



period did not prejudice defendant.

¶ 2 On August 24, 2009, plaintiff, Karen Kreinik, individually and as guardian of Keith Kreinik, a disabled adult, filed a complaint against defendant for damages caused by an automobile accident between defendant and plaintiff's husband. The complaint also named defendant's brother and an automobile dealership as defendants, on the grounds defendant's brother owned the vehicle, defendant was acting as his brother's agent or employee at the time of the accident, and defendant's brother was an agent or employee of the dealership. Plaintiff obtained service on defendant more than 15 months later at the Skokie courthouse, after previous unsuccessful attempts at service at defendant's residence. One year later, on November 21, 2011, the trial court granted defendant's motion to quash service because the process server who actually served defendant was not the process server the circuit court appointed. Ten days later, on December 1, 2011, plaintiff obtained effective service. On January 3, 2012, defendant filed a motion to dismiss the complaint against him with prejudice pursuant to Illinois Supreme Court Rule 103(b) (Ill. S. Ct. R. 103(b) (eff. July 1, 2007)). The parties briefed the motion and, following a hearing, the court granted defendant's motion. For the following reasons, we reverse and remand.

¶ 3

### BACKGROUND

¶ 4 Only a brief recitation of the facts necessary to an understanding of our disposition is required at this stage of proceedings. Before filing the complaint in this case, Karen Kreinik filed a petition to be appointed temporary guardian of Keith Kreinik. The petition alleged that a petition was filed for the appointment of a guardian of the estate and person of Keith Kreinik,

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and that a temporary guardian was necessary for Keith's welfare and protection. The petition states that a temporary guardian was necessary because Keith sustained injuries in a motorcycle accident on September 2, 2007, and "[t]he statute of limitations for filing a personal injury lawsuit runs on September 2, 2009. Therefore, a temporary guardian is necessary to file the lawsuit and protect the interest of Keith Kreinik." Plaintiff and her attorney signed the petition. The petition bears the case number 09 P 5387. The same day the circuit court entered an order appointing plaintiff temporary guardian to "file a personal injury lawsuit on behalf of Keith Kreinik for a 9/27/07 accident."

¶ 5 The same day a Guardian *ad litem* (GAL) for Keith Kreinik submitted her report. The GAL stated that when Keith initially went home after his hospital stay, he was able to walk with a walker, talk, and go on errands with his wife, but since that time, he has had several infections which have impaired his ability to recover from his injuries. The report states that while there have been periods when Keith was capable of talking or able to give a thumbs up or respond "in some way" to questions, he is completely unable to communicate. The report concludes Keith is completely impaired and is unable to communicate. The report states that it is the GAL's opinion that Keith is totally incapable of making personal and financial decisions.

¶ 6 On January 3, 2012, defendant filed a motion to dismiss plaintiff's complaint pursuant to Illinois Supreme Court Rule 103(b) (Ill. S. Ct. R. 103(b) (eff. Jul. 1, 2007)). The motion asks the trial court to "dismiss the plaintiff's case with prejudice." Plaintiff filed a response to defendant's motion to dismiss. Plaintiff's response argued, in part, that the statute of limitations tolled because Keith was legally disabled. Plaintiff argued that the GAL's report makes clear

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that Keith was legally disabled for the entire time between the date of the accident and the date the GAL filed the report. Thus, plaintiff argued, “the statute of limitations was tolled until Karen was appointed Guardian on that day. Therefore, the applicable statute of limitations for the filing of the complaint \*\*\* did not expire until August 24, 2011.”

¶ 7 On January 13, 2012, plaintiff filed a combined motion to strike the motion to dismiss and motion for sanctions. Plaintiff alleged that prior to filing his motion, plaintiff’s counsel called defendant’s counsel and stated that due to Keith’s legal disability, the statute of limitations did not begin to run “until at least the Guardian was appointed,” therefore the initial service was had well within the running of the statute and the second service was achieved within 10 days of the order granting the motion to quash the initial service. The motion complained that despite this information, defendant persisted in his Rule 103(b) motion.

¶ 8 On January 30, 2012, plaintiff filed a motion for sanctions against defendant for “proceedings with a 103 B Motion in an obvious attempt to delay presenting the Defendant for deposition.” Plaintiff’s motion for sanctions argued defense counsel “is fully aware and has even been provided with the report of the Guardian *ad Litem* demonstrating Keith Kreinik’s total incapacity for the entire time he remained living after the accident. Despite full knowledge that the statute would toll due to his condition, counsel ignores this fact in her motion and is continuing to press forward.” The motion states that, based on the fact that a guardian was not appointed until August 24, 2009, the statute of limitations did not expire until August 24, 2011.

¶ 9 On February 23, 2012, the trial court entered a case management order setting the matter for status on obtaining plaintiff’s medical records, and for a possible setting of a hearing on

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defendant's Rule 103(b) motion to dismiss, and plaintiff's motion to strike defendant's motion and for sanctions.

