

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

IN THE SUPREME COURT STATE OF ARIZONA

PETITION TO PERMANENTLY	)	No. R-24-0004
ADOPT RULES FOR THE FAST TRIAL	)	
AND ALTERNATIVE RESOLUTION	)	REPLY
PROGRAM (“FASTAR”)	)	
	)	

I. Introduction

By Administrative Order No. 2017-116, this Court adopted rules for a pilot program in the Superior Court in Pima County commonly referred to as “FASTAR.” (“FASTAR” is an acronym for the Fast Trial and Alternative Resolution Program.) Undersigned’s petition asks the Court to permanently adopt the FASTAR rules as amended in order [R-20-0012](#) on December 8, 2021, with minor modifications to eliminate the reference to FASTAR being a pilot program. This Reply discusses the comments filed on the Court Rules Forum and concludes by asking the Court to permanently adopt the program and deferring to the Court’s discretion on certain suggested amendments.

II. Background

Petitioner believes it is important to remember what led to the implementation of the 2017 FASTAR program.

Supreme Court Administrative Order [No. 2015-126](#) established the Committee on Civil Justice Reform (“CJRC”). In October 2016, the CJRC submitted its final report to the Arizona Judicial Council (“AJC”) with more than a dozen recommendations.

The CJRC studied the compulsory arbitration process set forth in the Arizona Rules of Civil Procedure. While the compulsory arbitration process was intended to provide a speedy and economical alternative to a jury trial, the CJRC determined that it did not uniformly achieve those goals. The CJRC found that the time from filing a complaint to the entry of judgment in cases subject to compulsory arbitration could require as much time as if the matter had gone to trial on a standard trial track. The CJRC also found that court-appointed arbitrators occasionally have no experience in the subject matter they are arbitrating, or that setting arbitration hearings and deciding cases are lesser priorities for attorney arbitrators than attending to their clients’ cases.

Additionally, while compulsory arbitration provides a right to “appeal” an arbitration award, the CJRC noted that Civil Rule 77 provides a trial *de novo* rather than an appeal on the record of the arbitration. Trials *de novo* routinely include

witnesses and evidence not disclosed prior to, or used in, the arbitration hearing, thereby increasing rather than mitigating litigation costs. Finally, the CJRC noted that Defendants who prevail at a trial *de novo* can seek sanctions including attorney's fees and expert witness fees, against a plaintiff who prevailed at an arbitration hearing. (See Civil Rule 68(g) regarding sanctions arising from an offer of judgment, and Civil Rule 77(h) concerning sanctions arising from an appeal from a compulsory arbitration award.)

To address the shortcomings of the compulsory arbitration process, the CJRC recommended the implementation of the FASTAR pilot program in Pima County. By Administrative Order [No. 2017-116](#), the Court adopted a three-year FASTAR pilot program in the Superior Court in Pima County, as well as rules for the FASTAR program.. FASTAR procedures allow plaintiffs to choose either the Alternative Resolution Track, which is like compulsory arbitration, or a Fast Trial before a judge or a jury.

III. Issues Raised by Comments.

In response to the petition to permanently adopt the FASTAR program, several comments argue the program is ineffective and unfair to plaintiffs. These arguments focus on several points. First, that FASTAR fails to increase the number of trials in Pima County. Second, that it is unfair that FASTAR require a Plaintiff who selects the Alternative Resolution Track to waive the right to appeal an alternative

resolution decision. Third, that the Fast Trial track is expensive and inefficient because the FASTAR rules do not allow for the presumptive admission of medical bills and records. Some comments argue that plaintiffs are forced into a binding alternative resolution hearing because calling required expert or medical witnesses at trial is cost prohibitive. Fourth, many criticize the sixty-day service deadline as onerous and unfair. Finally, there is a recommendation for an additional meet and confer requirement for the parties. Petitioner addresses each of these concerns separately.

A. FASTAR has not increased the number of trials but it has reduced the cost and time of completion for all cases in the program.

Comments criticize the program for failing to increase the number of trials. Petitioner concedes trials have not increased. As noted in previous petitions, however, increasing trials was not the primary goal of the FASTAR program. The program's objective "is to achieve a more efficient and inexpensive, yet fair, resolution of eligible cases." See FASTAR Rule 101 (a).

Petitioner's past progress reports support the conclusion that FASTAR has decreased disposition times as compared to disposition times under compulsory arbitration. Disposition times consistently decreased over the program's six reporting periods. Additionally, by expediting deadlines, limiting discovery, limiting expert fees, and allowing video recording of medical providers' depositions, the program has reduced litigation costs. No comment argues otherwise.

