill. 2d 616, 619, 363 N.E.2d 796, 798 (1977).

112. ILL. REV. STAT. ch. 110A, para. 103(b) (1989). According to the Committee Comments to Rule 103,

[p]aragraph (b) was changed in the 1967 revision to provide that the dismissal may be with prejudice, and was further revised in 1969 to provide that a dismissal with prejudice shall be entered only when the failure to exercise due diligence to obtain service occurred after the expiration of the applicable statute of limitations. Prior to the expiration of the statute, a delay in service does not prejudice a defendant.

ILL. ANN. STAT. ch. 110A, para. 103(b) (Committee Comments) (Smith-Hurd 1985).

113. Rule 301 states,

Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception need be taken in order to make any ruling or action of the court reviewable.

ILL. REV. STAT. ch. 110A, para. 301 (1989).

114. Rule 304(a) states in relevant part:

If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. . . . [A]ny judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights and liabilities of all the parties.

ILL. REV. STAT. ch. 110A, para. 304(a) (1989).

115. *Id.* para. 301.

116. *Id.* para. 304. See also *Lawyers Title Ins. Corp. v. Kneller*, 172 Ill. App. 3d 210, 212-13, 525 N.E.2d 1155, 1157 (3d Dist. 1988) (citing ILL. REV. STAT. ch. 110A, para. 304(a) (1985)) ("Rule 304 specifically calls for a finding that there is no just reason for delaying 'enforcement or appeal':").

contrast to the plaintiff's remedies, a defendant can appeal a denial of a Rule 103(b) motion only through Supreme Court Rule 308.<sup>117</sup> Rule 308, however, allows discretionary interlocutory appeals, and it is construed strictly<sup>118</sup> and used sparingly.<sup>119</sup> Appeals under this rule are allowed only for exceptional cases.<sup>120</sup>

Because both grants and denials under Rule 103(b) lie within the sound discretion of the trial court, such rulings will not be disturbed on review absent an abuse of that discretion.<sup>121</sup>

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117. Rule 308(a) states,

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. REV. STAT. ch. 110A, para. 308(a) (1989).

118. *Getto v. City of Chicago*, 92 Ill. App. 3d 1045, 1048, 416 N.E.2d 1110, 1112 (1st Dist. 1981) (citing *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 538, 387 N.E.2d 325, cert. denied, 444 U.S. 940 (1979)).

119. See *State ex rel. Skinner v. Lombard Co.*, 106 Ill. App. 3d 307, 436 N.E.2d 566 (1st Dist. 1982).

120. *People v. Pollution Control Bd.*, 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1984) (a legislative enactment prohibiting the Board from regulating noise from sporting events was constitutional). See *Renshaw v. General Telephone Co.*, 112 Ill. App. 3d 58, 445 N.E.2d 70 (5th Dist. 1983) (discussing the structure of the Illinois Appellate Court). It is interesting to note that the defendants in both *Muskat v. Sternberg*, 122 Ill. 2d 41, 521 N.E.2d 932 (1988), and *O'Connell v. St. Francis Hospital*, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986) used Rule 308 to appeal denials of Rule 103(b) motions. See, e.g., *infra* notes 176, 155 and accompanying text.

121. *Segal v. Sacco*, 175 Ill. App. 3d 504, 506, 529 N.E.2d 1038, 1039 (1st Dist. 1988) ("Dismissal under Rule 103(b) is within the sound discretion of the trial court, and the court's judgment will not be disturbed absent an abuse of discretion."); *North Cicero Dodge v. Victoria Feed Co.*, 151 Ill. App. 3d 860, 863, 503 N.E.2d 868, 870 (3d Dist. 1987) ("A dismissal of an action pursuant to Rule 103(b) is within the sound discretion of the trial court and will not be disturbed on review absent an abuse of that discretion."); *Kappel v. Errera*, 164 Ill. App. 3d 673, 679, 518 N.E.2d 226, 231 (1st Dist. 1987) ("A Rule 103(b) motion is directed to the sound discretion of the trial court. As such, a court's determination will not be set aside on review absent a showing of an abuse of the court's discretion."); *Miller v. Alexander*, 150 Ill. App. 3d 594, 595, 502 N.E.2d 40, 41 (2d Dist. 1986) ("Motions to dismiss for failure to exercise reasonable diligence to obtain service of process are addressed to the sound discretion of the trial court, and absent abuse of discretion, that court's ruling will not be disturbed."); *Licka v. William A. Sales, Ltd.*, 70 Ill. App. 3d 929, 937, 388 N.E.2d 1261, 1267 (1st Dist. 1979) ("A motion pursuant to Rule 103(b) is addressed to the sound discretion of the trial court, and it is only where there is an abuse of discretion that a reviewing court will interfere.").



