Hon. Jeffrey T. Bergin, Petitioner
Presiding Judge
Superior Court of Arizona in Pima County
110 W. Congress St., Tucson, AZ 85701

SUPREME COURT OF ARIZONA

SUPPLEMENTAL REPLY TO PERMANENTLY ADOPT RULES RULES FOR THE FAST TRIAL ALTERNATIVE RESOLUTION PROGRAM ("FASTAR")	) Supreme Court No. R-20-0012)) SUPPLEMENTAL REPLY)))

1. Introduction. The Hon. Kyle Bryson, Presiding Judge of the Superior Court of Arizona in Pima County, filed R-20-0012 on January 9, 2021. R-20-0012 proposed permanent adoption of the FASTAR rules, with a variety of modifications to those rules. On June 1, 2020, Judge Bryson filed a reply to the initial round of public comments to his petition. His reply proposed two additional modifications: a revision to Rule 102(d), and the correction of a cross-reference in Rule 122(f). His reply also requested the Court to defer action on this rule petition and to instead extend the FASTAR pilot program in Pima County. The Court granted the request, and on October 7, 2020, it entered Administrative Order No. 2020-158, which extended the FASTAR pilot program to December 31, 2021.

At its August 24, 2021 Rules Agenda, the Court re-opened R-20-0012 for public comments. Two additional comments were filed thereafter. The Hon. Jeffrey Bergin, who has succeeded Judge Bryson as the Presiding Judge of the Superior Court of Arizona in Pima County, files this Supplemental Reply to those two comments.

2. Comment from Lawrence A. Ruzow. Petitioner appreciates Mr. Ruzow's comment in support of the FASTAR program. Admittedly, the FASTAR program might not have yet achieved all the benefits cited by Mr. Ruzow. Petitioner believes, however, that the program is already saving the court and litigants time and money. In comparison with the system of compulsory arbitration, FASTAR has demonstrated significantly decreased times to case disposition. Before FASTAR, the average time to disposition for Pima County compulsory arbitration cases was 8 months. If a party appealed a compulsory arbitration award and the court conducted a trial de novo, case resolution took up to two years. By comparison, in the third year of the FASTAR program, cases in the alternative resolution track were resolved in 121 days (i.e., 4 months) and cases in the fast trial track were resolved in 159 days (about 5 months.)

Although Petitioner does not have data regarding litigation costs during these periods, Petitioner believes that decreased times to disposition are probably associated with lower attorneys' fees and costs. Indeed, certain FASTAR rules

facilitate cost reduction. For example, FASTAR Rule 113, which concerns depositions of medical providers and experts, caps the fee of a medical provider or expert witness at $500 per hour and limits the length of the deposition to two hours (one hour per side). In addition, the fee of the doctor or expert is apportioned to the parties according to the length of time each party questioned the witness. Furthermore, any party may video record the deposition by using "any unobtrusive and reliable device," thereby eliminating the cost of a professional videographer. While Petitioner cannot quantify the reduced costs, they almost certainly exist. The rules for compulsory arbitration (Rules 72 through 77 of the Arizona Rules of Civil Procedure) contain no similar cost reducing mechanisms.

Regardless, then, of whether FASTAR has accomplished every one of its laudable aspirations, it has still achieved the objectives of reduced times to disposition and mitigation of litigation costs, both of which are acknowledged goals of civil justice reform.

The last paragraph of Mr. Ruzow's comment, regarding the admissibility of medical bills in a fast trial, is separately discussed in section 4 of this reply.

3. Comment from Robert A. Bernheim. Mr. Bernheim's noted that his comment did "not opine on the merits of extending the duration of the FASTAR program" or similar issues, but rather, it was limited to observations concerning Judge Bryson's proposed modifications to the FASTAR rules.

