

plaintiff was not diligent in serving summons. We reverse and remand.

¶ 3

BACKGROUND

¶ 4 On October 26, 2002, the plaintiff and the defendants in the original actions, Adolphus and Agnes Dodillet, were involved in a motor vehicle collision that occurred in Washington County. On October 22, 2004, the plaintiff filed a personal injury complaint seeking damages for injuries he suffered in the collision, and the defendants were served with summons on January 4, 2005. The defendants filed an answer on August 24, 2005. On May 1, 2007, the court entered an order of substitution as to the plaintiff's attorneys. On June 3, 2008, over objection of the defendants, the court set the matter for jury trial on August 25, 2008. On August 4, 2008, the plaintiff filed a motion for voluntary dismissal. On August 8, 2008, on the plaintiff's motion, the circuit court dismissed the plaintiff's suit without prejudice.

¶ 5 On August 3, 2009, the plaintiff refiled his personal injury complaint, naming Adolphus and Agnes as defendants. Agnes had died on June 14, 2003. After attempting service, the plaintiff learned that on May 23, 2009, Adolphus had also died from causes unrelated to the accident. On September 1, 2009, the plaintiff filed a motion to substitute as defendants Eva Kathleen McGee and Polly Jo Ann Irwin, as special representatives for Adolphus's estate. On the same date, the circuit court entered an order granting the plaintiff's motion.

¶ 6 On October 19, 2010, the circuit court entered an order granting the defendants' motion for leave to withdraw a previously filed motion to dismiss. On October 20, 2010, the plaintiff filed a motion to appoint special process server to obtain service of process upon Irwin and McGee in "the immediate future." On the same date, the circuit court entered an order granting the plaintiff's motion. On November 8, 2010, the plaintiff filed two affidavits of service showing service of the summons, motion to substitute the defendants, order

substituting the defendants, and complaint for damages upon special representatives Irwin and McGee.

¶ 7 On November 23, 2010, the defendants filed a second motion to dismiss for failure to prosecute and for failure to effect diligent service. On December 10, 2010, the plaintiff filed his response.

¶ 8 At the hearing on December 15, 2010, pursuant to the plaintiff's acquiescence, the circuit court dismissed the cause against Agnes, who was not the driver at the time of the accident and is not subject to this appeal. The plaintiff stated that he had voluntarily dismissed the previously filed complaint because he was unable to contact his treating neurology doctor, who he had attempted to contact for two years. The plaintiff stated that he later learned that the doctor had died and had been suffering from health concerns during the two-year period that he had attempted to contact him. The plaintiff stated that he had first learned of Adolphus's death when he attempted service shortly after the refile of his complaint on August 3, 2009.

¶ 9 On May 5, 2011, the circuit court entered an order dismissing the plaintiff's complaint for want of prosecution and for failure to effect diligent service by complying with the requirements of section 13-209(c)(4) of the Code (735 ILCS 5/13-209(c)(4) (West 2008)). In its order, the circuit court found that the plaintiff had failed to comply with section 13-209(c)(4) of the Code (735 ILCS 5/13-209(c)(4) (West 2008)) because he had failed to file an amended complaint within two years of the time limited for the commencement of the original action. The court also dismissed the plaintiff's action on the basis that the plaintiff had shown "inexcusable delay and lack of diligence" and had shown an "intention to thwart the progress of the action to its conclusion and, by his inaction in general, ha[d] failed to progress the action to its conclusion." On May 23, 2011, the plaintiff filed a notice of appeal.

¶ 10

ANALYSIS

¶ 11

Section 13-209(c)(4) of the Code

¶ 12 The plaintiff argues that the circuit court erred in dismissing his complaint on the basis that he failed to file an amended complaint pursuant to section 13-209(c)(4) of the Code (735 ILCS 5/13-209(c)(4) (West 2008)). The plaintiff argues that he complied with the substance and intent of section 13-209(c)(4) by substituting the deceased's personal representatives as the defendants and serving them with the summons, order of substitution, and the original complaint. The defendant counters that the plaintiff failed to comply with the plain language of section 13-209(c)(4) of the Code, which required the plaintiff to file an amended complaint within two years of the time limited for the commencement of the original action, and therefore, his claim was properly dismissed.