*F. Miscellaneous: Affidavits, Special Appearances, and Malpractice*

1. Affidavits

Although Rule 103(b) does not state that affidavits are required to show reasonable diligence, both plaintiffs and defendants have consistently used affidavits to show reasonable diligence or a lack thereof.<sup>122</sup> In dicta courts have required affidavits to show reasonable diligence.<sup>123</sup> In *Gatto v. Nelson*,<sup>124</sup> for example, the court made two strong statements about the need for affidavits in showing reasonable diligence. First, although the plaintiff's attorney stated that his law clerk checked telephone directories to locate the defendant, the court noted "that the motion to vacate [the dismissal] did not include an affidavit from counsel's law clerk" attesting to such investigation.<sup>125</sup> Secondly, although the plaintiff's attorney stated that he hired a private investigator, who alleged the defendant was in hiding, the court stated that, "plaintiff's counsel failed to submit an affidavit from his investigator to authenticate these averments."<sup>126</sup> Thus, although not specifically required by Rule 103(b), some courts do require affidavits to support or confute allegations of reasonable diligence.

2. Special Appearance

Despite defendants' practice of using special and limited appearances,<sup>127</sup> a special appearance is not required by defendants when they file a Rule 103(b) motion because the motion itself asks the court to exercise its jurisdiction over the matter.<sup>128</sup> Defendants, however, have continued to use a special appearance instead of ap-

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122. *North Cicero Dodge*, 151 Ill. App. 3d at 862, 503 N.E.2d at 869 ("plaintiff filed a counter-affidavit in opposition to the defendant's [Rule 103(b)] motion"); *Dawson v. St. Francis Hosp.*, 174 Ill. App. 3d 351, 356, 528 N.E.2d 362, 365 (1st Dist. 1988) ("Defendant . . . filed affidavits"); *Montero v. University of Ill. Hosp.*, 57 Ill. App. 3d 206, 211, 372 N.E.2d 1010, 1012 (1st Dist. 1978) ("record consists of two affidavits").

123. *Jarmon v. Jinks*, 165 Ill. App. 3d 855, 861, 520 N.E.2d 783, 786 (1st Dist. 1987) ("record lacks any sworn affidavits or other evidence").

124. 142 Ill. App. 3d 284, 492 N.E.2d 1 (1st Dist. 1986).

125. *Id.* at 288-89, 492 N.E.2d at 5.

126. *Id.* at 291, 492 N.E.2d at 7.

127. ILL. REV. STAT. ch. 110, para. 2-301 (1989).

128. *Caliendo v. Public Taxi Serv.*, 70 Ill. App. 2d 86, 88, 217 N.E.2d 369, 371 (1st Dist. 1966) ("The defendant . . . invoked the court's jurisdiction by asking it to exercise its power to dismiss an action . . ."); see also *Lovell v. Hastings*, 11 Ill. App. 3d 221, 223, 296 N.E.2d 608, 610 (5th Dist. 1973) ("Dismissal for lack of diligence under Supreme Court Rule 103(b) does not require that defendant proceed by way of a special appearance.").

pearing generally,<sup>129</sup> apparently believing that a Rule 103(b) general appearance will somehow prejudice their defense. This practice is unnecessary when filing a Rule 103(b) motion.

### 3. Legal Malpractice

The fifth district has recently decided that failure to use reasonable diligence to obtain service of process is a negligent act on the part of the plaintiff's attorney.<sup>130</sup> Although it is too early to predict the consequences of this decision, it seems very possible that any case in which a Rule 103(b) motion precludes a plaintiff from a cause of action because the service was obtained after the expiration of the statute of limitations could evolve instantly into a new case of legal malpractice against the plaintiff's attorney. Furthermore, once the plaintiff's case is dismissed pursuant to Rule 103(b), the attorney would be liable *per se* on the question of negligence.<sup>131</sup> The attorney, however, would not be liable *per se* on the issue of damages or causation.<sup>132</sup>

### III. INTERPLAY OF SUPREME COURT RULE 103(B) AND ILLINOIS CODE OF CIVIL PROCEDURE SECTIONS 2-1009 AND 13-217

Although standing alone Rule 103(b) has had a problematic history of application, greater difficulties arise when Rule 103(b) conflicts with the Illinois Code of Civil Procedure sections 2-1009<sup>133</sup>

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129. *Daily v. Hartley*, 77 Ill. App. 3d 697, 700, 396 N.E.2d 586, 589 (3d Dist. 1979) (defendant "filed a special and limited appearance and a motion to dismiss the plaintiff's complaint pursuant to Supreme Court Rule 103(b) . . ."); *Galvan v. Morales*, 9 Ill. App. 3d 255, 256, 292 N.E.2d 36, 37 (1st Dist. 1972) (defendants "filed a special and limited appearance . . . and one week later filed their motion to dismiss for lack of diligence.").

130. *Gray v. Hallett*, 170 Ill. App. 3d 660, 525 N.E.2d 89 (5th Dist. 1988) (holding that service of process does not require legal judgment and therefore no expert testimony is needed).

131. *Id.* at 664, 525 N.E.2d at 92 ("delaying for so long that a dismissal for lack of diligence becomes a permanent bar by virtue of Illinois Supreme Court Rule 103(b) [citation omitted] is clearly and unquestionably negligent.").