¶ 10 On March 26, 2012, plaintiff filed an affidavit by Dr. Nedad Brkic. Plaintiff did not file the affidavit attached to a pleading. The affidavit states that Dr. Brkic was the attending physician in charge of Keith Kreinik's care, and that he had "reviewed Mr. Kreinik's medical records and/or overseen his care from the date of the accident." The affidavit states: "It is my opinion to a reasonable degree of medical certainty that from the date of the accident, September 2, 2007, until his death, Mr. Kreinik was disabled in that he was entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs."

¶ 11 On April 20, 2012, defendant filed a motion to strike certain documents submitted by plaintiff's counsel. Defendant's motion to strike alleged defense counsel received a letter indicating that plaintiff filed certain "courtesy copies" with the trial court. The items listed on the letter included, among others, plaintiff's second motion for sanctions, Dr. Brkic's affidavit, and defendant's deposition taken on plaintiff's motion after defendant submitted an affidavit in support of his motion to dismiss pursuant to Rule 103(b). The deposition was to be limited to matters related to the motion to dismiss. Defendant's motion to strike argued that plaintiff's submission of these "courtesy copies" was an attempt to place matters before the trial court which had not been properly noticed, briefed, or allowed by the court. The motion asked the court not to consider any matters that have not been properly noticed and that the hearing scheduled for April 25, 2012, proceed. On April 23, 2012, the court entered an order that the

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motion would be heard on April 25, 2012.

¶ 12 After briefing by the parties the trial court held a hearing on the motion on April 25, 2012. At the hearing defendant argued that the statute of limitations on plaintiff's cause of action for personal injuries expired on September 2, 2009, two years from the date of the accident which injured Keith. Defendant also argued that plaintiff's petition for guardianship of Keith Kreinik supports defendant's contention. In the petition for guardianship filed on August 24, 2009, plaintiff alleged that the statute of limitations was to expire on September 2, 2009. Defendant argued that even accepting plaintiff's position that the statute of limitations did not expire until August 24, 2011, two years after the appointing of a guardian lifting Keith Kreinik's disability, since defendant was not served until November 2011, after the statute of limitations expired, the complaint should be dismissed with prejudice. Plaintiff argued the statute of limitations did not expire until two years after Keith's death, or until January 2, 2012.

¶ 13 Defense counsel also argued that plaintiff's filing of Dr. Brkic's affidavit was improper because it was filed outside the briefing schedule set by the trial court on defendant's motion to dismiss. Later in the proceedings, the court commented that "the plaintiff has the obligation to establish reasonable diligence from the time of the complaint until the time of service." The court stated it would "put aside sanctions for now" to address the substance of defendant's Rule 103(b) motion.

¶ 14 Defense counsel noted plaintiff's argument that the statute of limitations had not expired due to Keith's legal disability. Defense counsel argued the trial court could not assume defendant knew Keith was disabled because plaintiff had not produced medical records. Defense

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counsel argued that the statute of limitations was relevant to the Rule 103(b) motion to determine whether the dismissal must be with or without prejudice. Defense counsel argued the statute of limitations expired on September 2, 2009. In support of dismissal with prejudice, defense counsel argued that when plaintiff served defendant, the statute of limitations had expired. Counsel continued: “Even if you take the plaintiff’s extended view of disability the statute still ran, because he admits the statute ran once the disability is removed when the temporary guardian was appointed, which was August 24th of 2009.” Defense counsel argued that the record does not contain evidence that Keith was, in fact, disabled, and again argued that Dr. Brkic’s affidavit was “not in any of the briefs that were before the Court.” The trial court asked defense counsel directly, “[b]ased on your interpretation of the facts, when did the statute of limitations run?” Counsel responded that the “outer limit” for the expiration of the statute of limitations was September 9, 2009.

¶ 15 During his response, plaintiff’s counsel asserted that the affidavit was filed prior to the hearing and he assumed it would be incorporated with the parties’ hearing. Plaintiff’s counsel argued that obtaining Dr. Brkic’s affidavit was “a lot more direct and a lot quicker and a lot less expensive than ordering thousands of dollars of medical records.” The trial court questioned counsel as to how Dr. Brkic obtained the medical records and counsel explained that Dr. Brkic had those records throughout Keith’s course of treatment. Plaintiff’s counsel also argued that had defendant wanted additional discovery on the affidavit, she should have requested it when the parties appeared before the court on March 27, 2012, when the court scheduled the hearing and after plaintiff had filed the affidavit. The trial court also asked plaintiff’s counsel for a

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specific date on which the statute of limitations expired. Plaintiff's counsel responded the statute expired on January 2, 2012, two years after Keith's death on January 2, 2010.

¶ 16 The trial court directed defense counsel to address the statute of limitations in her reply argument. Defense counsel noted that plaintiff was now arguing that the statute expired in January 2012, but in plaintiff's response to defendant's Rule 103(b) motion, plaintiff's counsel stated the statute of limitations expired on August 24, 2009. Defense counsel reasserted that the statute expired on September 2, 2009, but stated that the furthest the statute was extended was August 24, 2011.

¶ 17 Following arguments, the trial court made oral findings. The court stated it would "break it down to the statute of limitations on disability and also the diligence." The court referenced the affidavit and that it was filed late. The court found that the statute of limitations expired on August 24, 2011. The court specifically stated that "giving counsel the benefit of the statute of limitations, even if we were to extend it based o his response brief, it would have extended to August 24th of 2011. So that will be our date."

