Admit It! You want to discuss rules of evidence and process in arbitration.
ARIAS Spring Meeting, May 11-13, 2022

HYPOTHETICAL

For the period January 1, 1978 to January 1, 1981, Suburban Insurance Company ("Suburban") insured Standup Corporation ("Standup), under a Commercial General Liability Policy (the "Standup Policy") with limits of $50M per occurrence and in the aggregate, excess of a primary policy.

The Standup Policy provides, in relevant part:

> Limits of Insurance
>
> The Limits of Insurance of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months . . .

Eastside Reinsurer ("Eastside Re") facultatively reinsured the Standup Policy under a reinsurance slip (the "Slip Contract"). The Slip Contract lists the period of the reinsurance as 1/1/1978-1/1/1981, and identifies the limits of the reinsured policy as "$50,000,000 occ/agg excess Primary." Suburban's retention is listed as: $5,000,000 part of $10,000,00. Reinsurance Accepted is: "$5,000,000 part of the first $10,000,000 excess Primary."

Suburban paid $100M to settle claims under the Standup Policy, and allocated them equally to each year of coverage, billing Eastside a total of $15M as its share.

Eastside disputes that its reinsurance applies on an annual basis. Neither side has a full underwriting or placing file.

During pre-arbitration settlement discussions, Suburban offered to accept $10M in settlement of the dispute. However, Eastside never moved off of its position that its liability was capped at $5 million.

After efforts to settle the dispute failed, Suburban demanded arbitration.

At the hearing, the parties call the following witnesses, among others:

Suburban:

- **John C. Underwriter.** John C. has been employed by Suburban since 2005. He has worked in the insurance industry since 1995.

Eastside Re:

- **Tristan T. Re.** Tristan is the President of Eastside, and has been employed there since 1975, when she started as a junior underwriter who worked on accepting the coverage at issue.

- **Jane A. Soom.** Jane has been the Director of Eastside's Assumed Facultative Underwriting since 2010. Before that, she was an assumed facultative underwriter on the property side.

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Specific scenarios based on this hypothetical will be posed during the Evidence Presentation.

SUPPLEMENTAL RESOURCES

I. Panel Authority

A. Arbitrators have broad authority to establish procedures governing arbitration and to apply, or abstain from following, strict rules of evidence

B. Sources of Authority

1. The Federal Arbitration Act ("FAA")

9 U.S.C. § 10 (award may be vacated "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced")

2. Typical Arbitration Clauses

3. Industry Rules for the Resolution of Insurance and Reinsurance Disputes

Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (Sept. 1999)

> *14.1* The Panel shall interpret the underlying agreement, which is the subject of the arbitration, as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. . . .

> 14.6 The Panel shall require that witnesses testify under oath, unless waived by all Parties. The Panel shall have the discretion to permit testimony by telephone, affidavit, or recorded by transcript, video tape, or other means, and may rely upon such evidence as it deems appropriate. Where there has been no opportunity for cross examination by the other Party, such evidence may be permitted by the Panel only for good cause shown. The Panel may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (Sept. 2009)

> 14.3 The Panel shall interpret the underlying agreement, which is the subject of the arbitration, as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. . . .
>
> 14.6 The Panel shall require that witnesses testify under oath, unless waived by all Parties. The Panel shall have the discretion to permit testimony by telephone, affidavit, or recorded by transcript, videotape, or other means, and may rely upon such evidence as it deems appropriate. Where there has been no opportunity for cross examination by the other Party, such evidence may be permitted by the Panel only for good cause shown. The Panel may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

ARIAS · U.S. Rules for the Resolution of Insurance and Reinsurance Disputes (2014)

14.3 The Panel shall not be obligated to follow the strict rules of law or evidence.

Alternative Version That May Be Chosen By Contract:

The Panel Shall interpret this contract as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. In making their Decision, the Panel shall apply the custom and practice of the insurance and reinsurance industry, with a view to effecting the general purpose of the this contract.

14.6 The Panel shall require that witnesses testify under oath, unless waived by all Parties. The Panel shall have the discretion to permit testimony by telephone, affidavit, or recorded by transcript, videotape, or other means, and may rely upon such evidence as it deems appropriate. Where there has been no opportunity for cross examination by the other Party, such evidence may be permitted by the Panel only for good cause shown. The Panel may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

II. The Rules of Evidence Every Commercial Arbitrator Should Know

A. Relevance (and its Limits)

1. **Relevance is a Threshold Issue.** Evidence that is not relevant is not admissible.

2. Evidence is relevant if: (a) it has any tendency to make a fact more or less Probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. FRE 401

3. Habit; Routine Practice (FRE 406)

a) "Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice."

b) Evidence of habit or routine practice doesn't need to be corroborated to be admitted.

4. Compromise Offers and Negotiations (including statements made in the course of those negotiations) (FRE 408)

a) not admissible if "offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction."

b) is admissible if it is offered for a purpose other than to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction.

B. Privileges (FRE 501 and 502)

a) In civil cases governed under state law, that law provides the rule of decision as to the applicability of a legal privilege.

b) Unlike other rules of evidence, privileges are substantive legal protections and apply not just to admissibility but also to discoverability.

C. Witnesses

1. Personal Knowledge

a) "Fact witnesses are competent to testify only if they have "personal knowledge of the matter." FRE 602

2. Mode and Order of Examining Witnesses and Presenting Evidence [FRE 611]

a) Leading Questions "should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." FRE 611(c)

b) Leading question is one that suggestions the answer

(1) Even in court, sometimes allowed (laying an evidentiary foundation, dealing with a hostile witness).

D. The Hearsay Rule and its Many Exceptions

1. What is Hearsay?

a) A statement that is made outside of the "court" (or hearing) that is offered to prove that the statement is true. FRE 801

b) Hearsay is not admissible unless it falls within an exception.

(1) Rationale for the rule -- where the statement is offered for its truth, the perception, memory and sincerity of the person who made the statement (and who is not in court) cannot be tested through cross-examination.

2. Not Hearsay (Rule 801)

a) An out of court statement made by an agent or employee of the opposing party when acting within the scope of his/her relationship when it existed. FRE 801(d)(2)

(1) --known as an "Admission by a party-opponent"

b) An out of court statement that is not offered for its truth;

c) In some circumstances, the witnesses own prior inconsistent or consistent statement made under oath FRE 801(d)(1)

3. Hearsay, but Still Admissible

a) A statement of the declarant's then-existing state of mind (such as motive or intent). (FRE 803(3))

b) Statements that the declarant made "against interest" if the declarant is "unavailable" (for reasons that were not wrongfully caused by the proponent of the evidence). FRE 804(b)(3)

c) Business Records. Records of regularly conducted activity. FRE 803 (6), (7).

d) The Residual Exception to the Hearsay Rule. FRE 807

(1) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(a) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(b) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(2) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

III. Hearing Procedure – Anticipating Issues Before They Derail the Hearing

A. Procedures for the Admission of Evidence

1. Deadlines to identify exhibits

2. How to handle depositions and deposition exhibits

B. Fully Remote or Hybrid Hearings

1. Many major Arbitral organization rules permit remote video hearings where found appropriate in the Arbitrator's discretion

or by party consent. *See, e.g.,* AAA Commercial Rules R-32(c) (2013); ICDR Rules Art. 20 (2021).

2. ARIAS Rules, as noted above, allow for remote testimony as well:

> 14.6 The Panel shall require that witnesses testify under oath, unless waived by all Parties. The Panel shall have the discretion to permit testimony by telephone, affidavit, or recorded by transcript, videotape, or other means, and may rely upon such evidence as it deems appropriate. Where there has been no opportunity for cross examination by the other Party, such evidence may be permitted by the Panel only for good cause shown. The Panel may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

3. Guidance from the Courts: FRCP 43(a): "At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. *For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location*.

4. What is "good cause in compelling circumstances?"

*a) In re Alle, 2021 WL 3032712, *5 (USDC CD Cal. July 19, 2021) (Covid-19 pandemic was good cause in compelling circumstances)*

b) Even pre-Covid, courts could allow testimony by contemporaneous videoconference.

(1) *Ever Win Int'l Corp. v. Prong, Inc*., 2017 WL 1654063, *1 (USDC CD Cal. January 6, 2017) (where the trial was in California, the overseas and East Coast residencies of two witnesses presented good faith compelling circumstances. *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018)

5. What does it mean to have "appropriate safeguards?"

*a) "Rule 43(a)'s requirement that testimony occur in open court serves two purposes: (1) to ensure that the witness testimony may be tested by cross-examination, and (2) to allow the trier of fact to observe the demeanor of the witness." In re Alle, 2021 WL 3032712, *5 (USDC CD Cal. July 19, 2021)*

b) In Re Alle, court required:

(1) all witnesses be visible from the waist up;

(2) Documents, notes, and electronic devices forbidden in the room where the witness is testifying.

(3) Pre-trial testing conference to ensure access and functionality.

C. Witnesses whose only role is to be the company rep to get in "opinion" testimony.

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Evidentiary Rules in Reinsurance Arbitrations

This article is based on a paper presented at the ARIAS 2009 Spring Conference.

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Some of the common evidentiary issues that may arise in a reinsurance arbitration and the principles underlying the applicable rules are discussed below.

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Introduction

Arbitration clauses in reinsurance agreements typically relieve the panel from having to follow strict rules of evidence. *See generally* Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes § 14.3 (April 2004). Moreover, unless an arbitration agreement expressly provides otherwise, it is well settled that arbitrators "possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions." *Commercial Risk Reins. Co. v. Security Ins. Co. of Hartford*, 526 F. Supp. 2d 424 (S.D.N.Y. 2007); see also Uniform Arbitration Act § 15 (Arbitration Process) ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to . . . determine the admissibility, relevance, materiality and weight of any evidence."). Given that reinsurance arbitrators are selected for their industry expertise, freeing them from the obligation to strictly follow evidentiary rules makes sense.

Still, arbitrators' authority to determine the procedures governing their proceedings is tempered by the requirement to hear evidence that is pertinent and material to the controversy. 9 U.S.C. § 10; *Nationwide Mutual Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 19 (D. Mass. 2002) ("Arbitrators are 'not bound to hear all of the evidence tendered by the parties,' though they 'must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments.'"). And reinsurance arbitrations have become increasingly like litigation in the past several years, with the result that arbitrators are increasing called upon to resolve evidentiary disputes. Often, these disputes are resolved in favor of "letting everything in," with the panel, like a judge, sifting through the evidence. The downside of such an approach is that it tends to lengthen the hearing, without necessarily increasing the fundamental fairness afforded the parties. Thus, while arbitrators need not strictly follow evidentiary rules, a grounding in the principles that underlie formal evidentiary rules is helpful in charting evidentiary issues that may arise in the course of the arbitration. Further, even if the arbitration panel ultimately decides to admit at the hearing evidence that would be precluded in court under federal or state rules of evidence, consideration of the rules and their rationale may affect the weight the arbitrators give to the contested evidence.

Guidance Provided By Evidentiary Rules In Reinsurance Arbitrations

Some of the common evidentiary issues that may arise in a reinsurance arbitration and the principles underlying the applicable rules are discussed below.

Burden of Proof

While not strictly speaking an evidentiary rule, the issue of who has the "burden of proof" is one that the panel frequently confronts. The party that has the "burden of proof" as to a claim or defense has the job of convincing the arbitrators – who are the triers of fact – of the correctness of its claim or defense.