132. See Weiland, *Another Early Chapter: Attorney Malpractice and the Trial Within a Trial: Time for a Change*, 19 J. MARSHALL L. REV. 275 (1986). See generally *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982) (economic loss is generally not recoverable for a tort).

133. Section 2-1009 provides:

(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause. Thereafter, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which

and 13-217.<sup>134</sup> Recently, the relationship between Rule 103(b) and these sections has been the focus of recurrent review in the Supreme Court of Illinois. In several cases, the court has attempted to reconcile the interplay between Rule 103(b) and sections 2-1009 and 13-217. These cases generally do not involve questions pertaining to the substantive application of the Rule;<sup>135</sup> rather, the issue in these cases more accurately involves whether plaintiffs confronted with a Rule 103(b) motion can dismiss their claims voluntarily under section 2-1009 and then refile the claims pursuant to section 13-217. This practice allows the plaintiff to avoid dismissal for a lack of reasonable diligence. The Supreme Court of Illinois first explained the relationship between Rule 103(b) and section 2-1009 and 13-217 in *O'Connell v. St. Francis Hospital*.<sup>136</sup> Subsequent cases have attempted to clarify this initial explanation.<sup>137</sup>

*A. Pre-O'Connell—Aranda v. Hobart Manufacturing Corp.*

In *Aranda v. Hobart Manufacturing Corp.*,<sup>138</sup> the court reversed the trial court's dismissal for lack of reasonable diligence.<sup>139</sup> In *Aranda*, the trial court dismissed the plaintiff's case for want of

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shall be supported by affidavit or other proof. After a counterclaim has been pleaded by a defendant no dismissal may be had as to the defendant except by the defendant's consent. (b) Counter-claimants and third party plaintiffs may dismiss upon the same terms and conditions as plaintiffs.

ILL. REV. STAT. ch. 110, para. 2-1009 (1989).

134. Section 13-217 provides:

In actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if . . . the action is voluntarily dismissed by the plaintiff . . . then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff . . . may commence a new action within one year or within the remaining period of limitation, whichever is greater, . . . after the action is voluntarily dismissed by the plaintiff.

*Id.* para. 13-217.

135. See *Martinez v. Erickson*, 127 Ill. 2d 112, 113, 535 N.E.2d 853, 854 (1989) ("In neither case had the plaintiff attempted or obtained service of process on any of the defendants."); *Muskat v. Sternberg*, 122 Ill. 2d 41, 43, 521 N.E.2d 932, 933 (1988) ("The suit remained pending for two years, during which time plaintiff neither attempted nor obtained service of process upon any of the defendants."); *Catlett v. Novak*, 116 Ill. 2d 63, 65-66, 506 N.E.2d 586, 587-588 (1987) ("[The defendant] filed a motion . . . to dismiss . . . under Rule 103(b),] arguing that he was not served until nearly one year after the statute of limitations had run and until almost three years after the accident occurred. The plaintiff, in response, moved for a voluntary dismissal.")

136. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

137. See *infra* notes 164-190 and accompanying text.

138. 66 Ill. 2d 616, 363 N.E.2d 796 (1977).

139. *Id.* at 620, 363 N.E.2d at 799.

prosecution before the applicable statute of limitations had run.<sup>140</sup> No defendants had been served in that action. After the statute of limitations ran, the plaintiff refiled her action pursuant to section 24a,<sup>141</sup> now section 13-217.<sup>142</sup> All the defendants were served within a month. Because of the length of time between the filing of the first suit and the service of the summons in the second suit, the trial court held that the plaintiff lacked reasonable diligence and granted the defendant's Rule 103(b) motion. The appellate court affirmed.<sup>143</sup>

In reversing the appellate court's decision, the supreme court noted that because the case was dismissed prior to the passage of the statute of limitations, the dismissal could only be without prejudice.<sup>144</sup> The court then stated that the statute "operates . . . as an extension of the applicable statute of limitations, and the plaintiff had an absolute right to refile his complaint at any time within the extended period."<sup>145</sup> The court warned, "If the extended period of time of [section 13-217] is to serve any useful purpose, plaintiff must be accorded a reasonable time after refileing his complaint within which to obtain service."<sup>146</sup> Although the court allowed trial courts to consider the overall time span between the first complaint and the ultimate service of process, the court stated, "[T]he period of time within which the plaintiff must obtain service following the refileing of his suit . . . cannot be so abbreviated as to make the right granted by that section meaningless."<sup>147</sup> Thus, the *Aranda* court read section 13-217 and section 2-1009 liberally to prevent dismissal of the plaintiff's suit pursuant to a 103(b) motion, if the original dismissal was without prejudice.

### B. *O'Connell v. St. Francis Hospital*

In 1986, the Supreme Court of Illinois decided *O'Connell v. St. Francis Hospital*,<sup>148</sup> thereby spawning a line of cases testing not only the relationship between Rule 103(b) and sections 2-1009 and 13-217, but also a plaintiff's right to dismiss voluntarily in general.<sup>149</sup> Without reference to *Aranda*, the *O'Connell* court held

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140. *Id.* at 617, 363 N.E.2d at 797.