¶ 13 "[T]he legislature enacted section 13-209(c) [of the Code] to specifically address situations where a plaintiff is unaware, at the time []he files h[is] action, that a named defendant is dead." *Minikon v. Escobedo*, 324 Ill. App. 3d 1073, 1078 (2001). "If the conditions in section 13-209(c) are met, the plaintiff will be permitted to substitute the personal representative of the decedent as the defendant even though the statute of limitations has already run." *Augustus v. Estate of Somers*, 278 Ill. App. 3d 90, 98 (1996). "[S]ection 13-209(c) is a limitations provision in itself which governs the period within which an 'action may be commenced against the deceased person's personal representative.'" *Minikon*, 324 Ill. App. 3d at 1078-79 (quoting 735 ILCS 5/13-209(c) (West 1998)). A limitations provision is designed to afford a defendant a fair opportunity to investigate the circumstances upon which liability is based while the facts are accessible. *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995).

¶ 14 Section 13-209(c) of the Code provides:

"(c) If a party commences an action against a deceased person whose death is

unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:

(1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.

(2) The party proceeds with reasonable diligence to serve process upon the personal representative.

(3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.

(4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action." 735 ILCS 5/13-209(c) (West 2008).

¶ 15 In this case, the plaintiff's refiled action naming Adolphus as a defendant was timely filed on August 3, 2009, but Adolphus had died. The plaintiff's claim against Adolphus was one for damages predicated upon negligence resulting in bodily injury and survived Adolphus's death. 755 ILCS 5/27-6 (West 2008); *Lindsey v. Special Administrator of the Estate of George Phillips*, 219 Ill. App. 3d 372, 375 (1991). The plaintiff discovered Adolphus had died when he attempted to serve summons. The two-year limitation period applicable to the plaintiff's individual claim against Adolphus (735 ILCS 5/13-202 (West 1998)) would have initially expired on October 26, 2004, after the plaintiff filed his original action on October 22, 2004. However, in refiled his action on August 3, 2009, within a year

from his previous voluntary dismissal, the plaintiff complied with the savings provision of the Limitations Act (735 ILCS 5/13-217 (West 1994))¹ and extended the statute of limitations to August 8, 2009. Section 13-217 of the Code does not prohibit further extension by other statutory provisions. See *Limer v. Lyman*, 220 Ill. App. 3d 1036, 1040 (1991). Thus, the plaintiff sought to further extend commencement of the action pursuant to section 13-209(c) of the Code (735 ILCS 5/13-209(c) (West 2008)).

¶ 16 In its order, the circuit court found that the plaintiff had complied with section 13-209(c)(1) of the Code by proceeding with reasonable diligence to move the court for leave to file an amended complaint substituting the personal representatives as defendant. The court stated: "[A]lthough the plaintiff never specifically asked to file an amended complaint, the language of section [13-209](c)(1) directs that the motion contemplates the substituting of the personal representatives as defendants. This is what the plaintiff requested to do."

¶ 17 The circuit court also found that the plaintiff had complied with section 13-209(c)(2) by proceeding with reasonable diligence to serve process upon the personal representatives. The circuit court noted that on October 20, 2010, the circuit clerk issued two summonses with captions listing Irwin and McGee as personal representatives of Adolphus's estate. The circuit court found that section 13-209(c)(3) was not germane to the case.

¶ 18 We agree with the circuit court's analysis regarding subsections (c)(1), (c)(2), and (c)(3) of section 13-209. We also agree with the circuit court's conclusion that the plaintiff "complied with the first element [of section 13-209(c)(4)] by having the special

¹Because the supreme court found Public Act 89-7, § 15, eff. Mar. 9, 1995, unconstitutional in its entirety (*Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997)), "[t]he version of section 13-217 currently in effect is, therefore, the version that preceded the amendments of Public Act 89-7." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 468-69 n.1 (2008).

representatives appointed as defendants." We find, however, that the circuit court erred in dismissing the plaintiff's action.

¶ 19 Section 2-603(c) of the Code of Civil Procedure explicitly provides that pleadings are to be liberally construed in order to do substantial justice between the parties. 735 ILCS 5/2-603(c) (West 2008). "[P]laintiffs are not to be barred from having the merits heard because of technical rules of pleading, and courts are to elevate issues of substance over form." *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2002).