The general rule in insurance cases is that the insured has the initial burden to show that its claim falls within the scope of its insurance policy and that once this burden has been met, the insurer has the burden of showing an exception or exclusion to coverage in order to defeat the claim.

International Surplus Lines Ins. Co. v. Fireman's Fund Ins. Co., 1992 WL 22223 (N.D.Ill. Jan. 31, 1992). Applied in reinsurance cases, this rule places on the cedent the initial burden to prove it "suffered a loss within the scope of its reinsurance coverage." *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 38 (1st Cir. 2000). Where it applies, the follow the settlements doctrine eases the cedent's burden and allows the cedent to establish a "prima facie"[2] case by showing it paid a claim, at least a portion of which was covered by the reinsured policy. *Commercial Union v. Seven Provinces*, 217 F.3d at 38.

Relevance

Evidence is "relevant" if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rules of Evidence ("FRE") 401. Thus, when a party seeks to present evidence, the first question is how does the evidence relate to the claims and defenses, or "is it relevant?"

In a litigation, relevant evidence is admissible (unless excluded for another reason), and evidence that is not relevant is excluded. Although evidence is relevant, courts may consider whether its relevance is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation. FRE 403. In an arbitration, there is no jury to confuse, and arbitrators tend to trust their ability to "sort the wheat from the chaff." Thus, arbitrators tend to apply a more relaxed test of relevance than would a court, with the main limitation being restrictions on cumulative evidence that unduly prolongs the hearing.

FRE 406 codifies the common sense notion that evidence that a person has a routine practice or habit is relevant to the issue of whether that person acted in conformity with that practice on a particular occasion at issue. As a concrete example, a lack of notes regarding an allegedly important telephone call (the existence of which is disputed) would support a claim that such a call never took place if the persons who allegedly participated in the call had a practice of memorializing important calls in writing.[3]

One category of potentially relevant evidence that is generally considered "inadmissible" in court is settlements and offers to settle, including statements made in the course of settlement negotiations, when that evidence is "offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction." FRE 408. This rule is based in part on policy reasons – the desire to promote settlements – and in part on a recognition that individuals and companies may settle claims for a host of reasons, some of which have little to do with considerations of liability. *See* Notes of Advisory Committee on Federal Rules, Rule 408. Note that the rule would not require exclusion of evidence relating to settlement negotiations when offered to rebut, for example, a claim that a reinsurer failed without excuse to pay a claim. *See* FRE 408 ("This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include... negating a contention of undue delay ..."). Likewise, where the claim is not disputed as to validity or amount, a reinsurer who uses settlement negotiations to try and renegotiate its deal cannot shield its settlement communications under FRE 408 in a subsequent litigation involving that claim. *See* FRE 408 (evidence of settlement negotiations is "not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim *that was disputed as to validity or amount*. . .") (emphasis added); *see also In re B.D. Intern. Discount Corp.*, 701 F.2d 1071, 1074 (2d Cir. 1983) (trial court properly admitted evidence of a conversation where debtor acknowledged accuracy of claim but sought to negotiate new payment schedule: "Rule 408 is limited to cases of 'compromising or attempting to compromise a claim which was disputed as to either validity or amount.' At the time of negotiation B.D.I. did not dispute Chase's claim; it was simply endeavoring to get more time in which to pay.").

Hearsay

"'Hearsay' is a statement, other than one made by [the person making the statement] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c). Subject to certain exceptions, hearsay is

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In an arbitration, there is no jury to confuse, and arbitrators tend to trust their ability to "sort the wheat from the chaff." Thus, arbitrators tend to apply a more relaxed test of relevance than would a court, with the main limitation being restrictions on cumulative evidence that unduly prolongs the hearing.

As a practical matter, arbitrators routinely allow hearsay testimony at arbitration hearings, and parties to an arbitration rarely raise this objection. Where such objections are made, however, understanding the rationale for the rule and its exceptions may assist the panel in deciding whether to admit or exclude this evidence.

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not admissible in a federal or state court trial or hearing. By way of example, a federal judge would not permit cedent to elicit from one of its employees, John Smith, testimony that one of his co-workers, Sue Doe, told Smith that the reinsurance treaty negotiated by Doe was intended to cover certain claims if the purpose for eliciting this testimony is to prove that the treaty was intended to cover those claims. Other out of court statements that are hearsay include most written documents, such as minutes of a meeting, underwriting files, etc. The rationale for this rule is that where the statement is offered for its truth, the perception, memory and sincerity of the person who made the statement cannot be tested through cross-examination.

If a prior "out of court" statement is not being offered for its truth, it is not hearsay. By way of example, if a statement is offered to show the effect it had on the listener, it is not hearsay. For example, if Sue's statement is offered to prove Smith acted in good faith when he presented the claims to the treaty, then Sue's truthfulness in making the statement is a side issue, and her out of court statement would not be hearsay. Likewise, if the statement is being offered because the fact that it was made has its own significance (such as in the giving of notice of a claim), the statement is not hearsay. A witness's own prior statement is also not considered hearsay if the witness' prior statement is inconsistent with the trial testimony and was itself given under oath or is consistent with the trial testimony and is offered to rebut the claim or suggestion that the witness' trial testimony is newly fabricated. *See* FRE 801(d)(1). In federal and state court, an important exemption from the definition of hearsay is out of court statements of a party opponent. Thus, in a dispute with reinsurer, John Smith could testify (for cedent), regarding a statement made to him by a representative of reinsurer even if the purpose of the evidence is to prove the truth of that statement. *See* FRE 801(d)(2).

Even if offered for their truth, certain "hearsay" statements are admissible in federal court based on the rationale that the circumstances under which the statement is made give it some indicia of trustworthiness (in other words, the circumstances are such that the person making the statement is not likely to be lying). The question of whether the statement was in fact made, can be tested by cross-examination of the testifying witness who allegedly heard the out of court statement. Exceptions to the rule that hearsay is inadmissible include:

- Present sense impressions. These are statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FRE 803(1).
- Excited utterances. These are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FRE 803(2).
- Statements regarding "then existing mental, emotional, or physical condition." FRE 801(3). "I am angry," would be a statement of then existing emotional condition. "I *was* so angry," would not.
- Recorded recollections. These are "a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately," provided it is established that the witness created the record when the matter was fresh in the mind of the witness, and the record is accurate. FRE 801(5). For example, a witness might not remember all the questions she had when she underwrote a risk five years ago, but if she memorialized those questions in a note at the time of underwriting or when the questions were fresh in her mind, and can testify that the note is accurate, the note would be a recorded recollection.
- Business records. Although hearsay, business records are admissible if they are "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation." FRE 801(6).

As a practical matter, arbitrators routinely allow hearsay testimony at arbitration hearings, and parties to an arbitration rarely raise this objection. Where such objections are made, however, understanding the rationale for the rule and its exceptions may assist the panel in deciding whether to admit or exclude this evidence.

Expert Testimony

Because reinsurance arbitrators are chosen for their industry knowledge, reinsurance arbitrations commonly proceed without the need for separately retained expert witnesses. Sometimes, however, the parties will request an opportunity to present expert evidence, and the panel may grant that request.

Under the Federal Rules of Evidence, a witness "qualified as an expert by knowledge, skill, experience, training, or education," may provide his or her expert opinion on a fact in issue "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FRE 702. The facts or data that the witness relies upon in forming its opinions "may be those perceived by or made known to the expert at or before the hearing." During cross examination, the expert may be required to disclose the facts or data he or she relied upon, including any privileged communications shown to the expert.

Privilege

In a reinsurance arbitration, the issue of whether a document or other evidence is privileged will generally be governed by State law. The attorney-client privilege and work product doctrine are two of the most commonly asserted privileges in reinsurance arbitrations. Disclosure of a privileged document or other privileged information can cause the privilege to be forever lost. Likewise, a determination that a document is not privileged can have consequences beyond the arbitration in question.

In reinsurance arbitrations, reinsurers may seek discovery of privileged communications between the cedent and the attorneys who acted on cedent's behalf in connection with an underlying coverage dispute, asserting that disclosure of these otherwise privileged communications are mandated under the access to records clause or that the disclosure of such communications is protected (and does not waive the privilege) based on a "common interest" between the cedent and its reinsurer.[4]

By and large, courts have rejected reinsurer's claims that the access to records clause, as commonly worded, requires the cedent to disclose to its reinsurers privileged documents regarding the underlying claim. *See North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363, 369 (D.N.J. 1992) ("Although a reinsured may contractually be bound to provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination, absent more explicit language, it does not through a claims cooperation clause give up wholesale its right to preserve the confidentiality of any consultation it may have with its attorney concerning the underlying claim and its coverage determination.").

Case law is mixed on the issue of whether a cedent's disclosure of otherwise privileged communications (about the underlying claim) to its reinsurer is protected based on the "common interest" of the cedent and reinsurer. *See Durham Industries Inc. v. North River Ins. Co.*, 1980 WL 112701 (S.D.N.Y. Nov. 21, 1980) (finding common interest between cedent and reinsurer sufficient to preserve the attorney-client privilege); *Great American Surplus Lines Insurance Co. v. Ace Oil Co.*, 120 F.R.D. 533 (E.D. Cal. 1988) (same). *But see Reliance Ins. Co. v. American Lintex Corp.*, 2001 WL 604080 (S.D.N.Y. June 1, 2001) (no common interest); *American Re-Ins. Co. v. United States Fidelity & Guar. Co.*, 40 A.D.3d 486, 837 N.Y.S.2d 616, 621 (App. Div. 1st Dep't 2007) (same).

The Federal Rules of Evidence were recently (December 2008) amended to allow a federal court to "order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court." FRE 502(d). If the court issues such an order, disclosure in the federal proceeding will not be deemed a waiver in "any other Federal or State proceeding." FRE 502(d). In contrast, an agreement solely between the parties as to the effect of disclosure will not be binding upon non-parties unless the agreement is so ordered by the court. See FRE 502(e). The non-waiver protections of FRE 502(d) and (e) are new. It is not clear whether courts would accord the same protections to similar orders issued as part of an arbitration.

Practical Observations Concerning The Role of Evidentiary Rules in Reinsurance Arbitrations

Based on the discussion above and general knowledge concerning reinsurance arbitrations, the following points can be made about the role of rules of evidence in reinsurance arbitrations:

First, one size does not fit all. As the discussion above demonstrates, the rules of evidence do have a potentially meaningful role in reinsurance arbitrations. However, the role of these rules and their impact on a reinsurance arbitration depends on the nature of the arbitration and the evidentiary issues raised. An arbitration involving a relatively small amount of money and issues which can be resolved simply by reference to the custom and practice in the industry may be best resolved under a streamlined procedure with little consideration of rules of evidence. By contrast, a reinsurance arbitration involving large dollar amounts and complex scientific and expert testimony may benefit from a more careful consideration of the rules of evidence.

Second, the composition of the arbitration panel will have an impact on the role of rules of evidence in reinsurance arbitrations. A panel that includes current or retired practicing lawyers or former judges is more apt to recognize the value of the rules of evidence as a framework for resolving evidentiary issues even if they are not strictly applied. Further, such lawyers are experienced in the application of the rules of evidence and are thus apt to be more comfortable in applying them in the arbitration setting. By contrast, a panel composed exclusively of non-lawyers who are well-versed in the "custom and practice" at issue in the arbitration may be more disposed to

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Tenth, if the determination of whether to admit evidence is a close call, and does not involve an assertion of privilege, the arbitration panel should err on the side of admitting evidence. With the exception of the admission of evidence that is unduly prejudicial or inflammatory, an arbitration award is more likely to be vacated based on a decision to exclude "pertinent and material" evidence than a decision to admit evidence.