141. ILL. REV. STAT. ch. 83, para. 24(a) (1973).

142. *Aranda*, 66 Ill. 2d at 617, 363 N.E.2d at 797.

143. *Id.*

144. *Id.* at 619, 363 N.E.2d at 798.

145. *Id.*

146. *Id.*

147. *Id.* at 620, 363 N.E.2d at 799.

148. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

149. See *Goldberg v. Swedish Covenant Hosp.*, 160 Ill. App. 3d 867, 513 N.E.2d 919

that a Rule 103(b) motion, if made first, must be heard on its merits prior to a plaintiff's motion to dismiss under section 2-1009.<sup>150</sup>

In *O'Connell*, the defendants moved to dismiss the plaintiff's claim pursuant to Rule 103(b).<sup>151</sup> In response, the plaintiff moved for a voluntary dismissal under section 2-1009.<sup>152</sup> The trial court granted the plaintiff's voluntary dismissal and the plaintiff then refiled pursuant to section 13-217.<sup>153</sup> The defendants were then promptly served. The defendants again moved for dismissal for failure to use reasonable diligence in serving process in the original complaint.<sup>154</sup> The trial court denied the motion but certified the question pursuant to Supreme Court Rule 308.<sup>155</sup> On appeal, the plaintiff argued to the Supreme Court of Illinois that Rule 103(b) was applicable only to the service of process on the refiled complaint, and not the original complaint.<sup>156</sup>

Relying on a separation of powers argument, the court held that when a procedural legislative enactment and a court rule conflict, the rule will prevail because the court possesses constitutional authority to regulate the judicial system.<sup>157</sup> The court stated, "Rule 103(b) was adopted by this court to effectuate its historical and constitutional mandate to render justice fairly and promptly."<sup>158</sup> Because sections 2-1009 and 13-217 infringe on the court's fundamental authority to discharge its duties fairly and expeditiously, if made first, a Rule 103(b) motion must be heard on its merits prior to a motion for voluntary dismissal. In addressing the merits of the Rule 103(b) motion, the trial court may consider the circum-

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(1st Dist. 1987); *Highland v. Stevenson*, 153 Ill. App. 3d 390, 505 N.E.2d 776 (3d Dist. 1987); *Jacobson v. Ragsdale*, 160 Ill. App. 3d 656, 513 N.E.2d 1112 (5th Dist. 1987); *Rohr v. Kraus*, 153 Ill. App. 3d 1013, 506 N.E.2d 634 (5th Dist. 1987); *Mancuso v. Alda Blanch Beach*, 149 Ill. App. 3d 188, 500 N.E.2d 589 (1st Dist. 1986) (attempting to extend the rule to motions to dismiss for failure to state a claim); *Metcalf v. St. Elizabeth Hosp.*, 160 Ill. App. 3d 47, 513 N.E.2d 12 (5th Dist. 1986) (attempting to extend the rule to motions to dismiss based on an affirmative defense); *Russ v. Grady*, 149 Ill. App. 3d 660, 500 N.E.2d 1032 (5th Dist. 1986) (attempting to extend the rule to motions for summary judgment).

150. *O'Connell v. St. Francis Hosp.*, 112 Ill. 2d 273, 283, 492 N.E.2d 1322, 1327 (1986).

151. *Id.* at 276-77, 492 N.E.2d at 1323.

152. *Id.* at 277, 492 N.E.2d at 1323.

153. *Id.* at 277, 492 N.E.2d at 1323-24.

154. *Id.* at 278, 492 N.E.2d at 1324.

155. *Id.* at 277, 492 N.E.2d at 1324 (citing ILL. REV. STAT. ch. 110A, para. 308 (1983)).

156. *Id.* at 279, 492 N.E.2d at 1324-25. The plaintiff was probably relying on *Aranda* as a basis for this argument; however, the *O'Connell* court never addressed *Aranda*.

157. *Id.* at 281, 492 N.E.2d at 1326.

158. *Id.*

stances surrounding the service of process on the plaintiff's original as well as refiled complaint.<sup>159</sup> The *O'Connell* court thus sharply limited the use of sections 2-1009 and 13-217 to avoid a Rule 103(b) motion.

The *O'Connell* decision not only reversed several appellate court decisions,<sup>160</sup> it also caused an avalanche of cases seeking to extend its holding to other dispositive motions.<sup>161</sup> The courts continually refused the attempts to extend the *O'Connell* holding to other motions. The supreme court, however, eventually extended an *O'Connell*-type rule in *Gibellina v. Handley*.<sup>162</sup> In *Gibellina*, the court held that a trial court may hear and decide a motion that has been filed prior to a section 2-1009 motion when that motion, if favorably ruled on by the court, could result in a final disposition of the case.<sup>163</sup>

### C. *Catlett v. Novak*

A year after *O'Connell* was decided, the Illinois Supreme Court reaffirmed it in *Catlett v. Novak*.<sup>164</sup> In *Catlett*, the plaintiff filed a complaint against Novak and the Illinois Central Gulf Railroad ("ICG").<sup>165</sup> Novak was not served until nearly a year after the statute of limitations had run and three years after the cause of action arose.<sup>166</sup> ICG was never served on the original complaint. Novak moved for dismissal pursuant to Rule 103(b) and the plaintiff moved to dismiss voluntarily. The trial court granted the plain-

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159. *Id.* at 283, 492 N.E.2d at 1327.