¶ 20 In *Nagel v. Inman*, 402 Ill. App. 3d 766 (2010), the plaintiff's wrongful death complaint listed him in his capacity as the special administrator of his son's estate, even though he was not appointed to act in that capacity until six months after suit was filed. The defendant argued that the trial court properly dismissed the cause because the proper plaintiff, the administrator of the estate, was never made a party to the original suit because the plaintiff never filed an amended complaint or a motion for substitution of a party. *Id.* The plaintiff argued that to require him to file an amended complaint identical to his original complaint would elevate form over substance. *Id.* at 770. This court agreed with the plaintiff, stating that in "accepting the defendant's interpretation[,] [the court] would elevate form over substance and [unreasonably] prevent the plaintiff's claim from being decided on the merits." *Id.* at 771-72.

¶ 21 Even though section 13-209(c)(4) of the Code requires that an amended complaint be filed, we liberally construe the plaintiff's original complaint and motion to substitute, in addition to the order appointing McGee and Irwin as special representatives and substituting them as defendants, as an amended complaint that complied with the Code. See *Wong v. Stevens*, 216 Ill. App. 3d 299, 301 (1991) (even though Illinois statutes require separate claims to be stated in separate counts of complaint, the filed motions were "liberally construed as amended complaints," because "[t]o do otherwise would be to elevate form over

substance and deny justice to the defendant"). The complaint, motion to substitute, and order were filed by August 8, 2011, "within 2 years of the time limited for the commencement of the original action." 735 ILCS 5/13-209(c)(4) (West 2008). Accepting the defendant's argument would elevate form over substance and unreasonably prevent the plaintiff's claim from being decided on the merits. Accordingly, we find that the circuit court erred in dismissing the plaintiff's complaint on this basis. See *Nagel*, 402 Ill. App. 3d at 771-72; *Wong*, 216 Ill. App. 3d at 301.

¶ 22 Want of Prosecution

¶ 23 The plaintiff next argues that the circuit court erred in dismissing his action for want of prosecution because the record in no way supports a finding that the plaintiff intentionally thwarted the progress of the underlying action. The plaintiff argues that the circuit court's dismissal was an abuse of discretion in that it wholly lacked evidentiary support and cannot in fairness stand.

¶ 24 The circuit court may dismiss a suit for failure of the plaintiff to prosecute it with due diligence where no sufficient cause is presented, and this power exists independent of any statute or rule of court. *Bejda v. SGL Industries, Inc.*, 82 Ill. 2d 322, 329 (1980). The circuit court has the inherent authority to control its docket, and this power is crucial for the circuit court to prevent undue delays in the disposition of cases caused by abuses of the litigation process. *Santiago v. E.W. Bliss Co.*, 406 Ill. App. 3d 449, 457 (2010), *appeal allowed*, No. 111792 (2011).

¶ 25 The trial court may properly dismiss the plaintiff's cause for failure to prosecute where the plaintiff manifests an intention to thwart the progress of the action to its conclusion or by some delaying tactic fails to progress the action toward its conclusion. *Department of Revenue v. Steinkopf*, 160 Ill. App. 3d 1008, 1018 (1987). "The determination of whether or not to grant a motion to dismiss for want of prosecution is governed by the particular facts

of a given case." *Id.* The determination of whether there has been a lack of diligent prosecution rests in the sound discretion of the trial court. *Id.* "The court, however, must give more weight to basic concepts of fundamental fairness and justice than to procedural matters." *Spancrete of Illinois, Inc. v. Brickman*, 69 Ill. App. 3d 571, 578-79 (1979). "These concepts of fundamental fairness and justice must *** take into account the effect of unnecessary delays on the counterdefendants and the disservice to other litigants." *Id.* at 579.

¶ 26 Generally, a dismissal for want of prosecution does not constitute a final order because the plaintiff has an absolute right, pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)), to refile his action against the same party or parties and to reallege the same causes of action. *Tuch v. McMillen*, 167 Ill. App. 3d 747, 752 (1988) (citing *Wold v. Bull Valley Management Co.*, 96 Ill. 2d 110, 112 (1983); *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982)). "If, however, a plaintiff has already exercised his one-time right to a section 13-217 refiling which then has been subsequently dismissed for want of prosecution, that subsequent dismissal constitutes a final and appealable order." *Tuch*, 167 Ill. App. 3d at 752.