B. Admission of Medical Bills

Admissibility of medical bills and FASTAR Rule 117 has been a frequent concern with the Fast Trial Track. In its December 8, 2021, Order (R20-0012), this Court amended FASTAR Rule 117. The amendment eliminated a requirement that a plaintiff lay foundation that the amount of a medical bill is reasonable, and the described treatment was medically necessary prior to admitting a medical bill into evidence. Amended Rule 117 allows the court to admit medical bills without requiring a plaintiff to establish this foundation. At the same time, Rule 117 does not relieve the admitting party of its burden of proving reasonableness of the amount billed and necessity of the treatment to prevail on a claim. Despite the presumption of medical bill admissibility for a plaintiff, comments argue that plaintiffs continue to be discouraged from selecting the Fast Trial track because it is expensive to call experts or treating physicians at trial for the purpose of showing that medical bills are reasonable and causally related to a claim. Attorney comments express frustration with the fact that it is more expensive to prove their case at a Fast Trial when compared to an alternative resolution hearing.

The amended rule allows the court to admit medical bills without calling an expert. If, however, a defendant challenges the bills as unreasonable or not necessary, Plaintiffs then carry the burden of proving those elements to prevail on

their claims. This is the same burden a plaintiff carries in compulsory arbitration. Plaintiffs selecting a Fast Trial should not have a different standard of proof than a plaintiff in an alternative resolution hearing. Petitioner believes that amended Rule 117 properly addresses admissibility of medical bills, and that no change is necessary.

Some comments support an amendment to Rule 117 that would mirror the Alternative Resolution rule governing the admissibility of medical bills, Rule 123 (d). This proposed amendment would not eliminate the need for a plaintiff to call medical providers or experts when the opposing party contests the reasonableness of the amount of the bill or whether the associated medical treatment is causally related. Accordingly, Petitioner opposes this proposed amendment.

If, however, this Court finds it appropriate to alter the burden of proof in a Fast Trial, the Court may wish to reconsider the amendment to Rule 117 Petitioner proposed in 2021. For the Court's convenience, the 2021 proposed language is below.

(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.

C. Plaintiffs' right to appeal an alternative resolution award.

Some attorneys argue that FASTAR is unfair to plaintiffs because it does not permit a plaintiff to appeal an alternative resolution award. Petitioner believes that allowing a plaintiff to choose the Alternative Resolution Track only when waiving the right to appeal compels plaintiffs to meaningfully prepare their cases for an alternative resolution hearing. Defendants are also motivated to put their best case forward in an alternative resolution hearing because if a defendant appeals an alternative resolution award, a defendant must obtain a more favorable award by 23% at trial to avoid sanctions. Petitioner believes that without this restriction, alternative resolution becomes little more than a dress rehearsal for the “real case” to be presented after an appeal from the alternative resolution hearing. This inevitably creates delays and increases expenses experienced prior to the FASTAR program. Petitioner recognizes that some comments disagree with this position.

Petitioner is committed to the Superior Court in Pima County providing a fair, efficient, and trusted forum in which the community can resolve its legal disputes in a timely manner. Petitioner believes FASTAR, as currently designed, achieves that goal. If after consideration, however, this Court decides that a plaintiff should have the right to appeal an alternative resolution award, Petitioner requests that any

amendment allowing an appeal to remain consistent with FASTAR's goal to resolve cases in a timely and efficient manner. Petitioner urges the Court to include strict timelines associated with the appeal and to limit new discovery and disclosure. Petitioner believes addressing these concerns will prevent appeals from any party prolonging final disposition of the case. Petitioner proposes the following language for the Court's consideration if it entertains this amendment to the program.

Rule 126. Appeal

(a) Filing a Notice of Appeal.

~~(1) *Plaintiff May Not Appeal.* Except as provided in Rule 103(d), the plaintiff who filed a Certificate under Rule 103(b) and chose Alternative Resolution may not file a notice of appeal of a decision, award, or judgment that was entered in an Alternative Resolution proceeding.~~

~~(2) *Other Parties May Appeal.* Any other party who appears and participates in an Alternative Resolution proceeding may appeal an arbitrator's award by filing a notice of appeal. However, absent good cause, a party waives the right to appeal if the party fails to appear or to participate in good faith at the Alternative Resolution hearing. A notice of appeal must be entitled "Appeal from Alternative Resolution and Motion for Trial Setting." The notice must request that the case be set for trial in the superior court and must state whether a jury trial is demanded and the estimated length of trial.~~

(b) – (c) no change

(d) Appeal de Novo. Although the proceeding is denominated a as an "appeal," the parties are entitled to a trial on all issues determined by the arbitrator. The arbitrator's legal rulings and factual findings are not binding on the court or the parties. If, however, the court finds that further proceedings before the arbitrator are appropriate, it may remand the action to the assigned arbitrator. **Any trial conducted under this rule is governed by FASTAR Rules 110, 112 through 119.**

- (1) trials de novo under this rule must begin within 120 days of the filing of the notice of appeal.

