



June 3, 2020

Sent Via Email: abowne@illinoiscourts.gov

Amy Bowne
Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street, 13th Floor
Chicago, IL 60601

Re: Response to Proposal 19-11

Dear Ms. Bowne:

The Illinois Association of Defense Trial Counsel, an organization whose members are committed to protecting and improving civil justice in Illinois, supports a change to Illinois Supreme Court Rule 23 to eliminate unpublished Rule 23 orders or, at a minimum, to allow citation to Rule 23 orders prospectively, similar to the procedure permitted under Federal Rule of Appellate Procedure 32.1.

With the elimination of case books and the advent of electronic access to decisions, what was once the justification for unpublished decisions, cluttering the case books with repetitive decisions, should be a strength. However, under Rule 23 this not a strength because many cases cannot be used. Rule 23 was adopted to serve the purpose of cutting the cost of publishing the case books. Today, the exclusive electronic publication of appellate court decisions eliminates that justification. Instead, electronic legal databases, such as Lexis and Westlaw (the way most lawyers do legal research) are filled with Illinois case law that cannot be used. Yet, in some cases, unpublished decisions are the most relevant for a matter under consideration and would aid the bench and the bar.

The American judicial system is a common law system. The law develops based upon the decisions that came before. The unique facts of each case might result in a different outcome even for matters 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Despite the current limitation on the use of Rule 23 Orders, trial judges have sometimes cited unpublished decisions and in *Cook v. Village of Oak Park*, 2019 IL App (1st) 190010, the Illinois Appellate, Court, First District, rejected this practice, stating:

“[i]t is important to note that as a basis for its holding, the circuit court, *sua sponte*, relied on *Werenska v. Sawa's Old Warsaw Inc.*, 2012 IL App (1st) 111671-U. We reemphasize that a lower court may not rely on an unpublished order except in the limited circumstances, none of which apply here, provided under Illinois Supreme Court Rule 23(e) (eff.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’).”

However, other appellate decisions have stated that a party can use an unpublished opinion to support the reasoning and logic of an argument, as long as it is not cited as “authority.” *Osman v. Ford Motor Co.*, 359 Ill.App.3d 367, 374 (4th Dist. 2005); *People v. Matous*, 381 Ill.App.3d 918, 926 (3d Dist. 2008)(Carter, J. concurring); *Midwest Medical Records Ass’n, Inc. v. Brown*, 2018 IL App (1st) 163230, ¶29. Thus, while some courts will consider Rule 23 orders in much the same way as a decision from a court in another state, other courts reject that practice, which leaves both trial courts and practitioners unsure about how strictly they must follow Rule 23.

The standard for publication under Rule 23 is: (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 *Ritchie Capital Management, LLC v. McGladrey & Pullen, LLP*, 2020 IL App (1st) 180806, *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.

In *Snow & Ice, Inc. v. MPR Management, Inc.*, 2017 IL App (1st) 151706-U ¶¶ 28-30,34 (Hyman, J., concurring in part and dissenting in part), one appellate court justice expressed concern that a majority of appellate court justices could refuse to publish an opinion, which would stifle a dissent. The same justice subsequently dissented in another opinion and expressed the opinion that the Rule 23 order should be a published opinion, which it was not. *Chicago Title Land Trust Company v. Qualizza*, 2019 IL App (1st) 181543-U ¶ 46. These concerns weigh against the current use of Rule 23 orders.

On the other hand, the appellate court has explained that “the clear intent of the rule is merely to avoid the publication of a morass of dispositions which add nothing to the available body of substantive law or of legal precedence.” *Bradley v. Howard Hembrough Volkswagen, Inc.*, 89 Ill. App. 3d 121, 124 (4th Dist. 1980). The Illinois Supreme Court has exercised its supervisory authority to vacate orders granting motions to publish and direct the appellate court to reinstate a Rule 23 order. *County of Lake v. Campus Investments, Inc.*, 967 N.E.2d 810 (Mem.), No. 11-4038 (May 30, 2012); *DeRaedt v. Rabiola*, 964 N.E.2d 509 (Mem.), No. 11-3501 (Mar. 28, 2012). And a limited number of published opinions on the same subject can make legal research faster and easier. While there is utility in the use of Rule 23 orders, it must be weighed against the resulting perception among certain practitioners that having two classes of cases is not fair, the risk that fine points of law lack clarity, and the concern that unpublished orders are misused in practice.