¶ 18 The trial judge noted the requirement to review the totality of the circumstances, and quoted from the court's decisions in *Rice v. Ford Motors*, 316 Ill. App. 3d 547 (2000). The trial judge quoted the holding in *Rice* that "[t]he critical issue is whether the plaintiff exercised due diligence to have the defendant served during the time that elapsed between the filing the [*sic*] case and the service of the defendant." The court then summarized plaintiff's efforts to serve defendant since filing the case on August 24, 2009: After filing the case, the sheriff attempted to serve summons, but the sheriff returned the summons on September 13, 2009, with no contact.

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Plaintiff's counsel obtained alias summons on June 18, 2010, and sent the summons to the same address for defendant on June 30, but it was not returned. The trial court noted that 10 months elapsed between the filing of the complaint and the issuance of alias summons. Then, on November 9, 2010, plaintiff's counsel obtained an alias summons to be served at the Skokie courthouse. The trial court noted that 15 months after filing the complaint defendant received service on November 22, 2010. However, the trial court quashed the service of summons from November 22, 2010, and alias summons was again issued on November 21, 2011, after the court granted the motion to quash. Defendant received service of the November 21, 2011 alias summons on December 1, 2011, at the Skokie courthouse.

¶ 19 The trial court recounted plaintiff's counsel's filings with regard to attempts at service. The court noted that at one point, a filing stated that plaintiff had new information and anticipated service, but the new information was a pending criminal case in Skokie "and that information was available to all parties at the beginning of this case." The court also discussed the trial court's orders and indicated that those orders reflect that defendant had not been served earlier. The court reviewed plaintiff's counsel's submission with regard to his conduct before defendant received service. The court concluded as follows:

"We begin with the August 24th, 2009, the original summons. From September to February, there's phone calls and web searches.

December 23rd, exhibits filed on behalf of [defendant] by attorneys per clerk website.

There's a difference between the website and the court file. The court file

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establishes beyond any doubt that [defendant] was not being represented by [counsel].

Then you go from January all the way to June where counsel is calling the defense attorney and the criminal attorney to determine, first, will the criminal attorney accept service and will the prosecutor give you information.

What that tells the court is that there was knowledge that there was a criminal case pending in Skokie and that knowledge comes out later when the service is for Skokie, the Skokie courthouse.

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[T]he service doesn't occur until December of 2011, which is beyond the statute of limitations and also I don't believe that there was reasonable diligence here, taking all the facts into account."

¶ 20 On April 25, 2012, the trial court granted the motion and dismissed defendant with prejudice. At the conclusion of the hearing on the motion, the court stated that the order should also reflect that the request for sanctions on both sides was denied.

¶ 21 On, May 25, 2012, plaintiff filed a motion to reconsider the trial court's order granting defendant's Rule 103(b) motion to dismiss. The motion states that Keith died on January 2, 2010, as a result of injuries sustained in an accident between Keith's motorcycle and defendant's automobile. The motion to reconsider notes that the circuit court appointed plaintiff guardian (and later administrator of Keith's estate) on August 24, 2009, and she filed her complaint against defendant the same day. Plaintiff provided a "detailed timeline of events" to assist the

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court in which plaintiff listed August 24, 2011, as the date the statute of limitations expired “per court due to Plaintiff’s legal incapacity until Guardian appointed on August 24, 2009.”

¶ 22 Plaintiff asserted, as a reason the trial court’s judgment should be reversed, that “any lack of diligence occurred well within the statute of limitations.” The motion also alleged that defendant engaged in gamesmanship by waiting to file his motion to dismiss “immediately after the statute expired.” Plaintiff argued that because she obtained service on November 22, 2010, “within the statute of limitations due to Keith’s disability,” the only period in which plaintiff may have shown a lack of diligence was between August 24, 2009 and November 22, 2010, “a period well within the statute of limitations.” The court quashed the November 22, 2010 service, but plaintiff obtained service ten days after the court issued that order.

¶ 23 Plaintiff argued the motion, if granted, should have been without prejudice because any lack of diligence occurred prior to the expiration of the statute of limitations, which the trial court found expired on August 24, 2011. The motion expressly states “the statute of limitations did not expire until August 24, 2011,” and plaintiff served--albeit ineffectively--defendant before that date. Plaintiff then obtained effective service within 10 days of the quashing of the ineffective service. On August 29, 2012, the trial court denied plaintiff’s motion to reconsider.

¶ 24 This appeal followed.

¶ 25 ANALYSIS

¶ 26 Illinois Supreme Court Rule 103(b) permits the trial court to dismiss a complaint where the plaintiff has failed to exercise reasonable diligence in serving process on a defendant. The trial court’s ruling granting a motion to dismiss pursuant to Rule 103(b) is reviewed for an abuse

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of discretion. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 213 (2007). Rule 103(b) provides, in pertinent part, as follows:

“If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant only and shall not bar any claim against any other party based on vicarious liability for that dismissed defendant’s conduct. The dismissal may be made on the application of any party or on the court’s own motion. In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances \*\*\*.” Ill. S. Ct. R. 103(b) (eff. Jul. 1, 2007).