(e) [No change]

(f) Discovery and Listing of Witnesses and Exhibits on Appeal.

- (1) Any discovery conducted while the action was assigned to Alternative Resolution may be used on appeal. **Except for experts, evidence not previously disclosed during Alternative Resolution may not be used on appeal.**

a. (A) A party seeking to use information, a witness or a document that was not disclosed while the case was assigned to the alternative resolution track must file a motion seeking the court's permission to use the new evidence. The motion must be supported by affidavit and comply with the requirements of Ariz. R. Civ. P. 37(c)(5).

(2) – (4) no change

(5) The parties have 80 days after the filing of the notice of appeal to complete ~~discovery under Civil Rules 26 through 37~~ expert discovery and any other discovery permitted by the Court under section (f)

(1) (a).

(6) [no change]

Should the Court decide to amend the FASTAR Rules to allow plaintiffs to appeal an alternative resolution award, Rule 103 would also need to be amended as follows:

Rule 103. Plaintiff's Choice

(a) [No change]

(b) Manner of Choosing.

(1) *[No change]*

(2) ~~“Waiver.” If the plaintiff chooses Alternative Resolution, then plaintiff's Choice Certificate must include express waiver of the rights:~~
~~(A) to have a trial before a judge or jury, and~~
~~(B) to appeal the Alternative Resolution decision, award, or judgment to the superior court or to an appellate court.~~

(c) [No change].

(d) Effect of a Counterclaim, Cross-claim, or Third-Party Complaint.

(1) If the case includes a counterclaim, cross-claim, or third-party complaint, the action will proceed by Fast Trial if the plaintiff timely made that choice in the plaintiff's Choice Certificate, or if the plaintiff failed to file a timely Choice Certificate. A defendant, counterclaimant, cross-claimant, or third-party plaintiff has no right under these rules to make the choice or to file a Choice Certificate.

(2) If the case includes a counterclaim, cross-claim, or third-party complaint, the action will proceed by Alternative Resolution if the plaintiff timely made that choice in the plaintiff's Choice Certificate. ~~In that circumstance, and notwithstanding the waiver under Rule 103(b)(2), the plaintiff retains the right to appeal and to have a trial before a judge or jury regarding the decision or award on the counterclaim, crossclaim, or third party complaint.~~

Similarly, the FASTAR Choice Certificate (Form 103(b)) would need to be modified to remove language requiring plaintiffs to waive their right to appeal should the Alternative Resolution Track be chosen. A proposed modified FASTAR Choice Certificate is attached to this Reply as Exhibit 2.

Finally, should the Court maintain the requirement that plaintiffs waive their right to appeal an award from Alternative Resolution, Petitioner has no objection to Judge Sakall's proposed modification to FASTAR Rule 124, allowing plaintiffs limited

ability to vacate or modify an award. Judge Sakall's proposed amendment appears at page 9 of his comment.

D. Service Deadlines and the Savings Statute

The strict 90-day service deadline is another criticism of the FASTAR program. Nevertheless, Petitioner believes that the shortened service deadline is critical to the program's success in reducing time to disposition in FASTAR cases. Because the rules do not allow for numerous continuances of the service deadline, Plaintiffs must be diligent in serving the complaint and in beginning the litigation process.

Petitioner believes that a rule permitting the trial judge to extend the service deadline will inevitably lead to needless extensions, unnecessarily delaying case processing. Additionally, and importantly, FASTAR's timelines are founded on an expedited service timeframe. Therefore, any extension of the service deadline impacts and extends all other deadlines in both the Fast Trial and Alternative Resolution tracks.

Petitioner recognizes that there are circumstances in which a plaintiff may not meet the FASTAR service deadline despite diligent efforts. Petitioner also recognizes that service by publication can cause diligent attorneys to miss the 90-day deadline. For these reasons, Petitioner supports adopting Judge Sakall's proposed modification to FASTAR Rule 104, allowing for service to extend beyond 90 days if Plaintiff obtains an order permitting an affidavit of service by publication

to be filed within 130 days of the filing of the complaint. Petitioner also supports modifying the Rule to require service in 90 days without any allowable extensions.

Further, Petitioner has considered the Commission on Access to Justice's proposal for a good cause exception to the service deadline and agrees such an amendment is warranted. Petitioner also supports Judge Sakall's proposal that any order dismissing a case for lack of service include language presumptively permitting a plaintiff to commence a new action for the same case within 60 days consistent with the saving statute. To reflect these amendments, Petitioner proposes modifying Rule 104 as set forth in Exhibit 1, attached to this Reply.