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view compliance with rules of evidence an impediment to consideration of evidence that is normally accepted in the business world. Parties to an arbitration should, of course, be mindful of this point in the arbitration selection process. If the dispute involves very complex issues which are likely to result in thorny evidentiary disputes, there is some benefit to selecting an umpire who is well-versed in rules of evidence.

Third, it is simplistic to view the rules of evidence as simply a vehicle to exclude evidence that would otherwise be admitted under a very loose standard for admissibility of evidence. In fact, the rules of evidence may provide a very useful framework for arbitrators to consider thorny evidentiary issues that would otherwise be very difficult to navigate.

Fourth, the arbitration panel should not exclude evidence based upon a technical or procedural rule that has not been made clear to the parties in advance. The problems posed by such a ruling are illustrated in Harvey Aluminum v. United Steelworkers of America, 263 F. Supp. 488 (C.D.Cal. 1967), where the court held that the arbitrator's exclusion of evidence on the ground that it was improperly offered as rebuttal evidence as opposed to being offered during the party's case in chief violated §10(c) of the Federal Arbitration Act. According to the court, it "would not be fair to preclude material evidence based on some technical rule of evidence without some warning that the rules of evidence or some portion thereof would be followed in the arbitration hearing." 263 F. Supp. at 492.

Fifth, consideration should be given to potential evidentiary issues in advance of the arbitration hearing. To the extent there are major evidentiary issues to be addressed at the hearing, the arbitration panel is well served by a thorough briefing of the issues in advance of the hearing.

Sixth, the arbitration panel should be even-handed in its application of rules of evidence. Given the wide discretion afforded to reinsurance arbitration panels, the arbitrators may choose to consider carefully or virtually ignore the rules of evidence in making evidentiary determinations without fear that their award will be vacated on appeal. However, the arbitrators should be careful not to apply (or decide not to apply) evidentiary rules differently for one party than another. For example, the panel should avoid permitting counsel for one of the parties to ask his or her witness leading questions on an important issue, while precluding such questions when posed by counsel for the other party.[5] Even if an uneven application of evidentiary rules does not constitute a basis for vacating the panel's award, it seriously taints the reinsurance arbitration process and can lead to cynicism about the fairness of the process.

Seventh, while the arbitration panel has very broad discretion in resolving evidentiary issues at a reinsurance arbitration, consideration of evidence on an ex parte basis is prohibited. See, e.g., Goldfinger v. Lisker, 68 N.Y.2d 225, 508N.Y.S.2d 159 (1970) (vacating an award where an ex parte communication between one party and the arbitrator deprived the other party of the opportunity to respond and created the appearance of impropriety).

Eighth, counsel for the parties in a reinsurance arbitration should recognize there is in some circumstances a value to raising objections based on rules of evidence even if the panel ultimately rules in its discretion to admit the evidence at issue. For example, counsel may object to the admissibility of testimony from a proposed expert on the ground that the expert lacks the qualifications to render the opinions offered. Even if the challenge is unsuccessful, counsel has the opportunity to demonstrate why the expert's opinion should be given limited (if any) weight. The same point can be made with respect to hearsay evidence.

Ninth, the arbitration panel and counsel for the parties should be sensitive to the necessity to avoid over-litigating the case by non-productive wrangling over evidentiary issues. There is, as previously stated, a benefit to consideration of evidentiary rules in reinsurance arbitrations since the rules may further the goal of reaching a fair and just result. However, evidentiary rules can easily be abused by litigants who raise evidentiary objections at every juncture (regardless of the merits) and call for a literal and strict application of evidentiary rules in all instances in which their client's interests are furthered. By failing to exercise discretion in raising evidentiary objections, counsel may lose the benefit of evidentiary rules with respect to issues where the litigant's position is strong.

Tenth, if the determination of whether to admit evidence is a close call, and does not involve an assertion of privilege, the arbitration panel should err on the side of admitting evidence. With the exception of the admission of evidence that is unduly prejudicial or inflammatory, an arbitration award is more likely to be vacated based on a decision to exclude "pertinent and material" evidence than a decision to admit evidence. In admitting evidence that is subject to a credible challenge, the arbitration panel can add the qualification that the objections will be considered in the context of the weight to be given to the evidence.

Finally, there is an interesting interplay between the role of rules of evidence in reinsurance arbitrations and the arbitrators' own knowledge of the custom and practice in the industry. While the terms of reinsurance agreements frequently emphasize the importance of such knowledge of custom and practice in the resolution of disputes, it is also important to be mindful of the guidance evidentiary rules may provide in the way in which evidence of custom and practice is presented at the arbitration.

1 Any views expressed in this article are those of the authors and do not necessarily reflect those of AIG, Zelle Hofmann or Zelle Hofmann's clients.

2 "Prima facie" evidence is evidence that is adequate to prove the case of the party with the initial burden of proof, absent substantial opposing evidence.

3 Of course, the weight of evidence is a different issue than its admissibility, and the weight to be assigned to this evidence would vary on a case by case basis.

4 For a more detailed discussion of this issue, see John M. Nonna and Patricia A. Taylor, Considerations in an Insurers' Disclosure of Privileged Documents to Its Reinsurers, Journal of Insurance Coverage, Vol. 3, No. 3 (Summer 2000), at page 104.

5 In general, the rules discourage the use of leading questions (questions that suggest the answer) on direct examination except for background or truly uncontroverted issues. Leading questions are generally permitted on cross examination. FRE 611(c).

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2017 WL 1654063
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

EVER WIN INT'L CORP.

v.

PRONG, INC.

Case No. CV 15–6433 DMG (GJSx)
|
Filed 01/06/2017

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Proceedings: IN CHAMBERS—ORDER RE PLAINTIFF'S MOTIONS *IN LIMINE* [57, 58]

DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

***1** The Court has duly considered the parties' written submissions in support of and in opposition to Plaintiff Ever Win International Corp.'s ("Ever Win") motions *in limine* ("MIL"), and now issues the following rulings.

I.

DISCUSSION

A. Ever Win's MIL 1 [57]

Ever Win seeks to exclude from admission at trial the affidavit testimony of Eric Pozin and George Du, on the ground that such testimony is prejudicial to Ever Win's right of confrontation and cross-examination. MIL 1 at 3. Ever Win explains that the right to confront and cross-examine witnesses is a fundamental right, and that the affidavit testimony must therefore be excluded. *Id.* at 4–5.

Defendant and Counterclaimant Prong, Inc. ("Prong") "does not oppose ... in principal but reserves the right to call" Du and Pozin in person or via videoconference, permission from the Court pending. MIL 1 Limited Opposition ("Limited Opposition") at 2. Because Prong does not oppose MIL 1 and because the affidavits are inadmissible, the Court **GRANTS** MIL 1. Prong will not be permitted to introduce affidavit testimony of Du or Pozin at trial.

B. Videoconferencing

Prong lodges a separate request in its Limited Opposition that Du and Pozin be permitted to testify by videoconference. In support, Prong asserts that Du lives in "the Far East," Pozin lives in Massachusetts, and that both witnesses are material to the issues to be decided at trial. *Id.*

Federal Rule of Civil Procedure 43 provides that witness testimony at trial "must be taken in open court unless a federal statute, the Federal Rules of Evidence, the [Federal Rules of Civil Procedure], or other rules adopted by the Supreme Court provide otherwise." Fed. R. Civ. P. 43(a). If "good cause in compelling circumstances" is shown, "the court may permit testimony in open court by contemporaneous transmission from a different location." *Id.* The Advisory Committee Notes further supply that "[t]he importance of presenting live testimony in court cannot be forgotten" because "[t]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling" and "[t]he opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition." Fed. R. Civ. P. 43 advisory committee notes to 1996 Amendment. Accordingly, "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." *Id.*

Here, Du's overseas residency and Pozin's East Coast residency present good faith compelling circumstances. *See Palmer v. Valdez*, 560 F.3d 965, 972–73 (9th Cir. 2009) ("[T]he jury would [not be disadvantaged] in evaluating the demeanor of a witness appearing via telephone or video. One might posit that in an ideal world

having the fact-finder view the witnesses in person permits a better evaluation of credibility.... But, even that assumption is not universally held."); *id.* at 973 (discussing discovery and evidentiary rules' anticipation of out-of-court testimony, and citing Supreme Court and Ninth Circuit case law permitting telephonic and audiovisual testimony); *Beltran–Tirado v. I.N.S.*, 213 F.3d 1179, 1186 (9th Cir. 2000) (upholding Missouri witness' telephonic testimony in San Diego hearing where witness was under oath and subject to cross-examination (citing Fed. R. Civ. P. 43(a); *Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997))); *Warner v. Cate*, No. 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) ("[G]ood cause and compelling circumstances may exist where a significant geographic distance separates the witness from the location of court proceedings) (collecting cases); *Official Airline Guides, Inc. v. Churchfield Publications, Inc.*, 756 F. Supp. 1393, 1398 n.2 (D. Or. 1990), *aff'd*, 6 F.3d 1385 (9th Cir. 1993) (overruling objection to telephonic testimony of witness in United Kingdom where testimony was made in open court and under oath). Further, so long as Du and Pozin provide live testimony (albeit by videoconference) during trial, testify under oath, and are subject to cross-examination, appropriate safeguards exist. *Palmer*, 560 F.3d at 973; *Beltran–Tirado*, 213 F.3d at 1186; *Alderman*, 104 F.3d at 288 n.4; *Warner*, 2015 WL 4645019, at *1.

***2** Ever Win's "vigorously objects" to Prong's requested means of testimony. MIL Reply at 2 [Doc. # 70]. The Court observes, however, that Ever Win's only arguments in support of its position are the text of Rule 43(a) and the accompanying committee notes, and the conclusory statement that Prong has not presented compelling circumstances in this case. *Id.* at 3. Although the Court strongly prefers live witnesses because videoconference testimony often presents logistical difficulties, it will not foreclose such testimony (especially in a court trial), provided that the parties ensure that hard copies of any exhibits about which these witnesses will testify are made available to them at their location at the time of their testimony. Ever Win's objection is **OVERRULED** and Prong's request for Du and Pozin's testimony by videoconference is **GRANTED.**

C. Prong's Request to Use Previously Undisclosed Witnesses

In the circumstance that Pozin is unavailable, Prong requests that the Court permit one of seven other individuals—Jose Abanto, Doug Lee, Elizabeth Vandawalker, Taisha Phillips. Daniel Nastari, Aaron Case, and Katherine Smith—to testify at trial in Pozin's place, either in person or via videoconference. Limited Opposition at 2; Prong Witness List at 2–3 [Doc. # 64.]. Ever Win points out, however, that these seven individuals were not previously disclosed in Prong's initial or supplemental disclosures under Federal Rule of Civil Procedure 26 and should therefore be prohibited from testifying at trial under Rule 37(c)(1). MIL 1 Reply at 2–3; MIL 1 at 4; *see* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").