¶ 27 Our supreme court has instructed that dismissal with prejudice under 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 against [it] is predicated while the facts are accessible. [Citation.]” (Internal quotation marks omitted.) *Segal v. Sacco*, 136 Ill. 2d 282, 288 (1990). The trial court may consider many factors to determine whether to allow or deny the motion to dismiss pursuant to Rule 103(b): (1) the length of time

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used to obtain service of process; (2) the activities of plaintiff; (3) plaintiff's knowledge of defendant's location; (4) the ease with which defendant's whereabouts could have been ascertained; (5) actual knowledge on the part of the defendant of the pendency of the action as a result of ineffective service; (6) special circumstances that would affect plaintiff's efforts; and (7) actual service on defendant. *Case*, 227 Ill. 2d at 212-13. "There is no specific time limitation provided by Rule 103(b). Rather, a court must consider the passage of time in relation to all the other facts and circumstances of each case individually. [Citation.]" *Id.* at 213.

¶ 28 The applicable statute of limitations is found in section 13-202 of the Code of Civil Procedure (Code) (735 ILCS 5/13-202 (West 2006)). The statute provides that "[a]ctions for damages for an injury to the person \*\*\* shall be commenced within 2 years next after the cause of action accrued." 735 ILCS 5/13-202 (West 2006). There is no dispute plaintiff's cause of action accrued on September 2, 2007, when he was injured in the accident. *Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 20 ("where a plaintiff's injury is caused by a 'sudden traumatic event,' such as the automobile accident that occurred in this case, the cause of action accrues, and the statute of limitations begins to run, on the date the injury occurs.") (quoting *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 362-63 (1995)). In this case, it is alleged that section 13-211 of the Code (735 ILCS 5/13-211 (West 2006)) operates to toll the statute of limitations.

¶ 29 Section 13-211 provides that "[i]f the person entitled to bring an action, specified in Sections 13-201 through 13-210 of this Act, at the time the cause of action accrued, is under the age of 18 years, or is under a legal disability, then he or she may bring the action within 2 years after the person attains the age of 18 years, or the disability is removed." 735 ILCS 5/13-211

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(West 2006). Whether section 13-211 operates to toll the statute of limitations is a matter of statutory construction. See *Scott v. Archer-Daniels-Midland Co.*, 194 Ill. App. 3d 510, 512 (1990) (applying rules of statutory construction to “sole issue on appeal [of] whether the tolling provisions of section 13–211 apply to this case.”). Accordingly, our standard of review on that question is *de novo*. *American Airlines, Inc. v. Department of Revenue*, 402 Ill. App. 3d 579, 589 (2009) (“the issue is purely a legal one, involving statutory interpretation, \*\*\* therefore *de novo* review is appropriate.”).

¶ 30 The issue raised in this appeal is whether the trial court erred in considering plaintiff’s diligence in attempting to serve defendant since the inception of the lawsuit, or whether it should have only considered plaintiff’s diligence since the expiration of the statute of limitations to decide whether plaintiff exercised sufficient diligence to survive defendant’s Rule 103(b) motion to dismiss. If the period between the expiring of the statute of limitations and effective service is in fact the determinative time frame, there is an issue as to when the statute of limitations expired. We find that the trial court did not consider the appropriate time frame, but erroneously took the entire period from the filing of the lawsuit to effective service into consideration in finding that plaintiff failed to show diligence in obtaining service.

¶ 31 1. Expiration of the Statute of Limitations

¶ 32 For the reasons explained below, the proper time frame by which to judge defendant’s Rule 103(b) motion to dismiss with prejudice is the period between the expiration of the statute of limitations and the date of effective service. Therefore, we must first determine when the statute of limitations expired. Plaintiff continues to argue that the statute of limitations did not

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expire until January 2, 2012, two years after Keith's death. Plaintiff argues that the affidavit from Dr. Nedad Brkic is uncontroverted and establishes that from the time of the accident until his death, Keith was unable to make any personal or financial decisions. Therefore, plaintiff argues, pursuant to section 13-211 of the Code, Keith was legally disabled from the date of the accident until his death on January 2, 2010. Plaintiff argues the appointment of a guardian has no effect on the tolling under section 13-211. Thus, the trial court erred in finding that (1) the tolling due to Keith's legal disability ended when the circuit court appointed plaintiff as Keith's guardian on August 24, 2009, and (2) the statute of limitations expired on August 24, 2011, because the appointment of a guardian did not remove Keith's legal disability. Although plaintiff took the position in these proceedings that the statute of limitations did expire on August 24, 2011, including in her motion to reconsider the trial court's order granting defendant's Rule 103(b) motion to dismiss, she argues her earlier positions are irrelevant, as the expiration of the statute of limitations is a question of law for the court to decide.

