

REVIEW OF SUPREME COURT RULE 308

By Celia Guzaldo Gamrath¹

This article reviews the function and scope of a permissive interlocutory appeal pursuant to Supreme Court Rule 308.² Rule 308(a) provides in pertinent part:

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 determination of the litigation, the court shall so state in writing, identifying the question of law involved.³

A Rule 308 appeal requires the permission of both the trial court and the appellate court, after requisite findings are made. The grant or denial of a Rule 308 appeal is within the discretion of the appellate court.⁴ Traditionally, the scope of appellate court review has been limited to only those questions certified by the trial court.⁵

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²134 Ill. 2d R. 308

³134 Ill. 2d R. 308(a)

⁴134 Ill. 2d R. 308(a); In re Estate of Stepp, 271 Ill. App. 3d 817, 820, 648 N.E.2d 1120 (3rd Dist. 1995)

⁵Getto v. City of Chicago, 92 Ill. App. 3d 1045, 416 N.E.2d 1110 (1st Dist. 1981)

Until recently, the Illinois Supreme Court has not engagingly addressed the scope of review applicable to Rule 308. In Faier v. Ambrose & Crushing, P.C.,⁶ however, the supreme court narrowly addressed two issues certified by the trial court for permissive interlocutory appeal under Rule 308. The majority in Faier held the appellate court erred in denying leave to appeal under Rule 308. The supreme court then heard the appeal, ruled upon the two disputed questions of law, and remanded to the circuit court.

Justice Harrison dissented in Faier, contending the proper procedure was for the supreme court to expand the scope of review and consider the propriety of the circuit court's underlying order from which the appeal was taken. Justice Harrison's dissent cited favorably the fourth district appellate court's decision in Schoonover v. American Family Insurance Co.,⁷ wherein the court held it had the authority pursuant to Rule 308 to go beyond the issues presented by the certified question. The Schoonover court stated:

[Rule 308] says nothing about limiting the scope of the appeal. Rather, the rule states that the appeal must "involve[] a question of law, as to which there is a substantial ground for a difference of opinion."

(Emphasis added.) (134 Ill. 2d R. 308(1).) *** If

⁶Faier v. Ambrose & Crushing, P.C., 154 Ill. 2d 384, 609 N.E.2d 315 (1993)

⁷Schoonover v. American Family Insurance Co., 214 Ill. App. 3d 33, 572 N.E.2d 1258 (4th Dist. 1991)

the Illinois Supreme Court had intended for Supreme Court Rule 308 to have merely involved the certification of a question to be answered by the appellate court, Supreme Court Rule 308(a) would have spoken of a question being certified for answer rather than permitting an appeal from the order which implies that the propriety of the order appealed is to be determined.

*** Once appeal is granted [under Rule 308], no judicial economy results from limiting consideration to the questions identified when the propriety of the order on appeal can be determined once and for all by considering all issues properly raised below.⁸

In the Faier dissent, Justice Harrison further noted that Rule 308 is derived from section 1292(b) of a Federal statute.⁹ He observed that in applying section 1292(b), the Federal courts have never limited appeal to the question identified. "Instead, they have stated that the reviewing court is free to consider 'such questions as are basic to and underlie the order supporting the appeal'" [citations] and that it can 'consider all grounds which might require reversal of the order appealed from' [citation]."¹⁰

⁸Schoonover, 214 Ill. App. 3d at 40

⁹28 U.S.C. §1292(b) (1964); See 134 Ill. 2d R. 308, Committee Comments, at 264

¹⁰Faier, 154 Ill. 2d at 389 (Harrison, J., dissenting)

The fourth district appellate court has interpreted Faier as overruling, sub silentio, its opinion in Schoonover, which held the scope of review of a Rule 308 appeal was not limited to the question certified by the trial court.¹¹ As a result, the fourth district appellate court has strictly circumscribed its margin of review under Rule 308 to answer only those questions certified by the trial court for interlocutory appeal, rather than consider all of the issues raised by the parties on appeal.¹²

Since Faier, the supreme court has further clarified the scope of permissible review under Rule 308, making what appears to be a distinction between the appellate court and the supreme court.¹³ In Schrock v. Shoemaker,¹⁴ the supreme court noted Rule 308 provides a limited exception to the general rule that an appeal to the appellate court may only be taken from a final judgment.¹⁵ It held, however, that the supreme court is not limited in its scope of review to whether the appellate court answered a certified question correctly, but the court may "enter any judgment and make any order that ought to have been given or

¹¹Kerker v. Elbert, 261 Ill. App. 3d 924, 925, 634 N.E.2d 482 (4th Dist. 1994)

¹²See Kerker, 261 Ill. App. 3d at 925; Danner v. Norfolk & Western Ry. Co., 271 Ill. App. 3d 598, 601, 648 N.E.2d 603 (4th Dist. 1995); Hardimon v. Carle Clinic Assoc., 272 Ill. App. 3d 117, 124, 650 N.E.2d 281 (4th Dist. 1995)

¹³See Hardimon, 272 Ill. App. 3d at 124

¹⁴Schrock v. Shoemaker, 159 Ill. 2d 533, 640 N.E.2d 937 (1994)