Prong requests that this Court permit these belatedly disclosed witnesses to testify at trial in its Limited Opposition, without addressing why the failure to timely disclose was substantially justified or is harmless. In the absence of such a showing, Prong's request to permit it to call untimely disclosed witnesses is **DENIED.**

D. Ever Win's MIL 2 [58]

Ever Win seeks the preclusion from evidence at trial any argument or testimony regarding Prong's alleged lost profits stemming from the PocketPlug product because (1) the PocketPlug was a new product that did not have a historical record of profits; (2) the business arrangement between Prong and Staples the Office Superstore, LLC ("Staples") was a new and unestablished business; and (3) Prong has not identified fact witnesses to authenticate, lay foundation, or establish the admissibility of any lost profits. MIL 2 at 3–5.

Before turning to Prong's response, some factual background is instructive. In early-to-mid 2014, Staples and Prong arranged for Staples to sell (and Prong to distribute) the PocketPlugs, which are manufactured and supplied by Ever Win, in several Staples stores for the holiday season. *See* MIL 2 at 3; MIL 2 Opposition at 2. Prong submits that Staples would pay Prong $30 per PocketPlug and that Prong would pay Ever Win between $19 and $21 per Pocketplug. MIL 2 Opposition at 4. A purchase order ("PO 1003") was entered into between Prong and Ever Win under which Ever Win offered Prong "a 30 day net term" on the PocketPlugs order, delivery of which "was guaranteed for August 22, 2014." MIL 2 Opposition at 2. The parties dispute when and for how

long the delivery dates were modified, but Ever Win never delivered the PocketPlugs to Prong, and Prong never paid for them. *See id.* at 3–4; MIL 2 at 3.[1] Ever Win argues that Prong was required to pay for the shipment up front, and Prong insists that there was a 30–day net term for payment of PO 1003 and that any promises on Prong's behalf to timely pay Ever Win for delivered PocketPlugs[2] relate to prior orders of PocketPlugs, not PO 1003. MIL 2 at 3; MIL 2 Opposition at 2, 4. Staples ultimately cancelled the agreement with Prong in October 2014, and Staples has refused to conduct business with Prong since then. MIL 2 Opposition at 3. Accordingly, Prong seeks damages for the lost profits incurred as a result of not supplying Staples with PocketPlugs through the fall of 2014.

***3** "[D]amages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent, ... albeit not with 'mathematical precision.' " *Sargon Enterprises, Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 773–74 (2012) (quotin *Grupe v. Glick*, 26 Cal. 2d 680, 693 (1945)). "[W]here the operation of an established business is prevented or interrupted" by a breach of contract, lost profits damages "are generally recoverable that their occurrence and extent may be ascertained with reasonable certainty" from, for example, "the past volume of business." *Id.* at 774 (alteration in original) (quoting *Grupe*, 26 Cal. 2d at 692). Generally, in the case of an unestablished business, "damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative." *Id.* at 774. "But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." *Id.* Accordingly, "[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty." *Id.* (quoting *GHK Assocs v. Mayer Grp., Inc.*, 224 Cal. App. 3d 856, 873 (1990)).

Prong maintains that the PocketPlug was not a new product, as evidenced by Ever Win's previous sales to Prong of PocketPlugs orders, which "Prong sold in their entirety." MIL 2 Opposition at 6. Rather, Prong contends that the damages here relate to the interruption of an established business operation by a breach of contract, permitting lost profits to be reasonably certain. *Id.* at 5–6. Prong further argues that although the arrangement between Staple and Prong was new, there are fact witnesses who can authenticate and lay foundation for various documents showing lost profits damages, as well as testify about the facts surrounding the arrangement. *See id.* at 2–4. Specifically, Prong points to Jesse Pliner (of Prong) and Tri Le (formerly of Ever Win), and to the Staples–Prong agreement (which shows the quantity of PocketPlugs ordered at $30/unit, and which Pliner negotiated), PO 1003 (which shows payment terms), and emails between the parties—all of which Prong contends, and Ever Win does not dispute, were timely produced or disclosed during discovery. *Id.* at 4. Prong also argues that Pliner and Le will both testify to the successful first launch of the PocketPlugs. *Id.* Thus, Prong argues that the lost profits stemming from Ever Win's failure to perform are "easily calculable" and reasonably certain. *Id.* at 2.

Given the limited facts presented by the parties at this juncture, the Court concludes that the PocketPlug is not a new product without a documented sales history, but that the standard governing unestablished businesses is nonetheless more appropriate here. Although Prong had successfully distributed PocketPlugs in the past, the arrangement with Staples was brand new. Prong and Ever Win's previous success supplying and distributing PocketPlugs may of course be relevant if at trial there is evidence of similar circumstances between past orders and the Staples–Prong arrangement, such as the same amount of PocketPlugs ordered or the sale of PocketPlugs in similar locales.

From the arguments submitted, however, the Court cannot determine whether the Prong–Staples arrangement was reasonably certain to extend through the fall of 2014, or whether there was one agreement between Prong and Staples for a single order of PocketPlugs that may have been followed by additional agreements if and only if the original order of PocketPlugs sold well or other circumstances were present. If, at trial, the evidence shows that Staples planned to place another order (on the same terms) for PocketPlugs upon complete performance of the initial Prong–Staples agreement, the Court is inclined to permit Prong to pursue lost profits damages and present testimony and argument on those lost profits. If, however, the agreement and testimony show that the only certain arrangement for PocketPlugs between Prong and Staples was the early-to-mid 2014 agreement, the Court will not permit Prong to introduce testimony or evidence on lost profit damages because such losses are speculative.

***4** MIL 2 is therefore **DENIED**, and the Court will rule on specific objections to testimony or argument at trial.

II.

CONCLUSION

In light of the foregoing, the Court (1) **GRANTS** MIL 1; (2) **OVERRULES** Ever Win's objection to out-of-court testimony, and **GRANTS** Prong's request for Du and Pozin to testify—live, during trial and subject to cross-examination—by videoconference; (3) **DENIES** Prong's request to present previously undisclosed witnesses; and (4) **DENIES** MIL 2.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 1654063

Footnotes

1 Prong placed a second order of PocketPlugs with Ever Win "in an effort to salvage the Staples agreement" after the first delivery date lapsed without performance. MIL 2 Opposition at 3.

2 The MIL 2 asserts that "[Prong] made numerous promises that [Prong] would timely pay [Ever Win] for components, and for the finished goods, but failed to do so. [Prong] ultimately received VC funding on December 4th, 2014 well after [Ever Win] tendered delivery of the goods. [Prong] never canceled the PO and failed to pay [Ever Win] for these specialized goods still stored in [Ever Win]'s warehouse." MIL 2 at 3.

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2021 WL 3032712
United States District Court, C.D. California.

IN RE John Emil ALLE, Debtor.
John Emil Alle, Appellant,
v.
Earl E. Gales, Jr., et al., Appellees.

Case No. 2:20-cv-11116-MCS
|
Bankruptcy Case No. 2:13-bk-38801-SK
|
Adversary Case No. 2:14-ap-01146-SK
|
Signed 07/19/2021

Attorneys and Law Firms

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ORDER AFFIRMING BANKRUPTCY COURT'S ORDERS

MARK C. SCARSI, UNITED STATES DISTRICT JUDGE

***1** Appellant John Emil Alle appeals the Bankruptcy Court's Judgment entered on December 3, 2020 in favor of the Appellees. Alle also appeals from the Bankruptcy Court's Order Granting Appellees' Motion For Order Permitting Trial by Zoom Video Technology entered on August 25, 2020 (the "Zoom Trial Order") and (2) the Order Denying Motion For Order Allowing Defendant to Argue, At Trial, All Elements of Every Cause of Action in the First Amended Complaint (the "Mandate Order") entered on February 27, 2019. For the following reasons, the Court **AFFIRMS** the decisions of the Bankruptcy Court.

I. BACKGROUND

On December 5, 2013, John Emil Alle, debtor and Appellant here, filed a chapter 7 petition. *In re Alle*, 13-38801-SK (Bankr. C.D. Cal.). On March 7, 2014, Earl Gales, Jr., Starla Gales, Robert Oppenheim, and Lois Oppenheim, plaintiffs in the adversary proceeding and Appellees here, filed a complaint against Alle alleging three claims: 1) Defalcation under 11 U.S.C. § 523(a)(4), 2) Fraud under § 523(a)(2)(A), and 3) Embezzlement under § 523(a)(4). *Gales et al. v. Alle (In re Alle)*, Adv. Proc. No. 2:14-ap-01446-SK (Bankr. C.D. Cal.). The adversary action is based upon the below facts.

The Appellees and Alle formed Shadow Mountain Properties, LLC ("SMP") in January 2006. (Appellees' Excerpts of Record, Tab 5 at 00047 (AER 5:47), ECF No. 13-1.)[1] The purpose of SMP was to purchase and operate a rental property in Palm Desert, CA. (*Id.*) SMP purchased the Property from the Humiston Family Trust for the sum of $1,600,000.00. (*Id.*) The Appellees contributed $800,000 and Humiston took back a deed of trust in the amount of $800,000 for the remainder. (*Id.*)

Over the next several years, frustration between the parties developed, as Alle failed to provide requested operating reports and bank statements to the Appellees. (*See* AER Tab 4; Tab 11.) SMP also fell behind on payments on the deed of trust, and on August 19, 2011, Humiston instituted a non-judicial foreclosure process by recording a Notice of Default listing the default and the requisite reinstatement amount at that time of $12,478.33. (AER 5:47.) Although Alle knew of this action, and was in loan modification negotiations with Humiston, Appellees were unaware of the dire financial situation. (AER 5:49.) Alle's negotiations failed, and the foreclosure sale took place on December 22, 2011, with Humiston submitting a winning bid in the amount of $842,737.25. (AER 5:48–50.) Alle, notwithstanding his duties as Managing Member of SMP, did not notify Appellees that Humiston foreclosed on the property. (AER 11:147; 7:94.) For the next four months, despite the foreclosure, Alle continued to represent to Appellees that he was controlling SMP and attempting to rectify the financial woes. (*See generally* AER Tab 5; Tab 41.)

***2** On November 9, 2012, Appellees filed a complaint against Alle in Los Angeles County Superior Court. (AER 34:510). On December 5, 2013, four days before the state action was to go to trial, Alle filed a chapter 7 petition.

(*Id.*) On March 7, 2014, Appellees filed a nondischargeability complaint, initiating the adversary proceeding. (*Id.*)

In their adversary proceeding, the Appellees seek a determination that their claims against Alle were not dischargeable under Section 523 for fraudulent representations and omissions, fraud or defalcation while acting as a fiduciary, and embezzlement. (AER 39:602–12.) In September 2016, the bankruptcy court held a hearing on the Appellees' Motion for Summary Judgment resulting in a 40-page ruling granting the Appellees' claims for defalcation while acting in a fiduciary capacity and embezzlement (the "MSJ Ruling"). (*See* AER Tab 34.) Additionally, the bankruptcy court determined that Alle embezzled $94,473.64 in funds from Shadow Mountain between May 2009 and December 2011. (*See* AER 34:506–09.) The bankruptcy court entered judgment against Alle for $800,000.00, plus attorneys' fees and costs (the "Initial Judgment"). (*See* AER Tab 33.)