¶ 27 An examination of the entire record reveals no intention on the plaintiff's part to thwart the progress of the action to its conclusion or by some delaying tactic fail to progress the action toward its conclusion. In his original action, the plaintiff served summons on the defendants within three months of filing his complaint. In this initial action, the defendants filed an answer seven months after service and objected to the court's scheduling the matter for jury trial. The plaintiff explained that he thereafter voluntarily dismissed his complaint because he had attempted for two years to contact the treating physician, who had been ill during the plaintiff's attempts to contact him and had ultimately died. See 735 ILCS 5/2-1009(a) (West 2008) ("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.").

¶ 28 The plaintiff timely refiled his action and timely substituted the personal representatives upon learning that Adolphus had died. The defendants followed with a motion to dismiss that they later withdrew. On October 20, 2010, the plaintiff filed a motion to appoint special process server, the personal representatives were served on October 26, 2010, and on November 8, 2010, the plaintiff filed two affidavits of service showing service of summons, motion to substitute defendants, order, and complaint on Irwin and McGee. After the defendants filed motions to dismiss, the plaintiff timely filed a response, appeared for hearing, and filed a motion for leave to cite additional authority. Although over one year had elapsed from when the plaintiff was apprised of Adolphus's death and the plaintiff acquired an order to appoint a special process server and effected service, we cannot conclude, in light of the remaining circumstances, that the plaintiff manifested an intention to thwart the progress of the action to its conclusion or by some delaying tactic failed to progress the action toward its conclusion. *Steinkopf*, 160 Ill. App. 3d at 1018. Accordingly, the circuit court abused its discretion in dismissing the plaintiff's action on this basis.

¶ 29 Reasonable Diligence to Obtain Service

¶ 30 The plaintiff next argues that the circuit court abused its discretion in dismissing his suit for failure to effect diligent service because it improperly considered the length of time the plaintiff waited before filing and refiled suit. The defendant argues that the circuit court did not err in considering the length of time before he filed his initial complaint and before he refiled suit after voluntary dismissal. We disagree with the defendant.

¶ 31 Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) was adopted by the supreme court to effectuate its historical and constitutional mandate to render justice fairly and promptly. *Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 377 (1990). "Rule 103(b) *** aims to protect a defendant from unnecessary delay in the service of process and

to prevent the plaintiff from circumventing the applicable statute of limitations by filing suit before the expiration of the limitations period but taking no action to have defendants served until the plaintiff is ready to proceed with the litigation." *Christian v. Lincoln Automotive Co.*, 403 Ill. App. 3d 1038, 1042 (2010). Although the rule has an essential purpose in promoting the expeditious handling of lawsuits by giving trial courts wide discretion to dismiss when service is not effected with reasonable diligence (*Segal v. Sacco*, 136 Ill. 2d 282, 285-86 (1990) (citing *Karpiel v. LaSalle National Bank of Chicago*, 119 Ill. App. 2d 157, 161 (1970))), a dismissal for lack of diligence in obtaining service prior to the expiration of applicable statute of limitation under Rule 103(b) is distinct from a dismissal for want of prosecution (*Green v. Wilmont Mountain, Inc.*, 92 Ill. App. 3d 176, 180 (1980)).

¶ 32 Pursuant to Illinois Supreme Court Rule 103(b), the trial court may dismiss with prejudice any claim where the plaintiff's "failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations." Ill. S. Ct. R. 103(b) (eff. July 4, 2007). "In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances, including both lack of reasonable diligence in any previous case voluntarily dismissed or dismissed for want of prosecution, and the exercise of reasonable diligence in obtaining service in any case refiled under section 13-217 of the Code of Civil Procedure." *Id.* "The 2007 amendment clarified that a Rule 103(b) dismissal which occurs after the expiration of the applicable statute of limitations shall be made with prejudice as to that defendant if the failure to exercise reasonable diligence to obtain service on the defendant occurred after the expiration of the applicable statute of limitations." Ill. S. Ct. R. 103(b), Committee Comments (adopted June 5, 2007).

¶ 33 Under Rule 103(b), the plaintiff has the burden of showing reasonable diligence in the service of process. *Segal*, 136 Ill. 2d at 286. The factors that a court may consider in determining whether to allow or deny a Rule 103(b) motion to dismiss include, but are not

limited to, the length of time used to obtain service of process, the activities of the plaintiff, the plaintiff's knowledge of the defendant's location, the ease with which the defendant's whereabouts could have been ascertained, the actual knowledge on the part of the defendant of the pendency of the action as a result of ineffective service, special circumstances which would affect the plaintiff's efforts, and actual service on the defendant. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 212-13 (2007). Other factors that may be considered by the court include the lack of prejudice to the defendant and the occurrence of settlement negotiations during the period of the delay. *McRoberts v. Bridgestone Americas Holding, Inc.*, 365 Ill. App. 3d 1039, 1043 (2006). These factors must be considered in light of the purposes of Rule 103(b) as set forth above. *Segal*, 136 Ill. 2d at 287.