Early meetings and joint reports. Judge Bryson's petition proposed adding to Rule 108 ("disclosure and discovery") a new section (a) ("generally") to clarify that the requirements of Civil Rule 16(b) (the required early meeting) do apply to all FASTAR cases, i.e., fast trial as well as alternative resolution, but the requirements of Civil Rule 16(c), which concern the filing of a joint report and proposed scheduling order, do not apply to these cases. In conjunction with this change, Judge Bryson proposed deleting Rule 111(d) ("joint report and proposed scheduling order not required"), which provided that the joint report and scheduling order did not need to be filed in fast trial cases, because new Rule 108(a) makes Rule 111(d) redundant.

Rule 111(d) was limited to fast trial cases and did not address whether a scheduling order was required in alternative resolution cases. See Judge Bryson's petition at pages 9 and 11. Judge Bryson's proposed amendments would encourage – would indeed require – that the parties communicate, that is, that they have an early meeting in fast trial and alternative resolution cases. But proportional to a Tier One case, the modifications would not burden parties with additional court filings, such as a joint report or a proposed scheduling order. As Mr. Bernheim noted at page 2 of his comment, "The proposed changes minimize any confusion and still require parties to meet early to plan the upcoming litigation, but they eliminate the joint report and proposed scheduling order, which reduces effort and costs associated with filing a formal report covering numerous topics that rarely arise in FASTAR

cases." Petitioner agrees with that observation and he continues to support these amendments.

Initial disclosure deadline. To conform the Fast Trial disclosure deadline with the deadline under the Civil Rules, Judge Bryson requested the Court to modify Rule 112(a) so that it also provided a 30-day deadline for the initial disclosure, rather than 20 days, as Rule 112(a) currently provides. Mr. Bernheim supports this amendment, as does the Petitioner.

Medical bills. Mr. Bernheim's comment regarding the admissibility of medical bills also is discussed in section 4 of this reply.

Discovery disputes. Rule 108 (now titled "disclosure and discovery disputes" but shortened to "disclosure and discovery" as proposed by this rule petition) currently contains requirements for presenting the dispute to the assigned judge or arbitrator. Judge Bryson's petition (at page 10) proposed a modification to this provision. In addition to the proposed addition of a new Rule 108(a) discussed above, Judge Bryson proposed relocating the remaining substantive content of current Rule 108 into a new section (b), which would have the title "disclosure and discovery disputes." Revised section (b) would require that the assigned judge hear all discovery disputes "because the plaintiff in an Alternative Resolution proceeding has no right to appeal" (petition at page 10) and the ruling on the dispute could have significant consequences on the outcome of the case.

Judge Bryon's petition also proposed an amendment to Rule 121 ("general duties of an arbitrator"), subpart (b)(1) ("authorized rulings") that specified the arbitrator's authority to rule on certain motions except "motions concerning disclosure and discovery disputes." Judge Bryson's petition did not propose any revisions to (A) Rule 121, subpart (b)(3) ("discovery motions"), which allows the arbitrator to "limit discovery when appropriate to accomplish the objectives of FASTAR…;" or (B) to Rule 121, subpart (b)(4) ("interlocutory appeal of discovery ruling"), which allows an aggrieved party to take an interlocutory appeal to the assigned judge from an arbitrator's ruling on a privilege claim. Subparts (b)(3) and (b)(4) are inconsistent with the proposed amendment to Rule 108(b). Petitioner agrees with Mr. Bernheim that if the Court adopts the proposed amendment to Rule 108, it should also delete Rule 121(b)(3). The Court's approval of Petitioner's proposed modifications to Rule 108(b) would also necessitate the elimination of Rule 121(b)(4).

Discovery limits. Judge Bryson's reply proposed adding to Rule 122 ("prehearing procedures") a new section (f) ("discovery limits and deadline") because the rules on alternative resolution currently contain no discovery limits. The proposed new section provides that discovery limits in an alternative resolution proceeding "are the same as specified in FASTAR Rule 112(b)."