¶ 33 As a preliminary matter, defendant argues that plaintiff failed to plead, and the record is insufficient to prove, that Keith was under a legal disability sufficient to toll the statute of limitations or that he is deceased. On the contrary, defendant argues, the record supports finding that Keith was not under a legal disability for the entire period following his accident until his alleged death. Specifically, the record indicates Keith hired an attorney, and the GAL's report states that after his accident, Keith was able to walk with a walker, speak, and go on errands with his wife. Defendant argues the GAL's report "would not establish that the disability arose from the cause of action and continued unabated." Defendant calls Dr. Brkic's affidavit

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“questionable” and complains that plaintiff filed the affidavit without leave of court. Defendant notes that Dr. Brkic’s name does not appear on any of Keith’s medical bills, which are the only medical records plaintiff submitted to the court, even though those medical records are “the most obvious way” to show that Keith was legally disabled when the cause of action accrued.

¶ 34 The parties argued the question of whether Dr. Brkic’s affidavit was properly before the court. Despite acknowledging that the defendant’s motion to strike the affidavit was before the court at the April 25, 2012, hearing, defendant failed to obtain an express ruling thereon. The trial court only denied the parties’ respective motions for sanctions.

“A court’s failure to rule on a motion does not constitute a denial of the motion. [Citations.] Rather, it is the responsibility of the party filing a motion to request the trial judge to rule on it, and when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise. [Citations.]” *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 628 (2008).

¶ 35 The trial court considered the affidavit as part of its ruling regarding the statute of limitations and did not state that the court would not consider the affidavit. The court also considered the GAL’s report. The court then ruled that the statute of limitations expired on August 24, 2011. Implicit in and necessary to the trial court’s ruling is a finding that Keith Kreinik was legally disabled from the time of his accident until the appointment of a guardian on August 24, 2009. Defendant’s response to plaintiff’s motion to reconsider the trial court’s

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judgment granting defendant's motion to dismiss complains that plaintiff had not produced medical records to demonstrate Keith's legal disability, but had produced "an after-the-fact affidavit of Dr. Brvik [*sic*] claiming that the affidavit was based upon a full review of the medical records." Defendant's response to plaintiff's motion to reconsider then notes that Dr. Brkic's initial report only asserted that Keith was disabled as of June 9, 2009.

¶ 36 Defendant failed to obtain an express ruling on his motion to strike Dr. Brkic's affidavit, and in later proceedings only attacked the credibility of the affidavit, not its admissibility. Under all of the circumstances, we find defendant has abandoned his motion to strike the affidavit.

Regardless, in light of the proceedings before the trial court, we find that the court admitted the affidavit even though plaintiff filed the affidavit outside the court's briefing schedule.

Accordingly, the affidavit it is properly part of the record. The trial court based its determination regarding the statute of limitations on both the affidavit and the GAL's report.

¶ 37 It is not required that the facts demonstrating Keith's legal disability be pled in the complaint for purposes of defending defendant's motion to dismiss. "In a case where a legal disability is alleged, the *record* must contain sufficient allegations of fact from which one could conclude that the person seeking to be found legally disabled was incompetent or suffered from serious mental disorder which made that person entirely without understanding or capacity to make or communicate decisions regarding his person and totally unable to manage his estate or financial affairs." (Emphasis added.) *In re Doe*, 301 Ill. App. 3d 123, 127 (1998). See also *Ruklick v. Julius Schmid, Inc.*, 169 Ill. App. 3d 1098, 1110 (1988) ("Despite the fact that plaintiffs purposely refrained from detailing in their refiled complaint the dates that might have

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avoided the limitations statute that defendants thereafter invoked through their dismissal motion, plaintiffs explained their reason (though misguided) for so refraining, and in any event at the time the refiled complaint was presented there had yet been no statute-of-limitations defense raised in the second case that plaintiffs would be required to meet, and the refiled complaint initially appeared to satisfy the limitations statute. Thus, we hold that the trial court erred in dismissing plaintiffs' refiled complaint rather than requiring them to replead more specifically.") In this case, the record was sufficient for the trial court to make its findings.

¶ 38 Next, defendant argues that plaintiff should be judicially estopped from now claiming that the statute of limitations did not expire on September 2, 2009.

“The doctrine of judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding. [Citation.] The principle is that if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events. [Citation.] The purpose of judicial estoppel is to promote truth-seeking in the courts, rather than gamesmanship; its aim is to protect the integrity of the judicial system, not necessarily the litigants. [Citation.] Judicial estoppel is flexible and not reducible to a formula. [Citation.]

Generally, five requirements must be shown to apply judicial estoppel. The party to be estopped must have (1) taken

two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) with the intent that the trier of fact accept the facts alleged as true, and (5) have succeeded in the first proceeding and received some benefit from it.

[Citation.] A party seeking to establish judicial estoppel must prove each requirement by clear and convincing evidence.

[Citations.]” *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶¶ 19, 20.

¶ 39 In this case, defendant argues that plaintiff changed her position regarding the date of expiration of the statute of limitations between petitioning to be appointed Keith’s guardian and in proceedings on defendant’s motion to dismiss--including changing her position at various points within proceedings on the motion to dismiss. Defendant argues that the controlling position is the one taken in the petition to be appointed guardian, in which plaintiff alleged that the statute of limitations was about to expire on September 2, 2009. Defendant concedes that the application of the statute of limitations is a question of law, but argues that plaintiff and plaintiff’s counsel knew the facts that supported their earlier contentions regarding whether the statute was tolled and are now asserting different facts to reach a different outcome. Defendant argues the facts supporting plaintiff’s various positions are factually inconsistent, she made those allegations of fact in separate legal proceedings expecting the trier of fact to believe her, and she succeeded in being appointed guardian.