E. Proposed meet and confer requirement in Rule 111.

Petitioner opposes Judge Sakall's proposed meet and confer requirement, Petitioner believes such a modification is unnecessary and is duplicative of the early meeting requirement present in FASTAR Rule 108 (a).

FASTAR Rule 111(a) requires trial judges to hold a trial setting conference no later than 120 days after the filing of the complaint. This results in trial setting conferences being held shortly after a defendant files an answer. Rule 108(a) already requires the parties to participate in an early meeting in compliance with Ariz.R.Civ.P. 16. Requiring a second meet and confer before a trial setting conference is unnecessary and duplicative of Rule 108's requirements.

Conclusion

To date, over 10,000 cases have been resolved through the FASTAR program. Disposition times have decreased in both the trial and alternative resolution tracks. The program furthers the Court's strategic goal of improving access to justice by shortening disposition times in Tier One civil cases. Both the Arizona State Bar and the Pima County Bar Association support the program and recognize its value in resolving Tier One cases in a fair, efficient, and inexpensive manner.

Accordingly, Petitioner requests that the Court permanently adopt the FASTAR Rules in Pima County and modify the FASTAR Rules consistent with the modifications set forth in its Exhibits 1 and 2 to its original petition, and as set forth in Exhibit 1 and 2 to this Reply.

RESPECTFULLY SUBMITTED this 3rd day of June 2024.

A handwritten signature in blue ink, appearing to read "Jeffrey Bergin", is written over a horizontal line.

Hon. Jeffrey Bergin
Presiding Judge
Superior Court of Arizona in Pima County

EXHIBIT 1 TO REPLY

Rule 104. Modification of Civil Rule 4(i) Regarding Time for Service; Dismissal of an Unserved or Timely-Served Defendant

(a) General Limitation. The time limit of Civil Rule 4(i) does not apply to FASTAR cases. Instead, a plaintiff must serve the summons and complaint on every defendant within ~~60~~ 90 days after the filing date of the complaint.

(b) Service by Publication. If a plaintiff obtains an order permitted service by publication under Civil Rule 4.1(l) or Civil Rule 4.2(f) within 90 days after the filing date of the complaint, the affidavit of publication must be filed within 130 days of the filing date of the complaint.

~~(b)~~ (c) Dismissal of an Unserved Defendant. If the plaintiff does not file proof of ~~timely complete~~ service within ~~60~~ 90 days after filing the complaint ~~or within 130 days if subsection (b) applies~~, the court will notify the plaintiff that it will dismiss the action without prejudice as to any unserved defendant 15 days after the date of the court's notice, and without further notice, unless the plaintiff files proof of timely service ~~completes service~~ within those 15 days.

(c) ~~(d)~~ Extension. Upon a showing that despite timely and diligent efforts, plaintiff has been unable to serve a defendant within the 90 days permitted by this rule, the Court may permit one extension of the service deadline. The extension may only be for so long as necessary for plaintiff to complete service with immediate and diligent efforts, and in no circumstance may exceed 30 days. Any order permitting such an extension must include an order extending all other deadlines under the rules by the same number of days granted in the extension.

~~Within 60 days after filing the complaint, the plaintiff may request, and the court may extend the time for completing service, but the court may not extend the time limit for service more than 90 days after the filing date of the complaint.~~

(e) Dismissal of a Timely-Served Defendant. The court will dismiss without prejudice any timely-served defendant who did not file an answer or other response within 120 days after the filing date of the complaint unless the plaintiff has filed a Rule 55 application for the entry of default of that defendant before the 120th day. The court will

provide the plaintiff at least 20 days' notice before dismissing that defendant in a multi-defendant case, or before dismissing a case that has only one defendant.

EXHIBIT 2 TO REPLY
Form 103(b). Choice Certificate

NAME: _____
ADDRESS: _____

TELEPHONE: _____
REPRESENTING: _____

ARIZONA SUPERIOR COURT, PIMA COUNTY

Plaintiff,

v.

Defendant.

CASE NO: _____

CHOICE CERTIFICATE:
FAST TRIAL OR
ALTERNATIVE RESOLUTION

The undersigned certifies that he or she has read FASTAR Rule 103 and makes the following choice regarding a Fast Trial or Alternative Resolution pursuant to FASTAR Rule 103 of the FASTAR Rules:

(NOTE – YOU MUST CHECK ONE OF THE BOXES BELOW OR THIS FORM WILL NOT BE ACCEPTED)

☐ **Fast Trial**

☐ **Alternative Resolution:** ~~By checking this box and choosing Alternative Resolution, I hereby knowingly and voluntarily waive Plaintiff(s)' constitutional and statutory rights to a trial (jury or bench), including the right to appeal the Alternative Resolution result.~~

Dated: _____

SIGNATURE