Is it time to nix Supreme Court Rule 23?

For the Defense

By Donald P. Eckler

Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. His views are his own and not those of his firm or its clients.

Posted April 7, 2020 4:52 PM

Every practitioner has had this experience: the perfect case is found; it is on all fours factually; it was decided by the appellate district in which your case is pending; it comes out the right way; and then you see it: the dreaded "-U" at the end of the case number.

Pursuant to Supreme Court Rule 23 such decisions "may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1)." Supreme Court Rule 23(e)(2). The case that is so perfect is useless unless you can find citations within the case that have those same qualities. Not likely.

What was once the justification for unpublished decision, cluttering of the case books with repetitive decisions, should be, in the absence of case books and with electronic access to decisions, a strength. However, because of Rule 23, this is not strength because many of the cases cannot be used.

When Rule 23 was adopted it served the purpose of cutting the cost of publishing the case books, but with the advent of the exclusive electronic publication of appellate court decisions, that justification has long since gone away. Instead, Lexis and Westlaw, the way most lawyers do legal research, are filled with Illinois case law that cannot be used. Often the unpublished decisions are the most relevant to what is being searched for and would aid the bench and the bar.

The American judicial system is a common law system. The law develops based on the decisions that came before. The unique facts of each case can change the outcome of a current case with similar facts and issues. When these unique cases are not available to be cited, the parties, lawyers, and judges suffer, but the law suffers most of all. Parties and their lawyers would benefit greatly from the certainty created by being able to use every decision available to guide their conduct before a course of action is undertaken and to support their arguments in litigation.

Despite this prohibition on practitioners, trial judges have sometimes cited unpublished decisions, and in *Cook v. Village of Oak Park*, 2019 IL App (1st) 190010, the 1st District Appellate Court rejected this practice, stating: "It is important to note that as a

apply here, provided under Illinois Supreme Court Rule 23(e) (eff. April 1, 2018). See *In re Donald R.*, 343 Ill. App. 3d 237, 244 (2003) (stating, 'a fundamental unfairness results when a trial court, sua sponte, relies on an unpublished order in reaching its decision')."

The standard for publication under Rule 23 is either one of two instances: "(1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court."

The appellate court has recognized that decisions it initially believed should not be published, indeed have value. Examples of recent decisions that were initially unpublished, but later published are *Vogt v. Round Robin*, 2020 IL App (4th) 190294, *Zamora v. Lewis*, 2019 IL App (1st) 181642, *Shaw v. Hass*, 2019 IL App (5th) 180588, *Witcher v. 1104 Madison*, 2019 IL App (1st) 181641, *Atlas v. Union Pacific Railroad*, 2019 IL App (1st) 181474, *Epple v. La Quinta Inns Inc.*, 2019 IL App (1st) 18085, and *Sparger v. Yamini*, 2019 IL App (1st) 180566. Previously, there were caps on the number of cases that could be published by each appellate district pursuant to Supreme Court Administrative Order M.R. No. 10343, but that order was vacated in 2006.

In the period since the electronic publication of every appellate decision available every day, Rule 23 simply serves no purpose, but it does stunt the growth the law. The law would benefit greatly from eliminating Rule 23.

Chicago Daily Law Bulletin

312-644-7800 – tel
312-644-4255 – fax