160. *See Miller v. Alexander*, 150 Ill. App. 3d 594, 595, 502 N.E.2d 40, 41 (2d Dist. 1986) ("In light of the decision in *O'Connell*, *Kiven v. Mercedes-Benz . . . Land v. Greenwood . . . and LaBarge, Inc. v. Corn Belt Bank . . . are no longer good law."* (citations omitted)); *see Kiven v. Mercedes-Benz of North America Inc.*, 142 Ill. App. 3d 245, 247, 488 N.E.2d 559, 560 (1st Dist. 1985), *reversed*, 111 Ill. 2d 585, 491 N.E.2d 1167 (1986) (holding that a Rule 103(b) motion does not constitute a hearing under the voluntary dismissal statute); *Land v. Greenwood*, 133 Ill. App. 3d 537, 478 N.E.2d 1203 (4th Dist. 1985) (holding that a plaintiff may voluntarily dismiss a suit and refile within one year if done prior to trial or hearing, notwithstanding the running of the statute of limitations or the plaintiff's lack of diligence in obtaining service); *LaBarge, Inc. v. Corn Belt Bank*, 101 Ill. App. 3d 741, 428 N.E.2d 711 (4th Dist. 1981) (holding that a plaintiff could voluntarily dismiss after the defendant filed a 103(b) motion as long as the original action was filed within the statute of limitations). *See also O'Connor v. Ohio Centennial Corp.*, 124 Ill. App. 3d 281, 463 N.E.2d 1376 (3d Dist. 1984) (dismissal with prejudice for want of prosecution reversed because the plaintiff had an absolute right to refile under section 13-217).

161. *See supra* note 149.

162. 127 Ill. 2d 122, 535 N.E.2d 858 (1989).

163. *Id.* at 137-38, 535 N.E.2d at 866.

164. 116 Ill. 2d 63, 506 N.E.2d 586 (1987).

165. *Id.* at 65, 506 N.E.2d at 587.

166. *Id.*

tiff's motion. The plaintiff then refiled his complaint nine months later. Both defendants then filed motions to dismiss, claiming that section 13-217 was an unconstitutional violation of their due process rights to rely on the statute of limitations.<sup>167</sup> The trial court granted ICG's motion.<sup>168</sup>

The supreme court applied *O'Connell* and held "that a plaintiff's right to voluntarily dismiss and refile his complaint under sections 2-1009 and 13-217 are subject to the reasonable diligence standard of Rule 103(b)."<sup>169</sup> The court then remanded the cause to the trial court for a hearing on the question of reasonable diligence in serving process.<sup>170</sup> Reiterating the *O'Connell* holding, the court instructed that "the trial court 'may consider the circumstances surrounding plaintiff's service of process on his original as well as his refiled complaint.'"<sup>171</sup> The supreme court had decided *O'Connell* while the *Catlett* suit was before the lower courts; thus, in effect, the *Catlett* court applied *O'Connell* retroactively.

#### D. *Muskat v. Sternberg*

In *Muskat v. Sternberg*,<sup>172</sup> the Illinois Supreme Court explicitly approved the retroactive application of *O'Connell*.<sup>173</sup> In *Muskat*, one day before the expiration of the applicable statute of limitations, the plaintiff filed suit against a surgeon, hospital, and manufacturer alleging negligence and product liability.<sup>174</sup> For two years, the plaintiff neither attempted nor obtained service of process upon the defendant, and the action was dismissed for want of prosecution. The plaintiff later refiled her complaint, and the defendants moved to dismiss under Rule 103(b). The trial court denied the motion, holding that the time from the refiled lawsuit to the service of summons was the proper period by which to measure the plaintiff's diligence. On appeal, the appellate court reversed and remanded.<sup>175</sup>

In affirming the appellate court, the supreme court reiterated the *O'Connell* holding that the trial court may consider the circum-

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167. *Id.* at 66, 506 N.E.2d at 588.

168. *Id.*

169. *Id.* at 70, 506 N.E.2d at 590.

170. *Id.* at 70-71, 506 N.E.2d at 590.

171. *Id.* at 71, 506 N.E.2d at 590 (quoting *O'Connell v. St. Francis Hosp.*, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986)).

172. 122 Ill. 2d 41, 521 N.E.2d 932 (1988).

173. *Id.* at 50, 521 N.E.2d at 936.

174. *Id.* at 43, 521 N.E.2d at 933.