¶ 40 Plaintiff replies there is no inconsistency in her allegations of fact with regard to the

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statute of limitations and tolling. Plaintiff argues that when she petitioned to become guardian, the statute of limitations, without tolling, would in fact have expired on September 2, 2009, as she alleged. It is not inconsistent to now assert that the statute actually tolled. We agree with plaintiff that the allegations in the petition for guardianship are not factually inconsistent with an assertion that the statute of limitations was tolled due to Keith's legal disability.

¶ 41 “It is plaintiff's burden to prove facts exist that call into play a rule tolling the period of limitation or repose. [Citation.]” *Follis v. Watkins*, 367 Ill. App. 3d 548, 558 (2006). The failure to plead facts demonstrating that the statute of limitations was tolled can result in waiver of the protection of the tolling statute. See *Gray v. Hallett*, 170 Ill. App. 3d 660, 665 (1988) (“Under the facts of this case, tolling of the statute of limitations constitutes an affirmative defense. As such, it should have been set forth in the pleadings \*\*\*. Because Hallett did not affirmatively plead this defense in his answer nor did he argue it at trial, it is waived for purposes of appeal.”). Plaintiff had not yet filed a lawsuit on Keith's behalf when she petitioned to be appointed temporary guardian. The statute of limitations as to Keith's claims does not toll automatically even if he is in fact under a legal disability when the cause of action arises. “In order to take advantage of those sections, plaintiff's complaint must sufficiently allege facts to show the existence of ‘legal disability.’ ” *Hertel v. Sullivan*, 261 Ill. App. 3d 156, 164 (1994). Although plaintiff should have known facts that would have established Keith's legal disability at that time, none of those facts had been plead to invoke section 13-211 of the Code. Without those allegations, the statute of limitations applicable to Keith's cause of action was, as plaintiff alleged in her petition, about to expire on September 2, 2009. Plaintiff's allegations in her

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petition are not factually inconsistent with her position that the statute of limitations could be tolled if she alleged sufficient facts to demonstrate Keith's legal disability.

¶ 42 Nonetheless, plaintiff is estopped from now asserting a different date of expiration of the statute of limitations than she previously asserted in these proceedings. *In re Estate of Hale*, 383 Ill. App. 3d 559, 561 (2008) (“A party is estopped from taking a position on appeal that is inconsistent with a position the party took in the trial court”) (citing *Czarobski v. Lata*, 227 Ill. 2d 364, 376 (2008) (citing *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007))).

“It is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding. [Citation.] A party cannot complain of error which he induced the court to make or to which he consented.” *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000).

¶ 43 In *Hale*, the appellants argued that the trial court erred in applying a five-year statute of limitations to their statutory custodial claim. *Hale*, 383 Ill. App. 3d at 561. The appellees argued the trial court's judgment did not reflect whether any statute of limitations affected the amount of the award, therefore, the court should not address the issue on appeal. *Id.* The *Hale* court found the appellees' position was contrary to the position they advanced in the circuit court. In the court below, the appellees had “argued that the circuit court correctly applied a five-year statute of limitations.” *Id.* The attorney for the appellees repeated that position during a hearing on the appellants' motion to reconsider. *Id.* The *Hale* court held that the appellees “cannot now claim

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that the circuit court did not apply the five-year statute of limitations.” *Id.*

¶ 44 In *McMath*, our supreme court affirmed the trial court’s order, which was based on an Illinois Supreme Court Rule that had been replaced at the time of the order, because the plaintiff challenging the order under that rule (which challenge invoked the amended rule) had “misled the trial court as to the law which governed the situation.” *McMath*, 191 Ill. 2d at 255-56. In the trial court, the plaintiff complained that the defendant could not testify because he had not disclosed himself as an opinion witness. *Id.* at 253. The rule governing witness disclosures had recently been amended, and when asked which rule applied, plaintiff informed the court the former rule applied, and argued that defendant could not testify under the former rule. *Id.* at 254. The plaintiff challenged the trial court’s ruling in a posttrial motion under the new rule. *Id.* The appellate court, with one Justice dissenting, ruled in favor of the plaintiff and found that the trial court “ ‘abused its discretion by applying an exception to [the old rule] in a case governed by [the new rule.]’ ” *Id.* at 255 (quoting *McMath v. Katholi*, 304 Ill. App. 3d 369, 378-79 (1999)). Our supreme court reversed, holding that, because of the plaintiff’s previous inconsistent position, the plaintiff is foreclosed from arguing the trial court’s order was erroneous under the new rule. *Id.* at 256.