Alle then appealed the Initial Judgment to the BAP in the appeal designated as *Alle v. Gales (In re Alle)*, Case No. CC-16-1412 (B.A.P. 9th Cir. 2016). The BAP affirmed in part and reversed in part the Initial Judgment and remanded the matter for further proceedings. (AER 37:582.) The BAP found that the bankruptcy court's findings were inadequate to support the ultimate conclusion that there was a defalcation. Specifically, the BAP opined that the bankruptcy court needed to make a sufficient finding that Alle's state of mind satisfied the applicable standard or an explicit finding that Alle's conduct caused the Appellees' damages. (AER 37:571.) The BAP further found that the bankruptcy court did not make sufficient findings to support the amount of damages awarded. (AER 37:580.)

After the remand by the BAP, Alle filed a motion seeking to set aside all of the bankruptcy court's prior determinations made in connection with its ruling on the MSJ and require the Appellees to prove every element of their complaint anew (the "Mandate Relief Motion"). (AER 40:654.) In response to this motion, the bankruptcy court ruled against Alle—finding its prior determinations were binding and the issues to be litigated at trial consisted of both the issues designated for remand by the BAP and the issues for which the bankruptcy court did not grant partial summary adjudication. (AER 38:590–600.) Further, the bankruptcy court found no valid exception to the law of the case doctrine and that the mandate rule applied, and accordingly entered the Mandate Order. (AER 4:35–36.)

On August 25, 2020, in light of the ongoing COVID-19 pandemic, the bankruptcy court entered an order that the action would proceed to a remote trial. (AER Tab 3.) At the hearing on the motion, the bankruptcy court stated that:

> based on the current pandemic, the district court's recent general orders that closed the district court because of the surging cases, the bankruptcy court's recent general order that closed the courthouse because of the surge in cases, it stands for all of these reasons stated, the Court find that there is good cause and compelling circumstances and exercises its discretion under FRCP 43(a) to order that this trial will proceed remotely.

***3** (AER 46:1183.) The trial took place October 29–30, 2020. (AER 4:34.) But Alle elected not to participate in the trial, with both Alle and his counsel filing court-ordered declarations indicating an understanding of the consequences of not participating in the trial. (AER Tab 21; Tab 22.)

On December 3, 2020, after the remote trial and post-trial motion practice, the bankruptcy court entered the Judgment in favor of the Appellees in the amount of $1,377,563.46 as to Mr. and Mrs. Gales and $740,606.77 as to Mr. and Mrs. Oppenheim. (AER 2:25–26.) This appeal followed.

II. QUESTIONS PRESENTED ON APPEAL[2]

1. Whether the Bankruptcy Court abused its discretion by entering the Zoom Trial Order?

2. Whether the Bankruptcy Court committed error by entering the Mandate Order?

3. Whether the Bankruptcy Court erred by entering the Judgment under 11 U.S.C. § 523(a)?

III. STANDARD OF REVIEW

"Findings of fact of the bankruptcy court are reviewed for clear error, and conclusions of law are reviewed de novo. Mixed questions of law and fact are reviewed de novo." *Harkey v. Grobstein (In re Point Ctr. Fin., Inc.)*, 957 F.3d 990, 995 (9th Cir. 2020) (citations omitted). The bankruptcy court's "findings of fact are accorded considerable deference and are only clearly erroneous if we are left with a definite and firm conviction a mistake has been committed." *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 618 B.R. 1, 5 (9th Cir. B.A.P. 2020). A reviewing court may affirm a bankruptcy court's decision "on any ground fairly supported by the record." *In re Warren*, 568 F.3d 1113, 1116 (9th Cir. 2009).

IV. DISCUSSION

Alle presents thirteen issues on appeal, which can be interpreted as falling within three separate categories of error: first, the bankruptcy court erred by ordering the trial to proceed by Zoom, second, the bankruptcy court erred by not requiring Appellees to prove every element of their claims at trial, and third, the bankruptcy court erred by granting judgment against Alle. (Opening Br. 1–2, ECF No. 10.) The Court addresses each issue in turn.

A. Holding the Trial by Remote Technology Was Permissible

First, Alle appeals the bankruptcy court's issuance of the Zoom Trial Order, arguing that the court abused its discretion in ordering the parties to proceed to a trial conducted via Zoom. (Opening Br. 10.) In support of this general allegation of error, Alle argues several reasons for why the bankruptcy court erred. Alle claims that the bankruptcy court could not have determined the credibility of remotely testifying witnesses and a Zoom trial restricts the party's ability to communicate with his attorney. (*Id.* 9, 10.) Also, because testimony would not occur in the open courtroom, there is the risk that a witness would improperly rely on documents during his or her testimony, be impermissibly coached by a person outside of the view of the camera during trial, or even communicate via text or email with the attorney without the court's knowledge. (*Id.*) Alle also argues that a "Zoom trial (compared to a routine court hearing) deprived Appellant of the constitutional right to confront witnesses, due process of law and effective counsel." (*Id.* 11.) He additionally argues that the Zoom trial could be impacted by the unstable or inconsistent internet available to his counsel, with personal anecdotes of previous losses of internet connectivity as justification. (*Id.* 13.) Furthermore, low-quality internet will result in interruptions and disfunction and favor well-resourced large law firms with dedicated IT support over small firms and solo practitioners. (*Id.* 13–14, 16.) And again, Alle argues that, because his counsel would not be sitting next to him during trial, he would be denied effective assistance of counsel, violating his due process rights. (*Id.* 15.)

***4** In conclusion, Alle argues that not only did the bankruptcy court abuse its direction in ordering the trial to proceed by Zoom, but it was also legal error to force Alle to appear via Zoom for the trial. (*Id.* 17.)

Appellants counter, *inter alia*, that Alle does not have a constitutional right to an in-person trial (Answering Br. 22, ECF No. 13), that a Zoom trial does not deprive Alle of due process, (*id.* 23), and that other courts have held bench trials via Zoom-like technology, (*id.* 26).

Pursuant to Federal Rule of Civil Procedure 43(a), "[a]t trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise." The rule, however, also provides that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43(a). Accordingly, the decision to require testimony by videoconference falls within a court's discretion. *Draper v. Rosario*, 836 F.3d 1072, 1081 (9th Cir. 2016); *see Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018) ("[U]nder Rule 43(a), the judge has discretion to allow live testimony by video for 'good cause in compelling circumstances and with appropriate safeguards.' " (quoting Fed. R. Civ. P. 43(a))), *cert. denied*, 140 S.Ct. 533 (2019). Moreover, a court's discretion is augmented by its "wide latitude in determining the manner in which evidence is to be presented" under the Federal Rules of Evidence. *Parkhurst v. Belt*, 567 F.3d 995, 1002 (8th Cir. 2009) (citing Fed. R. Evid. 611(a)).

As an initial matter, Alle's effort to impose in a civil case the requirements of the Sixth Amendment, where a defendant enjoys the protection of the Confrontation Clause, is inapt. *See* *Austin v. United States*, 509 U.S. 602, 608 (1993) ("The protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions." (quotation omitted)). The Federal Rules of Civil Procedure control here and Rule 43 plainly permits

a court to permit testimony in open court by contemporaneous transmission from a different location "[f]or good cause in compelling circumstances and with appropriate safeguards." Fed. R. Civ. P. 43(a).

Here, the bankruptcy court, acting in good cause in light of the compelling circumstances created by the COVID-19 pandemic, developed the appropriate safeguards as required by Rule 43(a).

1. Good Cause in Compelling Circumstances

The bankruptcy court did not abuse its discretion in finding there was good cause in compelling circumstances sufficient to order the trial to proceed by remote means. Specifically, the bankruptcy court noted it was operating under the restrictions imposed by the U.S. Bankruptcy Court for the Central District of California's General Order 20-06. (AER 3:30.) This Order instructed the bankruptcy court that there would be "no in person hearings ... held in any matter, until further notice" and "Judges will continue to hear matters remotely through telephonic or by video service." (*Id.* (citing General Order 20-06).) The General Order was issued in response to the surge of COVID-19 cases in California during the summer of 2020. The Court also acknowledged, that as of the summer of 2020, "[t]here is currently 'no known cure, no effective treatment, and no vaccine' for COVID-19." (*Id.* (quoting *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613 (2020) (Roberts, C.J., concurring))).

***5** In finding that the COVID-19 pandemic was good cause in compelling circumstances, the bankruptcy court implied its decision was not an outlier, but that courts across the country have ordered remote trials. (AER 3:31 (citing, *inter alia, Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n*, 2020 WL 3717792 (E.D. Mich. June 30, 2020); *Vitamins Online, Inc. v. Heartwise, Inc.*, 2020 WL 3452872 (D. Utah June 24, 2020); *Argonaut Inc. Co. v. Manetta Enters.*, 2020 WL 3104033 (E.D.N.Y June 11, 2020)).) In further support of its ruling that good cause existed, the bankruptcy court highlighted that the adversary proceeding was approximately 6 1/2 years old at the time of the Zoom Trial Order and that it was "unknown when the courthouse will reopen for ordinary operations." (AER 3:30.)

The bankruptcy court's exercise of discretion continues to be well-founded—since the bankruptcy court entered its Zoom Trial Order in August 2020, several more Ninth Circuit district courts have also entered similar orders. *See, e.g., Julian Liu v. State Farm Mut. Auto. Ins. Co.*, No. CV 2:18-1862-BJR, 2020 WL 8465987, at *2 (W.D. Wash. Dec. 17, 2020) (finding that good cause and compelling circumstances existed because COVID-19 was a public health emergency); *see also Bao Xuyen Le v. Reverend Dr. Martin Luther King, Jr. Cty.*, No. C18-55 TSZ, 2021 WL 859493, at *2–3 (W.D. Wash. Mar. 8, 2021) (same); *Goldstine v. FedEx Freight Inc.*, No. C18-1164 MJP, 2021 WL 952354, at *10 (W.D. Wash. Mar. 11, 2021) (same); *Cramton v. Grabbagreen Franchising LLC*, No. CV-17-04663-PHX-DWL, 2020 WL 8620346, at *2 (D. Ariz. Nov. 13, 2020) (same) (collecting cases).

In summary, the bankruptcy court did not abuse its discretion in finding good cause in compelling circumstances to support the Zoom Trial Order. *Draper*, 836 F.3d at 1081.

2. Appropriate Safeguards

Next, the Court considers whether the bankruptcy court abused its discretion in finding or fashioning "appropriate safeguards" as contemplated by Rule 43(a). The Court holds the bankruptcy court did not.

Rule 43(a)'s requirement that testimony occur in open court serves two purposes: (1) to ensure that the witness testimony may be tested by cross-examination, and (2) to allow the trier of fact to observe the demeanor of the witness. *In re Adair*, 965 F.2d 777, 780 (9th Cir. 1992) (citing *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529, 536 (2d Cir. 1972)). The bankruptcy court acknowledged these dual requirements in its Zoom Trial Order, stating "an order will be entered before trial providing instructions to all parties regarding numerous issues." (AER 3:31.) On September 30, 2020, the bankruptcy court issued that order, requiring, for example, that all parties would use the same court-provided blue background; that all witnesses must be visible from the waist up; and documents, notes, and electronic devices were forbidden in the room from which the witness was testifying. (*See* AER 24:96–399.) Furthermore, the bankruptcy court scheduled a pretrial testing conference two weeks prior to the set trial date in order to ensure each party's access and functionality. (AER 24:397.)