175. *Id.*

stances surrounding the plaintiff's service of process not only on the original but also on the refiled complaint.<sup>176</sup> Additionally, the court addressed whether *O'Connell* should be applied retroactively. The court gave three reasons to justify retroactive application of *O'Connell*.<sup>177</sup> First, "the holding of *O'Connell* related to procedural, and not substantive, matters."<sup>178</sup> Second, the court did "not view the holding in *O'Connell* as a clear change in the law"<sup>179</sup> because the holding in *Aranda v Hobart Manufacturing Corp.*, allowing the trial court to consider the overall span of time between the filing of the complaint and the ultimate service of process in the refiled suit, foreshadowed *O'Connell*.<sup>180</sup> Third, the court noted that it previously had applied *O'Connell* retroactively in *Catlett*.<sup>181</sup>

### E. *Martinez v. Erickson*

The Supreme Court of Illinois again questioned the retroactive application of *O'Connell* in *Martinez v. Erickson*.<sup>182</sup> In *Martinez*, on the same day the statute of limitations expired, the plaintiff brought an action in the Cook County Circuit Court, alleging medical malpractice against Dr. John Erickson, Dr. Darroll Erickson, and the Sterling-Rock Falls Clinic ("Clinic").<sup>183</sup> About five months later, one day before the statute of limitations expired, the plaintiff brought a factually related action, in the same circuit court, against Dr. Bakkiam Subbiah. The plaintiff dismissed his action voluntarily against the Ericksons and the Clinic, and the action against Dr. Subbiah was dismissed for want of prosecution. The plaintiff neither attempted nor obtained service of process on any of the defendants in either case.<sup>184</sup>

Pursuant to section 13-217, the plaintiff refiled a single action in the Circuit Court of Whiteside County against all the defendants. Although served within three weeks, all defendants eventually moved for dismissal under Rule 103(b). Eventually, the trial court granted Dr. Erickson's and the Clinic's motion for summary judg-

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176. *Id.* at 45, 521 N.E.2d at 934.

177. *Id.* at 49-50, 521 N.E.2d at 936.

178. *Id.* at 49, 521 N.E.2d at 936.

179. *Id.*

180. *Id.* at 50, 521 N.E.2d at 936 (citing *Aranda v. Hobart Mfg. Corp.*, 66 Ill. 2d 616, 363 N.E.2d 796 (1977)).

181. *Id.* For a further discussion and critique of these three factors see *infra* notes 191-212 and accompanying text.

182. 127 Ill. 2d 112, 535 N.E.2d 853 (1989).

183. *Id.* at 113, 535 N.E.2d at 854.

184. *Id.* at 113-14, 535 N.E.2d at 854.



ment and Dr. Subbiah's motion to dismiss.<sup>185</sup>

The appellate court reversed, ruling that *O'Connell* established a new principle of law that should not be applied retroactively.<sup>186</sup> The appellate court concluded that *Catlett* was not controlling because it did not examine the fact that *O'Connell* represented a clear change in the law, nor did it mention the issue of the new rule's retroactive application.<sup>187</sup>

The supreme court reversed, declaring that retroactive application of *O'Connell* was expressly resolved in *Muskat v. Sternberg*.<sup>188</sup> After reiterating the three reasons for retroactive application,<sup>189</sup> the court went on to state, "[w]e are concerned . . . that the circuit court judge may not have accorded adequate weight to the plaintiff's conduct in effecting service on the defendants following the refile of his action in Whiteside County,"<sup>190</sup> and remanded the case. Thus, *Martinez* solidified the court's previous decisions regarding retroactive application of *O'Connell*.

#### IV. THE IMPROPRIETY OF APPLYING *O'CONNELL* RETROACTIVELY

Although *Muskat* and *Martinez* explicitly set forth that the *O'Connell* rule should be applied retroactively,<sup>191</sup> the court's justification for doing so is not persuasive. *O'Connell* should not have been applied retroactively for three reasons: first, the court's arguments fail to support retroactive application; second, the companion case to *Martinez*, *Gibellina v. Handley*,<sup>192</sup> holding that a trial court may hear a dispositive motion filed prior to a motion to voluntarily dismiss, was applied prospectively only; third, the standards for determining application of a new rule favor prospective application.

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185. *Id.* at 114, 535 N.E.2d at 854.

186. *Id.* at 115, 535 N.E.2d at 855.

187. *Id.* The appellate court's decision appears at 155 Ill. App. 3d 1093, 509 N.E.2d 1032 (3d Dist. 1987). The appellate court applied the three-part test of *Board of Comm'rs of Wood Dale Public Library Dist. v. County of DuPage*, 103 Ill. 2d 422, 469 N.E.2d 1370 (1984) to determine if a decision should be applied prospectively or retroactively. The test's elements are as follows: 1) whether the decision announces a new principle of law; 2) whether the purposes and effects will be best served by prospective or retroactive application; and 3) whether it would be inequitable to impose retroactive application.

188. *Martinez*, 127 Ill. 2d at 117, 535 N.E.2d at 856.

189. *See supra* notes 177-181 and accompanying text.

190. *Martinez*, 127 Ill. 2d at 121, 535 N.E.2d at 857.

191. *See supra* text accompanying notes 177-81.

192. 127 Ill. 2d 122, 535 N.E.2d 858 (1989).