¶ 45 In this case, both in her initial response to defendant’s motion to dismiss and in her motion to reconsider, plaintiff adopted August 24, 2011, as the date the statute of limitations expired. It would be “manifestly unfair to allow [plaintiff] a second trial upon the basis of error which [she] injected into the proceedings.” *McMath*, 191 Ill. 2d at 255. Here, as in *McMath*, plaintiff invited to trial court to make its ruling based on August 24, 2011, as the expiration of

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the statute of limitations. It would be unfair to allow plaintiff to assert a different date other than the erroneous date she injected into the proceedings. Although we reverse the trial court's judgment as erroneous in other respects, plaintiff cannot now complain that the trial court's adoption of that date was error. *Id.* at 255 ("A party cannot complain of error which he induced the court to make or to which he consented."). Accordingly, we affirm that portion of the trial court's judgment fixing August 24, 2011, as the expiration date for the statute of limitations as to plaintiff's claims. But see *Mazikoske v. Firestone Tire & Rubber Co.*, 149 Ill. App. 3d 166, 177-78 (1986) (rejecting argument that legal disability resulting from accident was removed when the court appointed a conservator). In light of this holding, it is not necessary to decide whether plaintiff provided sufficient proof of Keith's death, as the date of his alleged death has no bearing on the expiration of the statute of limitations.

¶ 46            2. Relevant Time Period for Rule 103(b) Dismissal with Prejudice

¶ 47    Plaintiff argues the trial court erroneously relied on the decision in *Rice v. Ford Motors*, 316 Ill. App. 3d 547 (2000), in which this court held that a court may consider the plaintiff's actions from the date of the filing of the complaint to the date on which he obtains service of summons for purposes of determining whether the plaintiff exercised reasonable diligence in obtaining service. *Id.* at 547. Plaintiff argues the trial court erred because the *Rice* court construed an amended version of Rule 103(b) which is no longer in effect. The version of Rule 103(b) the *Rice* court construed read as follows:

"If the plaintiff fails to exercise reasonable diligence to  
obtain service on a defendant, the action as to that defendant may

be dismissed without prejudice, with the right to refile if the statute of limitations has not run.” (Internal quotation marks omitted.)

*Rice*, 316 Ill. App. 3d at 550 (quoting 177 Ill. 2d R. 103(b)).

¶ 48 The *Rice* court held that the version of the rule in effect at the time “contains no restriction on the court’s analysis based on when the plaintiff’s ‘reasonable diligence,’ or lack thereof, occurred, *i.e.*, before or after the expiration of the statute of limitations.” *Id.* at 551. Under the old version of the rule (which mirrors the version in effect for purposes of defendant’s motion), “the court would look to the date when the plaintiff failed to exercise reasonable diligence to determine whether the dismissal would operate with prejudice.” *Id.* at 551 (quoting *Paige-Myatt v. Mount Sinai Hospital Medical Center*, 313 Ill. App. 3d 482, 487 (2000)).

¶ 49 In *Matthews v. Donnelly*, 265 Ill. App. 3d 1016, 1019 (1994), this court held that “in determining whether or not a defendant may be dismissed with prejudice under Rule 103(b), the crucial inquiry is whether or not an examination of the plaintiff’s actions *following the expiration of the statute of limitations* reveals a failure to exercise reasonable diligence.” (Emphasis added.) *Id.* This court adopted the rule announced in *Langford v. Sentry Insurance of Illinois, Inc.*, 193 Ill. App. 3d 386, 388 (1990), “which allows the trial court to consider only the time and actions after the expiration of the limitations period when ruling on a motion to dismiss with prejudice under Supreme Court Rule 103(b).” *Id.* at 1020 (citing *Langford*, 193 Ill. App. 3d at 388 (“In ruling on a Rule 103(b) motion, a court may not consider the period or activities before the expiration of the statute of limitations.”)). Both *Matthews* and *Langford* construed versions of

the rule nearly identical to the version at issue in this case.<sup>1</sup> Moreover, the committee comments to the 2007 revision to Rule 103 state that “[t]he 2007 amendment clarified that a Rule 103(b) dismissal which occurred 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, Committee Comments (adopted June 5, 2007).

¶ 50 We find that the trial court could only dismiss plaintiff’s complaint with prejudice under Rule 103(b) if plaintiff’s lack of diligence in obtaining service occurred after the expiration of the statute of limitations. “[A] trial court can abuse its discretion \*\*\* by applying the wrong legal standard [citation] or by using the wrong legal criteria [citation].” *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 23. The trial court’s order clearly indicates that the trial court found a lack of diligence in obtaining service on defendant based on plaintiff’s counsel’s conduct between filing the complaint and obtaining effective service. This was error, and the trial court’s order must be reversed. However, as explained below, remand for consideration of the motion to dismiss is not necessary in this case.

¶ 51 3. Plaintiff’s Diligence in Obtaining Service

¶ 52 The relevant time period for purposes of defendant’s motion is August 24, 2011, until December 1, 2011. *Langford*, 193 Ill. App. 3d at 388. By August 24, 2011, when the statute of

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<sup>1</sup> “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.” *Matthews*, 265 Ill. App. 3d at 1019 (quoting 134 Ill. 2d R. 103(b)).

