Donald Patrick Eckler
Freeman Mathis & Gary LLP, Chicago

Numerous Recent Decisions Elucidate Important Procedural Rules

From 735 ILCS 5/2-1007.1 to Illinois Rules of Evidence 615 and 902(11) to Supreme Court Rule 236 to the award of prejudgment interest and costs in mandatory arbitration proceedings, these recent decisions highlight important rules that civil defense lawyers should be aware of as they litigate matters in Illinois.

Ramirez v. Avon Products, Inc.

The amendment to Section 1007.1 of the Illinois Code of Civil Procedure allows for even faster advancement of matters in which the plaintiff is aged or in financial distress. In *Ramirez v. Avon Products, Inc.*, the Illinois Appellate Court First District affirmed the judgment of the circuit court, which bifurcated direct claims and third-party claims for contribution in order to maintain an expedited trial date, despite the substantial problems and the prejudice such a procedure caused to the defendant. 2024 IL App (1st) 240441-U, ¶¶ 2-3

The plaintiff was diagnosed with mesothelioma in January 2023 and sued his former employer, Avon, among others in April 2023 for personal injury and loss of consortium. *Ramirez*, 2024 IL App (1st) 240441-U, ¶¶ 2, 6-7. He served Avon on May 15, 2023, and on June 13, 2023, the plaintiff moved for an expedited trial pursuant to 735 ILCS 5/2-1007.1. *Id.* ¶ 8. The circuit court granted the motion based upon the plaintiff's limited life expectancy and set a case management schedule with a trial set for March 19, 2024. *Id.* ¶ 6.

During discovery, Avon discovered several other former employers of the plaintiff that it claimed could have contributed to his disease and requested leave to file a third-party complaint for contribution against them. *Id.* ¶ 8. In opposing the motion, Ramirez argued that "Avon had been on notice of the proposed third-party defendants for months, Avon had not acted in a timely manner to bring those parties into the case, some of the companies that Avon wanted to bring in as third parties no longer existed, there was no evidence Mr. Ramirez had been exposed to asbestos from any employment other than at Avon, and permitting Avon to assert the claims at that late juncture would result in significant prejudice to the plaintiffs because of Mr. Ramirez's diminished life expectancy." *Id.* ¶ 9. The circuit court granted the motion for leave to file the contribution claims but bifurcated the claims from the plaintiff's complaint and kept the trial date. *Id.* ¶ 11.

On appeal, the appellate court found that the circuit court did not abuse its discretion, citing *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, and *Zoot v. Alaniz Group*, 2016 IL App (1st) 160013-U and rejecting Avon's reliance on *Laue v. Leifheit*, 105 Ill. 2d 191 (1984). *Ramirez*, 2024 IL App (1st) 240441-U, ¶¶ 29-30. Accordingly, the appellate court remanded the matter back to the circuit court for trial on an expedited basis. *Id.* ¶ 33.

Several notes are important about this case. First, the original motion was filed before the amendment to Section 1007.1, which further liberalized expedited trial dates under certain circumstances. Defense counsel must be prepared for further motions of this kind under the current statute. Second, this case illustrates the combination of the expedited trial schedule and the ability to bring such claims against employers at all under the amendments to the Occupational Disease Act, which is the subject of *Martin v. Goodrich Corp.*, 95 F.4th 475 (7th Cir. 2024), currently pending before the Illinois Supreme Court on certified questions from the Seventh Circuit. This is emblematic of the plaintiffs' bar remaking the toxic tort landscape in Illinois. Third, where the plaintiff moves for an expedited trial, it is critical that defense counsel move expeditiously to complete discovery and name parties because, following this decision, it is unlikely that relief is coming from the courts of review.

— Continued on next page

About the Author

Donald Patrick Eckler is a partner at *Freeman Mathis & Gary LLP*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

where the plaintiff moves for an expedited trial, it is critical that defense counsel move expeditiously to complete discovery and name parties because, following this decision, it is unlikely that relief is coming from the courts of review.

Sanders v. CSX Transportation, Inc.

Illinois Rule of Evidence 615 governs the sequestration of witnesses, and in *Sanders v. CSX Transp., Inc.*, 2024 IL App (1st) 230481, the application shows that its plain language trumps what might be common practice with respect to former employees. The rule states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by law to be present.

In *Sanders*, which was originally an unpublished decision, the Illinois Appellate Court First District held that the circuit court did not abuse its discretion in giving an instruction on the credibility of the defendant's former employee, who had been improperly designated as the corporate representative of the defendant and thus present during the trial, hearing trial testimony that should not have been permitted. *Sanders*, 2024 IL App (1st) 230481, ¶¶ 62-63.