The court's arguments in support of the retroactive application of *O'Connell* are unpersuasive. The court asserted that retroactive application was possible because: 1) the change was procedural; 2) it was not a clear change in the law; and 3) it had been applied retroactively already.<sup>193</sup> The court is disingenuous, however, in asserting that these three reasons clearly support retroactive application of *O'Connell*. These three reasons are not as persuasive as the court suggests. Although the Illinois Supreme Court Rules are procedural,<sup>194</sup> a dismissal with prejudice bars any consideration of the substantive merit of the claim. Thus, in allowing consideration of a Rule 103(b) motion before consideration of the motion to dismiss voluntarily, the *O'Connell* holding exalts procedure over substance. The court in *O'Connell* stated "Nothing is more critical to the judicial function than the administration of justice without delay."<sup>195</sup> That function must be balanced, however, with the "overriding consideration that cases should be decided on their merits after both sides have their day in court."<sup>196</sup>

In addition, *O'Connell* marked a clear change in the law as the confusion regarding its application illustrates, i.e., within three years, three cases directly questioning the holding reached the Illinois Supreme Court. Furthermore, as the *Miller v. Alexander* court noted,<sup>197</sup> *O'Connell* overruled several appellate court decisions. These appellate courts relied on the court's decision in *Aranda*,<sup>198</sup> and they apparently did not view *Aranda* as a precursor to the *O'Connell* decision.

Contrary to the court's assertions, *Aranda* arguably did not foreshadow *O'Connell*; the court in *O'Connell* made no reference or cite to *Aranda*. Certainly one would expect a case that foreshadows a holding, on a very important point, to be mentioned. Courts considering both cases have consistently distinguished *O'Connell* from *Aranda* and have stated that *Aranda* stands for an entirely different proposition than does *O'Connell*.<sup>199</sup> In fact, in *Muskat*,

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193. These three justifications for the retroactive application of a judicial decision were first identified in *Muskat v. Sternberg*, 122 Ill. 2d 41, 49-50, 521 N.E.2d 932, 936 (1988). *Martinez* merely reiterated them without further analysis. *Martinez*, 127 Ill. 2d at 121, 535 N.E.2d at 857.

194. *O'Connell*, 112 Ill. 2d at 281, 492 N.E.2d at 1326 ("The Illinois Constitution clearly empowers this court to promulgate *procedural* rules . . ." (emphasis added)).

195. *Id.* at 282, 492 N.E.2d at 1326 (1986).

196. *Galvan v. Morales*, 9 Ill. App. 3d 255, 258, 292 N.E.2d 36, 38 (1st Dist. 1972).

197. See *supra* note 160 for a list of cases overruled by the *O'Connell* decision.

198. See *supra* notes 138-47 and accompanying text.

199. *Muskat v. Sternberg*, 122 Ill. 2d 41, 45, 521 N.E.2d 932, 934 (1988) ("We noted in *Aranda* that the dismissal had been before the running of the statute of limitations and

wherein the court characterized the *O'Connell* holding as consistent with prior law, the court distinguished *Aranda*. The *Muskat* court said that *Aranda* involved dismissal before the statute of limitations expired, whereas *O'Connell* involved a dismissal after the expiration of the applicable statute of limitations.<sup>200</sup> The *Muskat* court thus distinguished *Aranda* from *O'Connell* while simultaneously asserting that *Aranda* foreshadowed *O'Connell*. Such reasoning is patently illogical.

Finally, although the court had previously applied *O'Connell* retroactively in *Catlett*, the court did not do so explicitly. Given the many cases surrounding this question of law, if the court had applied *O'Connell* retroactively in *Catlett*, it would have done so explicitly. It is more likely that the court did not address the issue of *O'Connell's* retroactive application because it was not raised. The *Muskat* court inferred from this silence a directive to apply *O'Connell* retroactively. Unfortunately, the court acted in a less than forthright manner by basing a significant change in the law upon a silence created by its own refusal to address an issue not raised, and by later declaring that the meaning of the silence was obvious.

A second argument for the non-retroactive application of *O'Connell* derives from *Gibellina v. Handley*,<sup>201</sup> the companion case to *Martinez v. Erickson*.<sup>202</sup> In *Gibellina*,<sup>203</sup> the Supreme Court of Illinois held that a trial court may hear and decide a dispositive motion which has been filed before a section 2-1009 motion, when that motion, if favorably ruled on by the court, could result in a final disposition of the case.<sup>204</sup> The *Gibellina* court's holding was given prospective application only.<sup>205</sup> The court stated:

Unlike *Martinez v. Erickson*, . . . also filed today, which upheld the retroactivity of *O'Connell v. St. Francis Hospital* . . . the cases in this appeal did not involve an unequivocal conflict between a specific rule of this court and the Code. Under the *O'Connell* line of cases, it cannot be disputed that plaintiffs had already been put on notice of the necessity of notifying potential defendants of the impending suit. Application of *O'Connell* retroactively therefore

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that if the dismissal would have been under our Rule 103(b) for failure to exercise diligence in obtaining service, the case could only have been dismissed without prejudice."').