Since every appellate court opinion and Rule 23 order is available electronically, Rule 23 orders can no longer be justified by limitations on the publishing of case books. It is prudent to reconsider the benefits and concerns related to the current use of Rule 23 orders. But one thing is certain: Illinois law would benefit greatly from more guidance from the Appellate Court. The IDC supports eliminating Rule 23 orders altogether and publishing all future appellate court opinions. At the very least, and on a prospective basis only, Rule 23 orders should be allowed to be cited as persuasive authority.

In the event that Rule 23 orders are eliminated, certain provisions of Rule 23 should remain. Accordingly, the IDC offers the following alternative proposed changes to Illinois Supreme Court Rule 23, detailed in Proposal 1. The IDC further offers Proposal 2 for consideration if Rule 23 orders may be cited as persuasive authority.

Sincerely,

William K. McVisk

William K. McVisk

2019-2020 President, Illinois Association of Defense Trial Counsel

Partner, Tressler, LLP

wmcvisk@tresslerllp.com, 312-627-4045

Proposal 1

Rule 23. Disposition of Cases in the Appellate Court

The decision of the Appellate Court ~~may be expressed in one of the following forms: a full opinion, a concise written order, or a summary order conforming to the provisions of this rule.~~ must be expressed as a full opinion. All dispositive opinions and orders shall contain the names of the judges who rendered the opinion, ~~or order.~~

~~—(a) Opinions.~~ A case may be disposed of by an opinion only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied:

~~—(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.~~

~~—(b) Written Order.~~ Cases which do not qualify for disposition by opinion may be disposed of by a concise written order which shall succinctly state:

~~—(1) in a separate introductory paragraph, a concise syllabus of the court's holding(s) in the case;~~

~~—(2) the germane facts;~~

~~—(3) the issues and contentions of the parties when appropriate;~~

~~—(4) the reasons for the decision; and~~

~~—(5) the judgment of the court.~~

~~—(c) Summary Order.~~ In any case in which the panel unanimously determines that any one or more of the following dispositive circumstances exist, the decision of the court may be made by summary order. A summary order may be utilized when:

~~—(1) the Appellate Court lacks jurisdiction;~~

~~—(2) the disposition is clearly controlled by case law precedent, statute, or rules of court;~~

~~—(3) the appeal is moot;~~

~~—(4) the issues involve no more than an application of well-settled rules to recurring fact situations;~~

~~—(5) the opinion or findings of fact and conclusions of law of the trial court or agency adequately explain the decision;~~

~~—(6) no error of law appears on the record;~~

~~—(7) the trial court or agency did not abuse its discretion; or~~

~~—(8) the record does not demonstrate that the decision of the trier of fact is against the manifest weight of the evidence.~~

~~—When a summary order is issued it shall contain:~~

~~—(i) a statement describing the nature of the case and the dispositive issues without a discussion of the facts;~~

~~—(ii) a citation to controlling precedent, if any; and~~

~~—(iii) the judgment of the court and a citation to one or more of the criteria under this rule which supports the judgment, e.g., “Affirmed in accordance with Supreme Court Rule 23(c)(1).”~~

~~—The court may dispose of a case by summary order at any time after the case is docketed in the Appellate Court. The disposition may provide for dismissal, affirmance, remand, reversal or any combination thereof as appropriate to the case. A summary order may be entered after a dispositive issue has been fully briefed, or if the issue has been raised by motion of a party or by the court, *sua sponte*, after expiration of the time for filing a response to the motion or rule to show cause issued by the court.~~

(d) (a) Captions. All opinions and orders entered under this rule shall bear a caption substantially conforming to the requirements of Rule 330. Additionally, an opinion or order entered under subpart (a) or (b) of this rule must clearly show the date of filing on its initial page.

~~—(c) Effect of Orders.~~

~~—(1) An order entered under subpart (b) or (c) of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res*~~

~~judicata, collateral estoppel or law of the case. When cited for these purposes, a copy of the order shall be furnished to all other counsel and the court.~~

~~—(2) An order entered under subpart (b) of this rule must contain on its first page a notice in substantially the following form:~~

NOTICE: ~~This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).~~

~~—(f) **Motions to Publish.** If an appeal is disposed of by order, any party may move to have the order published as an opinion. The motion shall set forth the reasons why the order satisfies the criteria for disposition as an opinion and shall be filed within 21 days of the entry of the order. The appellate court shall retain jurisdiction to grant or deny a timely filed motion to publish irrespective of the filing of a petition for leave to appeal under Rule 315 and shall rule on the motion to publish within 14 days of its filing, prior to disposition by the Supreme Court of any petition for leave to appeal.~~

(g) (b) Electronic Publication. In order to make available to the public all opinions and orders entered under subparts (a) and (b) of this rule, the clerks of the Appellate Court shall transmit an electronic copy of each opinion or order filed in his or her district to the webmaster of the Illinois Supreme and Appellate Courts' Web site on the day of filing. No opinion or order may be posted to the Web site that does not substantially comply with the Style Manual for the Supreme and Appellate Courts.