The deceased's estate claimed that exposure to asbestos and diesel fumes at the CSX facility caused colon cancer, leading to his death. *Id*. ¶¶ 3-4. The matter proceeded to trial, and the deceased's former supervisor, James Prichard, was designated as the corporate representative and seated at counsel table. *Id*. ¶ 9. After observing several witnesses testify, Prichard was called as an adverse witness by the plaintiff. During his testimony, it was revealed for the first time that he was no longer an employee of CSX. *Id*. ¶ 15.

The trial judge raised the issue *sue sponte* following Pritchard's testimony, and the following day, the court heard argument on the violation of Evid. R. 615. *Id*. ¶¶ 20-21. CSX argued that Pritchard was a "table representative" of the company and that he need not be a current employee, but the plaintiff countered that a former employee could not be a corporate representative. *Id*. The plaintiff requested that Pritchard's testimony be stricken, but the trial judge instructed the jury that attorneys are permitted to speak with witnesses and that the jurors are the sole judge of the credibility of witnesses. *Sanders*, 2024 IL App (1st) 230481, ¶ 21.

The jury rendered a verdict in favor of the plaintiff but found him 65% contributorily negligent (likely because of his long-term tobacco use). CSX appealed under the Federal Employers' Liability Act (FELA), which employs pure comparative fault pursuant to 45 USC § 53. The estate was entitled to recover $770,000. *Id*. ¶¶ 3, 41. Among other issues on appeal, CSX raised the issue whether the instruction with respect to Prichard's presence at counsel table was proper. *Id*. ¶ 58. The appellate court concluded that the trial court took "a reasonable approach" and chose the least "draconian" measure available to it rather than striking Pritchard's testimony as requested by plaintiff. *Id*. ¶ 62.

Defense counsels are wise to take heed from this decision and review Rule 615 before designating the corporate representative at trial.

Wright v. Naperville Autohaus, Inc.

Many cases that proceed to trial, or even on summary judgment, include documents that are offered for self-authentication. In *Wright v. Naperville Autohaus, Inc.*, 2024 IL App (3d) 220520-U, ¶ 2, the Illinois Appellate Court Third District affirmed the ruling of the trial court that the plaintiff had insufficiently laid the foundation for the admission of a repair estimate in a case regarding the breach of warranty of merchantability.

Ill. Evid. R. 902(11) provides as follows:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(11) Certified Records of Regularly Conducted Activity. The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The word "certification" as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Wright, 2024 IL App (3d) 220520-U, ¶ 6. The plaintiff in *Wright* attempted to offer into evidence a repair estimate of a vehicle he purchased from the defendant that included the following statement: "CUSTOMER REQUEST ESTIMATE DUE TO WATER DAMAGE. CARPET HAS MOLD." *Id*. In addition to chain of custody issues, the defendant argued that the document was hearsay within hearsay. *Id*.

The circuit court granted a motion *in limine* for the repair estimate finding that no exception to the rule against hearsay applied. *Id*. ¶ 7. A directed verdict in favor of the defendant was entered on the basis that the plaintiff did not prove whether the defect in the vehicle was present at the time of the purchase. *Id* ¶¶ 9-10.

On appeal, the plaintiff contended that the repair estimate was a business record under Rule 902(11). *Id*. ¶ 12. The appellate court agreed that the repair estimate was a business record under Rule 803(6) and that the ruling of the circuit court in this regard was error but that the certification of the document under Rule 902(11) was insufficient. *Wright*, 2024 IL App (3d) 220520-U, ¶ 17. Specifically, the appellate court found that the certification was not notarized and was not sworn to by the affiant. *Id*. ¶ 19. The court drew the distinction between the Illinois version of the rule and the federal version, as Illinois law requires "a written declaration under oath subject to the penalty of perjury." *Id*. Further, the document did not record who made the notations on the document and thus the defendant could not subpoena the author to testify to challenge its credibility. *Id*. ¶ 21.

Whether it is a repair estimate or medical records, Rule 902(11) is often used to admit business records into evidence at trial. A careful practitioner should review the certification provided to determine whether it satisfies the requirements of Rule 902(11).

Whether it is a repair estimate or medical records, Rule 902(11) is often used to admit business records into evidence at trial. A careful practitioner should review the certification provided to determine whether it satisfies the requirements of Rule 902(11).