200. *Id.*

201. 127 Ill. 2d 122, 535 N.E.2d 858 (1989).

202. 127 Ill. 2d 112, 535 N.E.2d 853 (1989).

203. *Gibellina*, 127 Ill. 2d at 137-38, 535 N.E.2d at 866.

204. *Id.* at 138, 535 N.E.2d at 866.

205. *Id.*

cannot be construed as an unfair burden on the litigants.<sup>206</sup>

Instead of comparing the similarity between *Gibellina* and the initial holding in *O'Connell*, the court compares *Gibellina* to the entire "*O'Connell* line of cases."<sup>207</sup> By relying on the entire line of cases, the court bypasses the important comparison between the actual holdings in *Gibellina* and *O'Connell*. Because both cases marked a clear change in the law, their holdings and effects are more similar than dissimilar.<sup>208</sup> Thus, like *Gibellina*, *O'Connell* should have been held to apply prospectively only.

The rules of prospective or retroactive application also favor a prospective application of *O'Connell*. In a civil case the general rule requires consideration of the following criteria: "(1) a decision to be applied prospectively must establish a new principle of law; (2) will the purpose and effect of the new decision be best served by retroactive or prospective application? and (3) the equities of the situation."<sup>209</sup> A more specific standard states that, "[g]enerally, decisions are applied retroactively unless the court: (1) expressly states its decision is a clear break with its past decisions; (2) overrules its own past practice; (3) disapproves a prior practice it has previously approved; or (4) overturns a well-established body of lower court precedent."<sup>210</sup>

Under either the first general rule or the more specific standard, *O'Connell* should have been applied prospectively only. *O'Connell* requires a prospective application because it instituted a new principle of law. *O'Connell* was the only Illinois Supreme Court decision to address the specific issue of the effect of a Rule 103(b) motion on a case voluntarily dismissed after the statute of limita-

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206. *Id.*

207. *Id.*

208. *Gibellina* effectively reversed many cases including the following: *Goldberg v. Swedish Covenant Hosp.*, 160 Ill. App. 3d 867, 513 N.E.2d 919 (1st Dist. 1987); *Jacobson v. Ragsdale*, 160 Ill. App. 3d 656, 513 N.E.2d 1112 (5th Dist. 1987); *Griffen v. Area E-7 Hospital Ass'n*, 158 Ill. App. 3d 720, 511 N.E.2d 256 (4th Dist. 1987); *Highland v. Stevenson*, 153 Ill. App. 3d 390, 505 N.E.2d 776 (3d Dist. 1987); *Rohr v. Kraus*, 153 Ill. App. 3d 1013, 506 N.E.2d 634 (5th Dist. 1987); *Mancuso v. Alda Blanch Beach*, 149 Ill. App. 3d 188, 500 N.E.2d 589 (1st Dist. 1986); *Metcalfe v. St. Elizabeth Hosp.*, 160 Ill. App. 3d 47, 513 N.E.2d 12 (5th Dist. 1986); *Russ v. Grady*, 149 Ill. App. 3d 660, 500 N.E.2d 1032 (5th Dist. 1986). See also *supra* note 160 (cases overruled by *O'Connell*).

209. *Revoal v. Illinois Human Rights Comm'n*, 128 Ill. App. 3d 70, 74, 470 N.E.2d 54, 57 (1st Dist. 1984) (employee was entitled to a hearing before the Human Rights Commission on the merits of his charge under the retroactive application of the United States Supreme Court holding that access to a Human Rights Commission adjudicative process was a protected property interest under the 14th Amendment).

210. *Board of Educ. v. Illinois Educ. Labor Relations Bd.*, 183 Ill. App. 3d 972, 977, 539 N.E.2d 882, 885 (4th Dist. 1989) (retrospective application of a decision rejecting the IELRB's authority to reconsider its own orders).

tions has expired.<sup>211</sup> The court cited no authority for the specific holding. That *O'Connell* was a new principle of law is also shown by the number of cases overruled by its decision.<sup>212</sup> Thus, contrary to the court's assertions, *O'Connell* marked a significant departure from existing law and should have been given prospective application only.

## V. CONCLUSION

While the standard for Rule 103(b)—reasonable diligence measured by the totality of the circumstances—has had questionable applications in the past, the Rule's relationship with sections 2-1009 and 13-217 is the most vexing problem for the courts. When both the questionable application and relationship with 2-1009 and 13-217 collide in a single case, the courts, and undoubtedly the Supreme Court of Illinois, will need to reevaluate the Rule, its application, and its interplay with the Code of Civil Procedure in order to provide litigants with a more comprehensive understanding of these various rules. Clarification of the present application and use of Rule 103(b) will also help future courts determine whether amendments to the current rules of application should be given retroactive or prospective application.

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211. *Aranda* addressed only the narrow issue of whether the dismissal could be with prejudice if the defendant was served prior to the expiration of the statute of limitations. *Aranda v. Hobart Mfg. Co.*, 66 Ill. 2d 616, 619, 363 N.E.2d 796, 798 (1977).

212. See *supra* note 160.