(h) (c) Public-Domain Case Designators

An opinion or order entered under subpart (a) or (b) of this rule must be assigned a public-domain case designator and internal paragraph numbers, as set forth in the accompanying administrative order.

Proposal 2

Rule 23. Disposition of Cases in the Appellate Court

The decision of the Appellate Court may be expressed in one of the following forms: a full opinion, a concise written order, or a summary order conforming to the provisions of this rule. All dispositive opinions and orders shall contain the names of the judges who rendered the opinion or order.

(a) Opinions. A case may be disposed of by an opinion only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied:

- (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.

(b) Written Order. Cases which do not qualify for disposition by opinion may be disposed of by a concise written order which shall succinctly state:

- (1) in a separate introductory paragraph, a concise syllabus of the court's holding(s) in the case;
- (2) the germane facts;
- (3) the issues and contentions of the parties when appropriate;
- (4) the reasons for the decision; and
- (5) the judgment of the court.

(c) Summary Order. In any case in which the panel unanimously determines that any one or more of the following dispositive circumstances exist, the decision of the court may be made by summary order. A summary order may be utilized when:

- (1) the Appellate Court lacks jurisdiction;
- (2) the disposition is clearly controlled by case law precedent, statute, or rules of court;
- (3) the appeal is moot;

(4) the issues involve no more than an application of well-settled rules to recurring fact situations;

(5) the opinion or findings of fact and conclusions of law of the trial court or agency adequately explain the decision;

(6) no error of law appears on the record;

(7) the trial court or agency did not abuse its discretion; or

(8) the record does not demonstrate that the decision of the trier of fact is against the manifest weight of the evidence.

When a summary order is issued it shall contain:

(i) a statement describing the nature of the case and the dispositive issues without a discussion of the facts;

(ii) a citation to controlling precedent, if any; and

(iii) the judgment of the court and a citation to one or more of the criteria under this rule which supports the judgment, *e.g.*, “Affirmed in accordance with Supreme Court Rule 23(c)(1).”

The court may dispose of a case by summary order at any time after the case is docketed in the Appellate Court. The disposition may provide for dismissal, affirmance, remand, reversal or any combination thereof as appropriate to the case. A summary order may be entered after a dispositive issue has been fully briefed, or if the issue has been raised by motion of a party or by the court, *sua sponte*, after expiration of the time for filing a response to the motion or rule to show cause issued by the court.

(d) Captions. All opinions and orders entered under this rule shall bear a caption substantially conforming to the requirements of Rule 330. Additionally, an opinion or order entered under subpart (a) or (b) of this rule must clearly show the date of filing on its initial page.

(e) Effect of Orders.

(1) An order entered before August 1, 2020, under subpart (b) or (c) of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case. When cited for

these purposes, a copy of the order shall be furnished to all other counsel and the court.

(2) An order entered before August 1, 2020, under subpart (b) of this rule must contain on its first page a notice in substantially the following form:

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

(3) An order entered on or after August 1, 2020, under subpart (b) or (c) of this rule is not precedential, but it may be cited by any party as persuasive authority or to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case.

(4) An order entered on or after August 1, 2020, under subpart (b) of this rule must contain on its first page a notice in substantially the following form:

NOTICE: This order was filed under Supreme Court Rule 23 and may be cited only as provided in Illinois Supreme Court Rule 23(e)(3).

(f) Motions to Publish. If an appeal is disposed of by order, any party may move to have the order published as an opinion. The motion shall set forth the reasons why the order satisfies the criteria for disposition as an opinion and shall be filed within 21 days of the entry of the order. The appellate court shall retain jurisdiction to grant or deny a timely filed motion to publish irrespective of the filing of a petition for leave to appeal under Rule 315 and shall rule on the motion to publish within 14 days of its filing, prior to disposition by the Supreme Court of any petition for leave to appeal.

(g) Electronic Publication. In order to make available to the public all opinions and orders entered under subparts (a) and (b) of this rule, the clerks of the Appellate Court shall transmit an electronic copy of each opinion or order filed in his or her district to the webmaster of the Illinois Supreme and Appellate Courts' Web site on the day of filing. No opinion or order may be posted to the Web site that does not substantially comply with the Style Manual for the Supreme and Appellate Courts.

(h) Public-Domain Case Designators

An opinion or order entered under subpart (a) or (b) of this rule must be assigned a public-domain case designator and internal paragraph numbers, as set forth in the accompanying administrative order.