Petitioner, however, notes an additional issue with proposed Rule 122(f). The proposed new section further provides that "the parties must complete discovery within 120 days after the filing date of the first answer, or by another deadline established by the court." Petitioner submits that this proposed provision might conflict with the timeline provided by other rules. The court administrator must assign an arbitrator no later than 30 days after an answer is filed. (Rule 120(e).) The arbitrator must set a hearing date not earlier than 60 days and not later than 120 days after the arbitrator's notice of assignment. (Rule 122(b).) Accordingly, the discovery completion deadline (120 days) might occur after the arbitrator is appointed and has set a hearing (30 days + 60 days = 90 days.) Petitioner now recommends shortening the discovery deadline under proposed Rule 122(f) to 90 days after the filing of the first answer.

Mr. Bernheim's comment further notes a possible discrepancy between "per side" and "per party" limits. His comment, however, goes on to observe, "It appears unlikely that either option of discovery limits significantly burdens any side more than the other. For this reason, I do not take a position on this proposed change." Petitioner agrees and submits no change on this point.

Remaining amendments. Mr. Bernheim's comment concludes, "The remaining amendments all appear to be either corrections for clarity and style or minor and seemingly uncontroversial changes." Petitioner agrees that Judge

Bryson's proposed amendments improve the clarity of the FASTAR rules and the functionality of the process.

4. Medical Bills. The comments from Mr. Ruzow and Mr. Bernheim both raised the issue of the admissibility of medical bills in a fast trial proceeding.

The same issue does not apply in an alternative resolution proceeding because FASTAR Rule 123 ("hearing procedures"), section (d) ("documentary evidence") generally allows the admission of medical bills ("the arbitrator must admit into evidence") in an alternative resolution hearing "unless a document is not what it appears to be and an objection is stated in the prehearing statement." By comparison, Rule 117 ("fast trial"), section (d) ("evidence") requires that in addition to listing the bills in the pretrial statement, "the party requesting admission of a bill [must establish] a foundation that the amount of the bill is reasonable and the treatment or service described in the bill was medically necessary."

At page 3 of his comment, Mr. Bernheim reported, "Many plaintiffs' personal injury attorneys dislike the current Fast Trial Track rule and feel they are forced to choose the Alternative Resolution Track because it is too difficult and costly to bring medical providers into trials to establish the necessary foundation to admit medical bills into evidence." Mr. Ruzow observed, "The issue of medical bills is a difficult one and ultimately comes down to the question of who should bear the burden--

either the plaintiff to prove reasonableness of such expenses or the defendant to disprove the reasonableness."

At about the time Judge Bryson filed R-20-0012, attorney James Abraham filed rule petition number R-20-0014, which also concerned FASTAR. In addition to proposing the elimination of alternative the resolution track, which Petitioner strongly opposes, Mr. Abraham's petition (at pages 7-8) addressed the issue of medical bills in a fast trial. Mr. Abraham's petition said,

> Second, to be fair, the Plaintiff lawyers and their clients need some relief from the burden of being required to prove that submitted medical bills are reasonable. (Plaintiff should retain the burden to prove that the medical care was caused by the Defendant's negligence.) For the past several decades, the practice in injury jury trials in Arizona was to admit all of the medical bills into evidence. The parties agreed to dispute the causation (the necessity) of the medical bills, but the parties rarely disputed the amount (the reasonableness) of the medical bills.
>
> However, the spike in the cost of medical care over at least the past 8-9 years has placed the counsel for the defense in the position where the reasonableness of the amount of a medical bill no longer may be undisputed at trial. Petitioner requests that the FASTAR Rules be changed so that the rules provide for a rebuttable presumption that the Plaintiff's submitted medical bills are reasonable in amount, but still allowing any party to offer evidence challenging the reasonableness of any submitted medical bill.
>
> The shifting of this burden of proof to the defense is fair. Typically, a collision-injured Plaintiff will see at least four health care providers, such as an ER/Urgent Care provider, a PCP/chiropractor, a radiology provider, and often a specialist, such as an orthopedist or a neurologist. At trial, under the current trend, the Plaintiff would have to call at least four to five fact witnesses from medical providers to explain why their bills are reasonable, or the Plaintiff would need to hire an expert to review all the medical bills, and then