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limitations expired, plaintiff had served defendant, but that service was legally ineffective. On November 21, 2011, the trial court granted defendant's motion to quash service. On December 1, 2011, plaintiff obtained effective service of defendant. The period between August 24, 2011, and December 1, 2011, despite defendant having been served, can be considered in ruling on defendant's Rule 103(b) motion. *Case*, 227 Ill. 2d at 218-19 (when case is voluntarily dismissed and refiled, court may consider period before dismissal and after refiling in passing on motion challenging the plaintiff's diligence in obtaining service). However, we find that in this case that period must be accorded very little weight. *Case*, 227 Ill. 2d at 222 ("a court must consider the passage of time in relation to all the other facts and circumstances"); *Segal*, 136 Ill. 2d at 287 (court should consider defendant's actual knowledge of pendency of cause of action resulting from ineffective service); *Case*, 227 Ill. 2d at 217 (in explaining why court may not consider period between voluntary dismissal and refiling in ruling on Rule 103(b) motion the court stated that if there is no reason to serve a defendant with process, there is nothing to delay, and nothing to be diligent about). A similar reasoning to that expressed by the *Case* court applies in this case. Plaintiff reasonably believed she had obtained effective service of defendant, and had no reason to think otherwise until defendant quashed that service. During that period, plaintiff had "nothing to be diligent about." *Case*, 227 Ill. 2d at 217.

¶ 53 The inquiry into the passage of time in relation to all other facts and circumstances to determine whether to allow or deny a motion to dismiss pursuant to Rule 103(b) is individual in nature. *Case*, 227 Ill. 2d at 213. In the face of an application of an incorrect legal standard, the necessity of looking into the facts and circumstances of a particular case would normally lead us

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to remand to the trial court to make the determination in the first instance under the appropriate standard. In this case, however, there is no need to remand for the trial court to enter an order, because due to the brevity of the delay and the circumstances of this case, it is not possible that granting defendant's motion could be substantiated.

“It would not be an abuse of discretion for a circuit court to allow a dismissal with prejudice under Rule 103(b) for a delay equal to or shorter than the [19-week] delay present in this case if the delay occurs under circumstances which serve to deny the defendants a fair opportunity to investigate the circumstances upon which liability against [the defendants] is predicated while the facts are accessible. [Citation.] Under such circumstances, the purpose of Rule 103(b), the protection of defendants from unnecessary delay and the prevention of the circumvention of the statute of limitations, would be promoted.” (Internal quotation marks omitted.) *Segal*, 136 Ill. 2d at 289.

¶ 54 Where, however, the length of the delay in the service of process is such that the purpose of Rule 103(b) would not be served by dismissing plaintiff's action, the allowance of the defendant's Rule 103(b) motion by the circuit court is an abuse of discretion. *Id.* The delay in this case could not have served to deny defendant a fair opportunity to investigate the circumstances upon which liability against defendant is predicated. The total delay after the expiration of the statute of limitations was less than four months. During that time, plaintiff

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obtained ineffective service and defendant had actual knowledge of the pendency of the lawsuit. We recognize that “while actual notice or knowledge of the pendency of a suit or the lack of prejudice to the defendant are significant in that they may affect the judge’s determination as to whether the plaintiff was diligent, they are but two factors to be considered by the court in making that determination.” *Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 377 (1990). In this case, however, the delay after the expiration of the statute of limitations was brief. Compare *Segal*, 136 Ill. 2d at 288 (“delay of 19 weeks did not threaten the circuit court’s ability to proceed expeditiously to a just resolution of the matter before it.”). Plaintiff’s activities do not show a lack of diligence because, for the overwhelming majority of the time at issue, plaintiff believed service was achieved and acted swiftly to rectify the situation when she learned the service had been ineffective. The ineffective service is a special circumstance which would have affected plaintiff’s efforts and reasonably lulled plaintiff from further action. Given the significance of defendant’s knowledge of plaintiff’s lawsuit and the absence of prejudice to defendant in his ability to investigate the circumstances of the accident while the facts are accessible, neither plaintiff’s knowledge of defendant’s location nor the ease with which defendant’s whereabouts could have been ascertained weigh sufficiently in favor of defendant’s motion to justify the harsh penalty of dismissal of a cause of action with prejudice under Rule 103(b). *Segal*, 136 Ill. 2d at 288-89.

¶ 55 Moreover, we find that there was no period of time since the accident occurred where any delay by plaintiff served to deny defendant that opportunity. It is clear that defendant was subject to criminal proceedings arising from the same conduct that is the subject of plaintiff’s complaint.

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It is also clear that defendant is represented by counsel in those criminal proceedings. Therefore, it would be unreasonable to assume that despite those criminal proceedings, somehow defendant was not investigating the circumstances of the accident--the basis of plaintiff's lawsuit--to preserve evidence. Further, "the plaintiff did not ignore her case for months at a time and make no attempts to locate or serve the defendant." *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1046 (2009). Accordingly, defendant's motion to dismiss must be denied.

¶ 56

#### CONCLUSION

¶ 57 For all of the foregoing reasons, the trial court's judgment is reversed, and the cause remanded for further proceedings consistent with this order.

¶ 58 Reversed and remanded.