In this Zoom Trial Order the bankruptcy court impliedly responded to several of Alle's arguments against proceeding remotely, *supra.* For example, the bankruptcy

court incorporated safeguards against the "potential coaching of witnesses." (AER 3:31.) It also directly rejected the argument that Alle could not effectively cross-examine via video, calling that argument "unfounded." (AER 3:32 (citing *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 2020 WL 3411385 (E.D. Va. Apr. 23, 2020)).)

***6** As above, other courts have continued to fashion similar and adequate safeguards in response to the COVID-19 pandemic. *See, e.g., Liu*, 2020 WL 8465987, at *3 ("This Court will not make [defendant] wait ... until it is safe to resume in-person civil jury trials, particularly when it is possible to conduct a remote jury trial in a manner that ameliorates each of Defendant's objections and satisfies Rules 77(b) and 43(a)."). And courts have found safeguards similar to those emplaced by the bankruptcy court sufficient. *Aoki v. Gilbert*, 11-cv-02797-TLN-CKD, 2019 WL 1243719, at *2 (E.D. Cal. Mar. 18, 2019) ("Especially in light of the fact that this is a bench trial, the Court foresees no issues with determining witness credibility, or with the logistics and timing of presenting and cross-examining the various witnesses by video.); *Warner v. Cate*, 12-cv-1146-LJO-MJS, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) ("Appropriate safeguards exist where the opposing party's ability to conduct cross-examination is not impaired, the witness testifies under oath in open court, and the witness's credibility can be assessed adequately.").

Accordingly, this Court holds that the bankruptcy court did not abuse its discretion in finding adequate safeguards to proceed at a remote trial. *Draper*, 836 F.3d at 1081.

Thus, because the bankruptcy court found good cause and developed adequate safeguards, it did not abuse its discretion in ordering the trial to proceed by Zoom. Therefore, the Court **AFFIRMS** the bankruptcy court's Zoom Trial Order.

B. Appellees Were Not Required to Prove Every Element

Alle's second assignment of error is that the bankruptcy court erred when it did not require "Appellees to prove, at trial, each element of each cause of action." (Opening Br. 17.) Although discordant and at times repetitive, the Court reads Alle's Opening Brief as making two broad arguments. First, the bankruptcy court committed legal error by misconstruing the prior BAP Appeal Judgment in order to limit the triable issues. (*See, e.g., id.* 18–19.) Second, the bankruptcy court abused its discretion by not finding an exception to the "law of the case" doctrine. (*See, e.g., id.* 20.)

In essence, to resolve Alle's arguments the Court must determine whether the rule of mandate or exceptions to the law of the case controlled the bankruptcy court's ability to preclude certain issues from being re-litigated at the trial. They did not.

1. Rule of Mandate

The Court can dispose of Alle's arguments against Claims One and Three by applying the rule of mandate.

"The rule of mandate is similar to, but broader than, the law of the case doctrine." *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). Under the "rule of mandate," on remand, a trial court cannot vary or examine the appellate court's mandate for any purpose other than executing it. *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016). On remand, a lower court's actions must be "consistent with both the letter and the spirit of the higher court's decision." *Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1214 (C.D. Cal. 2005) (citations omitted). But the rule of mandate does not preclude a trial court from deciding anything not foreclosed by the mandate. *Stacy*, 825 F.3d at 568. In other words, it "leaves to the [lower] court any issue not expressly or impliedly disposed of on appeal." *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (citation omitted). Violation of the rule of mandate is a jurisdictional error and is reviewed de novo. *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007).

a. Claim One: Defalcation under § 523(a)(4)

Under Section 523(a)(4), to prevail under a defalcation theory, the party must demonstrate that: 1) an express or technical trust existed, 2) the debt was caused by fraud or defalcation, and 3) the debtor acted as a fiduciary to the creditor at the time the debt was created. *In re Bigelow*, 271 B.R. 178, 186 (B.A.P. 9th Cir. 2001).

In the MSJ Ruling, the bankruptcy court granted summary judgment on Claim One for Defalcation. (AER 34:521.) The BAP panel affirmed the bankruptcy court's findings that: 1) a technical trust existed under California law, 2) Alle acted as a fiduciary to Appellees, and 3) Alle breached his fiduciary duties to Appellees by failing to provide Appellees with appropriate income and expense reports regarding SMP and by misappropriating SMP's funds. (AER 37:571–74.)

***7** But, the BAP reversed the bankruptcy court's determination that Alle's debt was caused by fraud or defalcation. (AER 37:574–79.) Specifically, because § 523(a)(4) defalcation requires "a culpable state of mind involving either bad faith, moral turpitude or an intentional wrong," the bankruptcy court erred when it made no findings whether Alle possessed the "requisite state of mind" to commit fraud or defalcation. (*Id.*) Additionally, the BAP ruled that the "bankruptcy court did not make sufficient findings to support the amount of damages awarded" and therefore "should make findings as to the proper measure of damages under California law and the facts of this case." (AER 37:580, 582.) Ultimately, the BAP remanded the case "for further proceedings in accordance with this disposition." (AER 37:582.)

Thus, the Panel's holdings that a trust existed, that Alle was a fiduciary to Appellees, and that he breached that duty disposed of those elements, and the bankruptcy court was expressly precluded from reconsidering those matters on remand. *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987) (internal citations omitted).

Therefore, the bankruptcy court did not commit legal error when it denied Alle's Mandate Relief Motion to require Appellees to prove all elements of Claim One. The Court **AFFIRMS** the bankruptcy court ruling under the rule of mandate and, thus, does not reach the law of the case argument. *In re Warren*, 568 F.3d at 1116 (affirming a bankruptcy court's decision "on any ground fairly supported by the record").

b. Claim Two: Fraud under § 523(a)(2)(A)

On appeal, the BAP Panel was not confronted with any issues stemming from Claim Two, and thus the BAP Appeal Judgment is silent as to this claim. Because there was no mandate from a higher court, the rule of mandate is inapplicable. *See, e.g.*, *Stacey v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016) (noting courts may consider any matter on remand that was not expressly or implicitly decided on appeal). The bankruptcy court properly did not apply the rule of mandate, nor shall this Court.

c. Claim Three: Embezzlement under § 523(a)(4)

Embezzlement under Section 523(a)(4) requires proof of three elements: 1) property rightfully in the possession of the nonowner debtor, 2) the nonowner's misappropriation of the property to a use other than that for which it was entrusted, and 3) circumstances indicating fraud. *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991). A finding that a defendant misappropriated the plaintiff's property creates damages in the amount of the misappropriated property. *In re Booher*, 284 B.R. 181, 214 (Bankr. W.D. Pa. 2002) (noting that damages for embezzlement are generally equal to the value of the misappropriated property).

In the MSJ Ruling, the bankruptcy court found that Appellees had satisfied all of the elements of embezzlement under § 523(a)(4), determining that 1) Alle was rightfully in possession of SMP's funds, and based on Appellees' membership interests in SMP, Appellees' funds, 2) Alle misappropriated those funds, and 3) the circumstances surrounding Alle's use of SMP's funds indicated fraud. (AER 34:526–27.) Based on those findings, the bankruptcy court granted summary judgment in favor of the Appellees and entered judgment on Claim Three for $800,000 in damages. (AER 34:485.)

On appeal, the BAP Panel did not agree with the amount of damages the bankruptcy court awarded because the bankruptcy court "did not award damages in the amount of the embezzled funds," with the Panel writing "it is not clear how the embezzlement claim could have been the basis for the $800,000 damage award" and "[a]ccordingly, the bankruptcy court erred in entering judgment on Plaintiffs' embezzlement claim." (AER 37:580.) But the BAP Appeal Judgment does not state that the bankruptcy court erred in finding that the elements of embezzlement had been proven. (*Id.*) And thus, the mandate from the BAP was limited, only stating that "on remand, the bankruptcy court should make findings as to the proper measure of damages under California law and the facts of this case." (AER 37:582.)

***8** In its Mandate Order denying Alle's Mandate Relief Motion to force Appellees to prove all of the elements, the bankruptcy court correctly read the BAP Appeal

Judgment mandate. (AER 38:593.) The mandate required the bankruptcy court to make findings only regarding the proper amount of damages under the Embezzlement Claim, implicitly affirming that all of the claim's elements had been satisfied. Therefore, based on the mandate, the bankruptcy court was precluded from considering any issued regarding Claim Three other than damages. *Miller*, 822 F.2d at 832 (prohibiting lower courts from reviewing issues on remand that were implicitly decided on appeal).

Because the bankruptcy court could only require those issues not disposed of by the BAP Appeal Judgment to be proven at trial, the bankruptcy court did not err when it denied Alle's Mandate Relief Motion. The Court **AFFIRMS** the bankruptcy court's Mandate Order ruling under the rule of mandate and, thus, does not reach the law of the case argument. *In re Warren*, 568 F.3d at 1116.

2. Law of the Case Doctrine

Because the BAP Appeal Judgment was silent as to Claim Two, the bankruptcy court necessarily analyzed Alle's Mandate Relief Motion under the law of the case doctrine. (AER 38:599–600.)

The law of the case doctrine, a judicial invention, aims to promote the efficient operation of the courts. *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). It generally preludes a court from reconsidering an issue decided previously by the same court or by a higher court in the identical case. *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). The issue in question must have been decided explicitly or by necessary implication in the previous disposition. *Id.* The doctrine serves to advance the "principle that in order to maintain consistency during the course of a single lawsuit, reconsideration of legal questions previously decided should be avoided." *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986). Application of the doctrine is discretionary. Appellate courts therefore review the lower court's decision for abuse of discretion. *See* *Milgard Tempering*, 902 F.2d at 715. Here, the bankruptcy court did not abuse its discretion.

Although the bankruptcy court's prior MSJ Ruling was the law of the case, the Ninth Circuit has recognized that a court can "depart from the law of the case ... in limited circumstances." *Malaney v. UAL Corp.*, 552 F. App'x 698, 700 (9th Cir. 2014) (citing *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005)). "A court [has] discretion to depart from the law of the case where: (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). "Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.*

In denying Alle's Mandate Relief Motion, the bankruptcy court, in its Mandate Order, *sua sponte* considered the law of the case doctrine and its exceptions, and correctly rejected each exception. (AER 38:600.) The bankruptcy court first noted that neither Alle nor Appellees addressed whether the law of the case doctrine applied to the bankruptcy court's ruling considering Claim Two, but the bankruptcy court then found that the doctrine did apply because it expressly decided those issues in the MSJ Ruling. (*Id.*) The bankruptcy court then found that Alle, in his Mandate Relief Motion, did not demonstrate that the bankruptcy court's findings regarding Claim Two were clearly erroneous, or that there had been an intervening change in the law that would retroactively affect the MSJ Ruling. (*Id.*) Nor did Alle submit substantially different evidence, and in fact, the bankruptcy court reviewed all of the evidence Alle did submit to support his Mandate Relief Motion, finding that Alle didn't show that the evidence was unavailable to him prior to the bankruptcy court's MSJ Ruling. (*Id.*; AER 38:597.) The bankruptcy court also rejected Alle's arguments that because he now had counsel his circumstances were changed. (AER 38:600.) Finally, the bankruptcy court found that Alle had provided no evidence that he would suffer manifest injustice if it adhered to its rulings regarding Claim Two. (*Id.*)

***9** Before this Court, Alle argues the bankruptcy court erroneously failed to find that an exception to the law of the case existed; specifically that Alle had insufficient time to review the bankruptcy court's tentative ruling on the MSJ, and now that Alle has had more time to respond and can provide additional details to explain the "inappropriate or unnecessary expenses for SMP" it would be manifest injustice to not revisit the judgment. (Opening Br. 20.) But this is the same argument based on the same facts that was presented to, and rejected by, the bankruptcy court in its Mandate Order denying the Mandate Relief Motion. (*See* AER 38:600.) Nothing Alle has provided on appeal shows the bankruptcy court abused its discretion.