Arrowwood Indemnity Company v. Thompson

Also related to the business record exception to the rule against hearsay but referencing Supreme Court Rule 236 instead of Ill. Evid. R. 803(6), the Illinois Appellate Court Fifth District in *Arrowwood Indem. Co. v. Thompson*, 2024 IL App (5th) 230876-U, affirmed the ruling of the circuit court and held that the judgment in favor of the plaintiff was proper.

— Continued on next page

The plaintiff insurer, who issued a default insurance policy to successors in interest to the defendant student loan providers, sued the defendant when he defaulted on those loans. *Thompson*, 2024 IL App (5th) 230876-U, ¶ 6. The defendant sought to bar testimony and documents related to business records created by the lenders and used by the insurer to pay the claim following the default. *Id*. ¶¶ 12-15. Specifically, the plaintiff sought to admit into evidence, through a 32-year employee of the plaintiff, the following: "the original claim documents, a record of the payments that were made, and a claim form." *Id*. ¶ 15. The plaintiff's witness further testified that the documents were kept in the ordinary course of business, it was the ordinary course of the business to keep those records, and the defendant relied on those documents in making payments on the claim. *Id*. ¶¶ 16-23.

The circuit court allowed the documents to be admitted into evidence over the objection of the defense, and judgment was entered in favor of the plaintiff and against the defendant. *Id*. ¶¶ 31-32.

On appeal, the defendant contended that the plaintiff did not satisfy the requirements of Rule 236 for the admission of a business record because the records were not created by the plaintiff but created by the insureds whom the plaintiff paid following the default. *Id*. ¶ 34. Thus, the defendant contended the documents could not be business records. *Id*.

The Rule provides as follows:

> Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term 'business,' as used in this rule, includes business, profession, occupation, and calling of every kind.

In opposition, the plaintiff relied on *Bank of Am., N.A. v. Land*, 2013 IL App (5th) 120283, which holds that "'Rule 236 expressly provides that lack of personal knowledge by the maker may affect the weight of the evidence but not its admissibility.'" The appellate court found that the testimony of an employee of the defendant with this extent of experience and knowledge was sufficient to support the admissibility of the evidence. Thus, the trial court's judgment was affirmed. *Thompson*, 2024 IL App (5th) 230876-U, ¶ 38.

What constitutes a business record for the purposes of admissibility is, in the modern world of commerce, often beyond those records created by the business, so long as they are kept in the ordinary course and regularly relied upon by the business.

> The lesson is important for defense counsel: to obtain costs in the event of a defense finding at mandatory arbitration, the defendant must present its costs at the arbitration. If they are not presented, it is likely that the circuit court will not be able to award them later.

Jordan v. Macedo

As the use of mandatory arbitration has expanded, with such arbitration now required for many matters in the Law Division of the Circuit Court of Cook County, and the availability of prejudgment interest, the decision in *Jordan v. Macedo*, 2024 IL App (1st) 230079 (originally unpublished), is an important decision for how costs and prejudgment interest are presented and awarded.

The plaintiff in *Jordan* filed suit for personal injuries following an automobile accident, and the matter proceeded to mandatory arbitration at which the plaintiff was awarded $13,070. *Jordan*, 2024 IL App (1st) 230079, ¶¶ 2-4. Neither party rejected the award, and the plaintiff then filed a Motion to Tax Costs and Award Prejudgment Interest. *Id*. ¶¶ 6-7. The defendant objected, and the circuit court denied the motion, entering judgment on the award of the arbitrators which did not include the costs or interest. *Id*. ¶ 10.

The Illinois Appellate Court First District reversed the circuit court as to

the award of prejudgment interest but affirmed the denial of costs as the former could not be presented to the arbitrators while the latter could. *Id*. ¶¶ 26, 31. In dissent, which is the important portion for defense counsel, the dissenting justice agreed that the circuit court erred in denying the award of prejudgment interest but also asserted that the circuit court erred in denying costs, stating that "[u]nder the court's ruling today, both sides must provide to the arbitrator a specific cost calculation, presumably with evidentiary support, or be foreclosed from a recovery of this statutory right. I do not think that is in keeping with the arbitration rules or with the statutory right to costs." *Id*. ¶¶ 37, 51.

The lesson is important for defense counsel: to obtain costs in the event of a defense finding at mandatory arbitration, the defendant must present its costs at the arbitration. If they are not presented, it is likely that the circuit court will not be able to award them later.

Takeaways

These basic rules are just that: basic. But they are easy to forget and must be applied properly. As seen in each of these situations, these errors were extremely detrimental, if not fatal, to the party that made the error or did not act with sufficient alacrity. Reviewing these rules and similar rules is critical to proper practice and the achievement of a positive outcome for clients.