¶ 34 "When assessing diligence in obtaining service in a refiled action, it is clear that diligence in obtaining service in the original action is a particularly significant consideration." *Hatchett v. Swanson*, 382 Ill. App. 3d 1084, 1092 (2008). "However, it is also appropriate to consider how long the original action was pending and other circumstances bearing on Rule 103(b)'s objective of affording defendants justice without delay." *Id.* "Moreover, the conduct of the parties in contributing to any delay in the original action [is] germane under the 'totality of the circumstances' approach." *Id.* at 1092.

¶ 35 "There is no specific time limitation provided by Rule 103(b)." *Case*, 227 Ill. 2d at 213. "Rather, a court must consider the passage of time in relation to all the other facts and circumstances of each case individually." *Id.* A trial court's dismissal with prejudice under Illinois Supreme Court Rule 103(b) is a harsh penalty which is justified when the delay in service of process is of a length which denies a defendant a fair opportunity to investigate the circumstances upon which liability is predicated while the facts are accessible. *Hatchett*, 382 Ill. App. 3d at 1088. "A ruling on a motion to dismiss pursuant to Rule 103(b) will not be disturbed absent an abuse of discretion." *Case*, 227 Ill. 2d at 213. A trial court abuses its

discretion only if no reasonable person could take the view adopted by it. *Hagemann v. Illinois Workers' Compensation Comm'n*, 399 Ill. App. 3d 197, 204 (2010).

¶ 36 In the present case, to determine if the circuit court abused its discretion by granting the defendants' motion to dismiss, we must first resolve the threshold issue of whether it was proper for the circuit court to have considered the time that passed before filing the original complaint and the months that passed between voluntary dismissal of the plaintiff's complaint on August 8, 2008, and its refiling on August 3, 2009. Such a determination requires us to interpret Rule 103(b) and section 13-217 of the Code and is subject to *de novo* review. See *Case*, 227 Ill. 2d at 213.

¶ 37 Where an action is not pending, there is no reason to serve a defendant with process and nothing to delay or be diligent about. *Case*, 227 Ill. 2d at 217. Likewise, courts consider "the periods before a dismissal and after a refiling as separate entities that are to be added together in determining diligence." *Id.* at 219. "[T]he time that elapses between the dismissal of a plaintiff's complaint and its refiling pursuant to section 13-217 is not to be considered by a court when ruling on a motion to dismiss for violation of Rule 103(b)." *Id.* at 222.

¶ 38 In the original action, the plaintiff filed his complaint on October 22, 2004, days before the statute of limitations expired on October 26, 2004. The plaintiff served the defendant with summons on January 4, 2005, within three months of filing his complaint. After voluntary dismissal, the plaintiff timely refiled his action on August 3, 2009, before the August 8, 2009, deadline, filed his motion to substitute the defendant on September 1, 2009, and served the defendant with summons on October 20, 2010, after acquiring an order appointing a special process server.

¶ 39 In its order dismissing the plaintiff's action, the circuit court stated that it was granting the defendant's motion to dismiss "for failure to effect diligent service" and considered that

the plaintiff initially "filed suit mere days before the running of the two year statute of limitations" and refiled suit "days before the time limit ran to re-file." In granting the defendants' motion to dismiss for failure to effect diligent service, the circuit court erred in considering the plaintiff's diligence or lack thereof during time periods when no action was pending, *i.e.*, before the complaint was initially filed and between the dismissal of the plaintiff's complaint and its refiling pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)). See *Case*, 227 Ill. 2d at 222. We decline to uphold a dismissal order based on improper considerations.

¶ 40 For the reasons stated, we find that the circuit court erred in dismissing the claims asserted by the plaintiff against Irwin and McGee as special administrators of Adolphus's estate, we reverse the trial court's judgment in that regard, and we remand this cause for reconsideration. See *Hatchett*, 382 Ill. App. 3d at 1093.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the order of the Washington County circuit court is reversed, and the cause is remanded.

¶ 43 Reversed and remanded.