In sum, this Court holds that the bankruptcy court did not abuse its discretion by abiding by the law of the case in the absence of an exception, and **AFFIRMS** the bankruptcy court's Mandate Order denying Alle's Mandate Relief Motion as to Claim Two.

C. Judgment Was Proper

In his final argument on appeal, Alle argues that the Judgment entered by the bankruptcy court following the trial is error. (Opening Br. 21.) Dedicating only thirteen lines of the twenty-two page brief to this issue, Alle argues that because the bankruptcy court wrongly did not force Appellees to prove every element at trial, and then wrongly ordered the trial to proceed remotely, it necessarily follows that the Judgment is a "fruit of the poison tree" and this Court should vacate and reverse the Judgment, and order a trial in person. (*Id.*)

Because this Court affirmed both the bankruptcy court's Zoom Trial Order and its Mandate Order, Alle's final argument logically fails.

V. CONCLUSION

The Court **AFFIRMS** the decisions of the bankruptcy court. The Clerk is directed to close the case.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 3032712, Bankr. L. Rep. P 83,692

Footnotes

1 The "AER #:###" designation refers to the consecutively numbered pagination for the Appendix to Appellees' Brief – Excerpts of Record, with the first number being the Tab No. and the second number being the page number but without the leading zeros.

2 Appellant stated thirteen issues on appeal, however the Court has found that the key issues can be distilled down to three questions. (*See* Opening Br. 1–2, ECF No. 10.)

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912 F.3d 971
United States Court of Appeals, Seventh Circuit.

Michael N. THOMAS, Plaintiff-Appellant,
v.
Raymond ANDERSON, et al.,
Defendants-Appellees.

No. 15-2830
|
Argued February 7, 2018
|
Decided November 14, 2018
|
As Amended on Petition for Rehearing January 11, 2019

Synopsis

Background: State inmate filed § 1983 action against prison guards and hearing officers, alleging that guards attacked inmate with excessive force, and that beating and subsequent disciplinary proceedings were in retaliation for lawsuits and grievances inmate had filed. The United States District Court for the Central District of Illinois, No. 12-C-1343, Joe Billy McDade, J., entered judgment as matter of law in officers' favor and entered judgment on jury verdict in guards' favor. Inmate appealed.

Holdings: On denial of rehearing, the Court of Appeals, Sykes, Circuit Judge, held that:

[1] issue of whether guard retaliated against inmate for filing grievances about him was for jury;

[2] issue of whether other guard retaliated against inmate for filing grievances about first guard was for jury;

[3] issue of whether hearing officers held disciplinary hearing that they knew was sham for purpose of retaliating against inmate was for jury;

[4] district court did not abuse its discretion in requiring inmate to stipulate that he had filed unspecified number of grievances against guard and other prison officials;

[5] district court did not abuse its discretion in declining to allow non-party inmate witnesses to testify at trial except by video conference; and

[6] district court did not abuse its discretion by declining to recruit pro bono counsel to represent inmate.

Affirmed in part, reversed in part, and remanded.

Opinion, 908 F.3d 1086, superseded.

Procedural Posture(s): Petition for Rehearing; On Appeal; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict; Judgment; Other.

West Headnotes (8)

[1] Civil Rights Criminal law enforcement; prisons

Issue of whether state prison guard retaliated against inmate for filing grievances about guard by issuing phony disciplinary report, in violation of inmate's First Amendment rights, was for jury in inmate's § 1983 action, in light of inmate's testimony that guard called for early lockup after seeing him in shower, that guard told another guard to write inmate ticket for refusing to lock up, even though he did not refuse, and that, when inmate protested that ticket was baseless, guard scoffed: "You should have thought about that before you made all of [your] complaints about me and filing grievances about me in the prison." U.S. Const. Amend. 1; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 50.

1 Cases that cite this headnote

[2] Civil Rights Criminal law enforcement; prisons

Issue of whether state prison guard retaliated against inmate for filing grievances about another guard by issuing phony disciplinary report, in violation of inmate's First Amendment rights, was for jury in inmate's § 1983 action, in light of inmate's testimony that guard was in cell when other guard told inmate that he should

not have filed grievances, and that guard himself said that he "didn't like inmates who tried to get staff in trouble." U.S. Const. Amend. 1; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 50.

[3] **Civil Rights** Criminal law enforcement; prisons

Issue of whether state prison hearing officers held disciplinary hearing that they knew was sham for purpose of retaliating against inmate for inmate's past grievances against guards, in violation of inmate's First Amendment rights, was for jury in inmate's § 1983 action, in light of inmate's testimony that one officer told him that he "shouldn't have been making complaints about the prison" if he did not "want to be in [this] situation" and that his "hands were tied," and that other officer agreed that his "hands were tied" and expressed concern that conducting a fair hearing could have interfered with officer's retirement. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983; Fed. R. Civ. P. 50.

1 Cases that cite this headnote

[4] **Constitutional Law** Retaliation in general

First Amendment retaliation claim only requires evidence that plaintiff's protected activity was at least one motivating factor for retaliatory action. U.S. Const. Amend. 1.

8 Cases that cite this headnote

[5] **Stipulations** Nature and essentials in general

District court did not abuse its discretion in requiring inmate to stipulate that he had filed unspecified number of grievances against prison guard and other prison officials in his § 1983 action alleging that guard retaliated against inmate for filing grievances, despite inmate's contention that court's refusal to permit inmate to introduce at trial more than 150 complaints and grievances he had filed were relevant to guard's motivation, where stipulation informed jury in general terms of inmate's grievance and complaints about prison conditions, and permitting inmate to introduce entire record of prior grievances would have bogged down proceedings and distracted and potentially confused jurors. 42 U.S.C.A. § 1983.

[6] **Federal Civil Procedure** Reception of Evidence

District court did not abuse its discretion in state inmate's § 1983 action in declining to allow non-party inmate witnesses to testify at trial except by video conference, where another inmate witness testified to same information that plaintiff wanted to cover with them, and there was no indication that plaintiff was prejudiced by absence of their testimony. 28 U.S.C.A. § 2241(c)(5); 42 U.S.C.A. § 1983; Fed. R. Civ. P. 43(a).

13 Cases that cite this headnote

[7] **Civil Rights** Criminal law enforcement; prisons

District court did not abuse its discretion by declining to recruit pro bono counsel to represent indigent inmate in inmate's § 1983 action against prison officials, where inmate did not claim that inmate had attempted to obtain counsel on his own or that he was precluded from doing so, and court found that inmate was competent to litigate his own case. 42 U.S.C.A. § 1983.

33 Cases that cite this headnote

[8] **Federal Civil Procedure** Appointment of counsel

Once judge appropriately addresses and resolves request for recruitment of pro bono counsel, he need not revisit question.

***973** Appeal from the United States District Court for the Central District of Illinois. No. 12-C-1343 — **Joe Billy McDade**, *Judge*.

Attorneys and Law Firms

Remi J.D. Jaffre, Attorney, JENNER & BLOCK LLP, New York, NY, Barry Levenstam, Attorney, JENNER & BLOCK LLP, Chicago, IL, for Plaintiff-Appellant.

Frank Henry Bieszczat, Attorney, OFFICE OF THE ATTORNEY GENERAL, Civil Appeals Division, Chicago, IL, for Defendants-Appellees.

Before Bauer, Rovner, and Sykes, Circuit Judges.

Opinion

Sykes, Circuit Judge.

Michael Thomas, an Illinois prisoner formerly confined at Hill Correctional Center, alleged that prison guards attacked him with excessive force and that the beating and subsequent disciplinary proceedings were in retaliation for lawsuits and grievances he filed. He sued the guards and other prison officials seeking damages under 42 U.S.C. § 1983. In the course of pretrial proceedings, the district judge required the parties to stipulate to the events preceding the attack and ruled that certain inmate witnesses must appear, if at all, by video conference. The judge also declined Thomas's request for recruited counsel, determining that he was competent to litigate the suit pro se. At trial the judge entered judgment as a matter of law for the defendants on all claims except those asserting excessive force by two officers. The jury decided those claims against Thomas.

On appeal Thomas contests the judge's evidentiary rulings, the decision not to recruit counsel, and the partial judgment for the defendants as a matter of law. Because Thomas's trial testimony allowed for a permissible inference of retaliation, the judge should not have taken the retaliation claims from the jury. We reverse the judgment on those claims. In all other respects, we affirm.

I. Background

Thomas's lawsuit centers on an altercation that occurred on March 24, 2011, at Hill Correctional. Thomas alleged that two prison guards, Raymond Anderson and Richard Cochran, attacked him and that a third guard, Roger Fitchpatrick, failed to intervene to stop the attack, all in violation of his rights under the Eighth Amendment. He also claimed that the officers violated the First Amendment by retaliating against him for his past grievances and lawsuits: Anderson, Cochran, and Fitchpatrick by assaulting him (or failing to intervene); Anderson and Cochran by issuing phony disciplinary charges after the attack; and two hearing officers, Cornealious Sanders and Scott Bailey, by finding him guilty of the charges knowing that they were baseless.

At trial Thomas testified to his version of the events on March 24 and the disciplinary proceeding that followed. He testified that on the morning of March 24, he was showering before the morning lockup when Officers Anderson, Cochran, and Fitchpatrick saw him and signaled—seven or eight minutes early—that all inmates must immediately return to their cells. Thomas hurried, still soapy and partially undressed, to return to his cell. Cochran slammed the cell door shut before Thomas could enter, but the door bounced open ***974** and he managed to slip inside. Anderson, Cochran, and Fitchpatrick followed, and Anderson told Cochran to "write that MF'er a ticket" for refusing to enter his cell after the lockup signal. When Thomas protested, Cochran cornered him, cursing and screaming. Anderson then rebuked Thomas, saying, "You should have thought about that before you made all of [your] complaints about me and filing grievances about me in the prison." Thomas had previously filed grievances complaining that Anderson had (among other things) threatened to retaliate against him for notifying prison administrators, legislators, and government officials of problems at Hill, including safety and sanitation. Cochran told him that he "didn't like inmates who tried to get staff in trouble."

Thomas testified that after the officers entered his cell, Cochran handcuffed him and Fitchpatrick ordered his cellmate to leave. Anderson then directed Cochran to

teach Thomas how to keep his "mouth closed and to not make the staff upset." Cochran pushed Thomas to the ground and punched him while a second guard "yanked" him. Thomas told the jury that this second guard must have been Anderson because he could see Fitchpatrick standing back "egging them on." The three guards then pulled Thomas from his cell and threw him against the corridor walls before sending him to the segregation unit.

The defendants disputed Thomas's version of events, denying that they used excessive force against him. Anderson and Cochran testified that Thomas resisted the lockup and shouted racial epithets. Cochran acknowledged that he handcuffed Thomas but denied using excessive force in doing so. Fitchpatrick echoed that Thomas had been shouting and swearing, and he too denied that Cochran used undue force. Anderson testified that he told Fitchpatrick that he did not want anything to do with Thomas because of his previous grievances against him. Fitchpatrick admitted knowing that Thomas had filed grievances against Anderson; Cochran testified that he did not know about the grievances.