¹⁵Schrock, 159 Ill. 2d at 537

made, and make any other and further orders and grant any relief *** that the case may require."¹⁶ In Bright v. Dicke,¹⁷ the supreme court further stated: "When this court accepts an appeal involving a question of law identified under Rule 308, interests of judicial economy and the need to reach an equitable result oblige us to go beyond the question of law presented and consider the propriety of the order that gave rise to the appeal."¹⁸

In Schrock and Bright, the supreme court expanded its own scope of review under Rule 308 to encompass additional questions raised on appeal which are not certified. In doing so, the court specifically noted that the scope of review of the appellate court remains a limited exception to the general rule that an appeal may only be taken from a final order. Unlike the appellate court, whose scope is limited by the exact question certified by the trial court, the supreme court enjoys a more liberal scope of review. The supreme court's seemingly deliberate use of possessive terminology in both Schrock and Bright, such as "this court," "us," "we," and "the scope of our review," suggests the court intended to give itself a more expansive scope of review than that enjoyed by the appellate court. Had the court resolved to also expand the scope of appellate court review, there would have been no need to distance itself. As succinctly expressed by the fourth district in

¹⁶134 Ill. 2d R. 366(a)(5)

¹⁷Bright v. Dicke, 166 Ill. 2d 204 (1995)

¹⁸Bright, 166 Ill. 2d at 208

Hardimon v. Carle Clinic Assoc., "There is nothing in Schrock which supports [the] contention the appellate court may address issues other than the questions certified as the decision relates solely to the scope of supreme court review."¹⁹

To date, Hardimon is the last word from the fourth district concerning the scope of review under Rule 308. In that opinion, the court made clear it would go to great lengths to confine its scope of review to only those questions certified for interlocutory appeal. It has rejected the notion that when a Rule 308(a) appeal is granted, all issues and facts are properly before the reviewing court. The other districts have also used the traditional approach of narrowly analyzing the certified question.

The first district appellate court has recognized that Rule 308 is a limited exception to the general rule that appeal may be had only from final judgments. For instance, in McMichael v. Michael Reese Health Plan Foundation,²⁰ the court severely restricted its scope of review to the question certified, refusing to expand upon the question to answer other issues raised on appeal. The court dismissed the appeal on the basis that the resolution of the question certified would not materially advance the litigation in the case.

As an aside, the first district appellate court has also

¹⁹Hardimon, 272 Ill. App. 3d at 124

²⁰McMichael v. Michael Reese Health Plan Foundation, 259 Ill. App. 3d 113, 116, 631 N.E.2d 317 (1st Dist. 1994)

held a Rule 308 appeal is optional with the parties, rather than mandatory. Accordingly, the failure to seek immediate appeal of a ruling under Rule 308 does not amount to waiver of the issue.²¹

The second, third, and fifth districts have also strictly limited the scope of Rule 308 review to those questions certified by the trial court.²² The fifth district, specifically, when invited to expand upon the question certified, has declined to do so, noting it "is restricted in its review of Rule 308 appeals to the questions certified."²³ The second district appellate court likewise has refused to answer additional issues raised on appeal which are beyond the scope of the questions certified by the trial court.²⁴

Clearly, the fourth district appellate court has been a leader among appellate districts in discerning the scope of review under Rule 308. In the wake of Faier, the court attempted to expand its scope of permissible review beyond questions certified by the trial court.²⁵ The court has digressed,

²¹Prosen v. Chowaniec, 271 Ill. App. 3d 65, 68, 646 N.E.2d 1311 (1st Dist. 1995)

²²Byron Community Unit School No. 226 v. Dunham-Bush, Inc., 215 Ill. App. 3d 343, 352, 574 N.E.2d 1383 (2nd Dist. 1991); Dep't of Transportation ex rel. People v. Parr, 259 Ill. App. 3d 602, 604, 633 N.E.2d 19 (3rd Dist. 1994); Lewis v. Norfolk & Western Ry. Co., 269 Ill. App. 3d 483, 487, 646 N.E.2d 1378 (5th Dist. 1995)

²³Lewis, 269 Ill. App. 3d at 487

²⁴Byron Community Unit School No. 226, 215 Ill. App. 3d at 352

²⁵Schoonover, 214 Ill. App. 3d at 40

however, from the possibility of expansion, commenting that there is nothing in the recent Schrock opinion which indicates the supreme court intended to give the appellate court the same broad scope of review as enjoyed by the supreme court.²⁶

The traditional view of narrowly reviewing a Rule 308 appeal has now come full circle. It is well-accepted among appellate court districts that Rule 308 should be used sparingly, as it is an exception to the general rule that only final judgments are appealable. To be sure, an appellate court allowing an appeal under Rule 308 may not expand on questions that were brought before it upon certification by the trial court. In the interests of judicial economy and equity, however, the supreme court enjoys a more expansive scope of review, whereby it may go beyond the question of law presented and consider other issues raised.²⁷

²⁶Hardimon, 272 Ill. App. 3d at 124

²⁷Bright, 166 Ill. 2d at 208