> explain their opinions to the jury. These are both time-consuming and expensive processes for all parties.
>
> Auto insurance carriers carefully examine all medical bills. Anecdotally, based on 24 years of insurance defense work in auto collisions, for five (5) large auto insurance carriers, the undersigned Petitioner knows that the carriers usually only challenge the amount of a medical bill when the charge seems to be grossly unreasonable. Usually, medical bills are disputed with expert testimony when thousands of dollars are at stake, rather than hundreds of dollars. The only practical way to dispute the amount of a medical bill is with expert testimony. If a medical bill appears to be is grossly overpriced, then it is likely to be disputed by the carrier, no matter who has the burden of proof for the reasonableness of that particular bill. The burden of proof should be on the industry, as that's it's business, not the Plaintiff, who did not choose to be in an auto accident, and often was carted away by ambulance to the nearest hospital.

The State Bar filed a comment to R-20-0014. The State Bar's comment said, in part:

> The Petition's proposal of a rebuttable presumption of the reasonability of the dollar amounts billed in medical records is one that would keep litigation leaner, cheaper, and faster on the whole, consistent with the spirit of FASTAR and the goals of the Committee on Civil Justice Reform. As the Petition correctly notes, medical bills will likely only be challenged for their reasonability when the amounts are obviously unreasonable. The proposed change would thus reduce unnecessary friction in the litigation process. Both plaintiff and defense practitioners, as well as some trial judges, see merit in this proposal.

Judge Bryson's reply in R-20-0012 noted the discussion regarding the admissibility of medical bills in R-20-0014 and anticipated, as the State Bar's comment suggested, that the proposed rebuttable presumption of reasonableness

might be the subject of additional study by the State Bar. But to Petitioner's knowledge, the State Bar has not yet finalized a study.

After considering the above-cited observations of Mr. Ruzow, Mr. Bernheim, Mr. Abraham, and the State Bar, Petitioner believes that it would now be appropriate to amend Rule 117(d)(1) in accordance with Mr. Abraham's proposal, as follows:

> **(d) Evidence.** The Arizona Rules of Evidence apply to a Fast Trial. However, and unless there is a specific legal objection in the joint pretrial statement, the following documents are admissible in evidence:
>
> (1) Medical bills of licensed or authorized providers, provided the party requesting admission of a bill establishes a foundation that ~~the amount of the bill reasonable and~~ the treatment or service described in the bill was medically necessary; the amounts of all medical bills are presumed reasonable, but any party may offer evidence to dispute the presumption of reasonableness of any medical bill;
>
> (2) – (5) [no change]

5. Conclusion. Within the next few weeks, Petitioner will be submitting a status report on the FASTAR program to the Arizona Judicial Council, as required by Administrative Order No. 2020-158. The report will include some of the matters noted in this Supplemental Reply. The report also will discuss the impact of the COVID-19 pandemic on the superior court's ability to provide jury trials to FASTAR litigants. Accordingly, the report will request an additional extension of the term of the pilot program.

Because Petitioner is asking to continue the pilot program, it might be inappropriate to now request the permanent adoption of the FASTAR rules.

Therefore, Petitioner again requests that the Court defer the matter of permanent adoption.

However, Petitioner believes that the rule amendments initially proposed by Judge Bryson's January 2020 petition, as further revised in his June 2020 reply, be incorporated in the rules governing the ongoing FASTAR pilot program, with these three additional modifications:

First, that current Rule 121(b)(3) be deleted, as proposed by Mr. Bernheim, and that Rule 121(b)(4) also be deleted, as proposed by Petitioner;

Second, in proposed Rule 122(f), that the previously proposed 120-day deadline for completion of discovery be shortened to 90 days; and

Third, that the Court amend Rule 117(d)(1), as shown in section 3 of this Supplemental Reply, so that medical bills introduced during a fast trial are deemed presumptively reasonable.

RESPECTFULLY SUBMITTED this 29 day of October 2021.

By __/s/_____
Hon. Jeffrey T. Bergin
Presiding Judge
Superior Court of Arizona Pima County

A copy of this supplemental reply was emailed this 29th day of October 2021 to:

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