Disciplinary proceedings against Thomas followed this incident. Cochran wrote Thomas up for resisting the lockup, making threats, being insolent, and disobeying a direct order. Officers Bailey and Sanders conducted the disciplinary hearing on these charges; the parties disagree about what happened. According to Thomas, Bailey and Sanders told him that "their hands were tied" and they "couldn't" exonerate him. He testified that Sanders mentioned that he was about to retire and did not want trouble, and Bailey said that Thomas "shouldn't have been making complaints about the prison" if he did not want "to be in a situation like" this one. Sanders denied saying that he found Thomas guilty because his "hands were tied" or that Thomas should not file grievances. Likewise, Bailey denied warning Thomas against complaining about prison employees. Thomas was found guilty of the rules violations and received a month in segregation and then spent three months assigned to C grade, a more restrictive confinement.

The judge restricted the scope of the trial in several ways that are relevant to this appeal. In lieu of admitting voluminous evidence of Thomas's prior grievances, the judge required the parties to stipulate that Thomas had filed numerous grievances against Anderson and others, and that he also had sued Anderson. Over Thomas's objection, the judge also refused to permit testimony about events before March 24. The judge barred the testimony of two of Thomas's proffered inmate witnesses, Kiante Simmons and Xavier Landers, who were no longer in state prison. Thomas thought that they might be incarcerated ***975** elsewhere—perhaps the Cook County Jail and an unnamed federal facility, respectively—but this supposition was just speculation. In any event, even assuming that they *were* in custody somewhere else, the judge was only willing to permit them to testify via video conference; he would not order them produced for in-person testimony.

Early on in the case, the judge had denied Thomas's several requests for recruited pro bono counsel. Closer to trial, the judge did not rule on Thomas's requests to reconsider those earlier decisions. Finally, at the close of the evidence, the judge took several claims from the jury, granting the defendants' motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. In the end the jury was asked to decide only if Anderson and Cochran had used excessive force and, if so, whether Anderson had been motivated to do so by a desire to retaliate for Thomas's lawsuits and grievances. On these claims the jury returned a verdict for Anderson and Cochran. This appeal followed.[1]

II. Analysis

We begin with Thomas's argument that the judge was wrong to grant the defendants' Rule 50 motion on two claims: that Anderson and Cochran retaliated against him by issuing a phony disciplinary report and that Sanders and Bailey retaliated against him by conducting a sham disciplinary hearing. Judgment as a matter of law is justified only if after a full hearing there is no "legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1); *Lopez v. City of Chicago*, 464 F.3d 711, 718 (7th Cir. 2006). Because the judge overlooked testimony supporting Thomas's position and failed to view evidence in the light most favorable to him, we reverse the judgment on these claims.

[1]As to Anderson, the judge explained that "the only evidence relating to any retaliation" was Anderson telling Fitchpatrick that he did not want anything to do with Thomas because of his previous grievances. But Thomas's account of the encounter provided an evidentiary basis from which a reasonable jury could infer retaliatory motive. Thomas testified that (1) Anderson called for an early lockup after seeing him in the shower; (2) Anderson told Cochran to write Thomas a ticket for refusing to lock up, even though Thomas did not refuse; and (3) when Thomas protested that the ticket was baseless, Anderson scoffed: "You should have thought about that before you made all of [your] complaints about me and filing grievances about me in the prison." It was

for the jury to decide which account to believe. *Passananti v. Cook County*, 689 F.3d 655, 659 (7th Cir. 2012) (noting that in assessing a Rule 50 motion, "[t]he court does not make credibility determinations or weigh the evidence"); *Lopez*, 464 F.3d at 720 (same). A jury could reasonably conclude from Thomas's version that Anderson orchestrated Thomas's "late" return to his cell to trump up a false disciplinary charge in retaliation for Thomas's past complaints.

[2]We reach a similar conclusion about Cochran. The judge granted the Rule 50 motion on the retaliation claim against him because he thought that there was no evidence that Cochran knew of Thomas's litigation. But Thomas testified that Cochran was in the cell when Anderson told Thomas that he should not ***976** have filed grievances and that Cochran himself said that he "didn't like inmates who tried to get staff in trouble." A jury could reasonably infer based on these statements that Cochran helped call for an early lockup before Thomas finished showering as revenge for Thomas's grievances and lawsuits. *See* *Gevas v. McLaughlin*, 798 F.3d 475, 477 (7th Cir. 2015) (assessing a Rule 50 motion requires the court "to assume the truth of" the testimony of the nonmoving party).

[3]Finally, the jury should have been permitted to decide whether Bailey and Sanders held a hearing that they knew was a sham for the purpose of retaliating against Thomas. The judge entered judgment in their favor on this claim because again he thought no evidence showed that these defendants knew of Thomas's past grievances. But retaliatory motive can be inferred from Thomas's account of the hearing. *See* *id.* at 477, 481–82. Thomas testified that Bailey told him that he "shouldn't have been making complaints about the prison" if he didn't "want to be in [this] situation" and that his "hands were tied." And he testified further that Sanders agreed that his "hands were tied" and expressed concern that conducting a fair hearing could interfere with his retirement.

[4]Bailey and Sanders respond that Thomas's testimony suggests only that they were motivated by personal concerns, not by Thomas's First Amendment activity. But a retaliation claim only requires evidence that the plaintiff's protected activity was "at least *a* motivating factor" for the retaliatory action. *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015) (emphasis added) (quoting *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009)). Thomas's testimony, if a jury finds it credible, could support an inference that retaliation for his past grievances was a motivating factor in their decision. Viewed as a whole, there was sufficient evidence to present this claim to the jury.

A. Events Before March 24, 2011

Thomas also contests the judge's decision to bar testimony about events before March 24, 2011, and instead require the parties to stipulate that Thomas had filed grievances against Anderson and other prison officials. Thomas proposed to introduce at trial more than 150 complaints and grievances he had filed. The judge ruled that admitting that number of grievances could confuse the issues, prolong the trial, and possibly prejudice the jurors. And apart from concerns about the quantity, the judge worried that jurors would be tempted to assess whether the grievances were true.

Thomas contends that this restriction disabled him from showing that his grievances actually motivated Anderson to retaliate against him. He argues that he could have used evidence from before March 24 to show that Anderson had threatened to issue "bogus disciplinary reports" and physically harm him if he did not stop filing grievances. In place of this evidence, Thomas says, the stipulation informed the jury only that he had engaged in constitutionally protected activity.

[5]That is not an accurate characterization of the stipulation. The stipulation informed the jury in general terms of Thomas's grievance and complaints about prison conditions. It also explained that Thomas had accused Anderson of "locking prisoners up in their cells earlier than the allowable time, making racial comments to inmates and threatening inmates, including plaintiff, with punishment for making complaints about [Anderson]." That was enough to convey to the jury the basic background facts pertaining to the alleged retaliatory motive.

***977** Moreover, the judge was understandably concerned that permitting Thomas to introduce the entire record of his prior grievances would bog down the proceedings and distract and potentially confuse the jurors. To avoid those risks, the judge reasonably concluded that the stipulation was an appropriate substitute for this evidence. *See* *Marcus & Millichap Inv. Servs. of Chi., Inc. v. Sekulovski*, 639 F.3d 301, 307 (7th Cir. 2011). That ruling was well within the judge's authority to manage the efficiency of the trial by streamlining Thomas's voluminous proposed evidence. *See* *Whitfield v. Int'l Truck & Engine Corp.*, 755 F.3d 438, 447 (7th Cir. 2014). We see no abuse of discretion.

B. Exclusion of Kiante Simmons and Xavier Landers

Thomas also challenges the judge's decision to exclude the testimony of two inmate witnesses, Kiante Simmons and Xavier Landers. In both instances the judge stated that the witnesses must testify, if at all, using video-conferencing technology. Because Thomas did not produce video-conference addresses for Simmons and Landers, they did not testify.

First, to the extent that either witness would have testified about events before March 24, 2011, their exclusion was harmless because the judge's earlier ruling foreclosed that evidence. And contrary to Thomas's argument on appeal, the judge's failure to apply the balancing test outlined in *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976), was not reversible error. By its terms, *Stone* applies when a district judge must decide whether a "plaintiff-prisoner in a civil rights suit" should be brought to court for trial. We explained that the judge should weigh the logistical difficulties and particular security risks of transporting the plaintiff-prisoner against the prisoner's interest in testifying in person and examining the witnesses face-to-face. *Id.* at 735–36.

We have not extended *Stone*'s particularized balancing test to nonparty inmate witnesses. As we've explained more recently, forcing a prisoner-plaintiff to try his case remotely by video conferencing raises special challenges—e.g., the inability of the prisoner-plaintiff to see jurors' faces, the difficulty in examining and evaluating witnesses, and the complications associated with communicating with the court and opposing counsel. *See* *Perotti v. Quinones*, 790 F.3d 712, 725 (7th Cir. 2015). Those concerns do not affect nonparty inmate witnesses testifying live via video-conferencing technology.

Instead, Rule 43(a) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2241(c)(5) bear directly on this question. The latter permits the court to issue a writ of habeas corpus when "[i]t is necessary to bring [a prisoner] to court to testify or for trial." § 2241(c)(5). And under Rule 43(a), the judge has discretion to allow live testimony by video for "good cause in compelling circumstances and with appropriate safeguards." *Thornton v. Snyder*, 428 F.3d 690, 698 (7th Cir. 2005) ("Rule 43 affirmatively allows for testimony by videoconference in certain circumstances ....").

[6]Here, another inmate witness testified to the same information that Thomas says he wanted to cover with Simmons and Landers. The judge determined that Thomas's interest in their testimony was outweighed by the expense and inconvenience of transporting them for trial (assuming they could be located and were in fact in custody). So he allowed them to testify, if at all, only by video. That ruling was well within his discretion.

Moreover, Thomas has not come close to establishing that he was prejudiced by the absence of their testimony. *See* *Mason v. S. Ill. Univ. at Carbondale*, 233 F.3d 1036, 1042–43 (7th Cir. 2000) (explaining that the party challenging the exclusion of the evidence ***978** must record the grounds for admissibility, content, and significance of the excluded testimony). Thomas suggests that Simmons and Landers would have recalled the March 24 altercation better than the inmate who testified in support of his story. But he has no evidence to back up that assertion. Accordingly, the judge's failure to apply *Stone*'s particularized balancing test was not reversible error.[2]

C. Recruitment of Counsel

[7]Finally, Thomas argues that the judge abused his discretion by declining to recruit counsel to represent him. We disagree. Thomas filed two requests for counsel in February 2014 and February 2015. But neither request showed that he tried to obtain counsel on his own or that he was precluded from doing so. So the judge's denial of these requests was not an abuse of discretion. *Pruitt v. Mote*, 503 F.3d 647, 654–55 (7th Cir. 2007) (en banc); *see* *Romanelli v. Suliene*, 615 F.3d 847, 851–52 (7th Cir. 2010) (explaining that the denial of a motion to recruit counsel was justified by the district court's finding that the plaintiff had not tried to obtain counsel). And the judge did not limit his decision to that particular defect; he also ruled that Thomas was competent to litigate his own case.

[8]Before trial, Thomas twice more asked that the judge "reconsider appointing counsel." Although these requests cured the technical defect in the earlier ones—Thomas specifically stated that he had tried unsuccessfully to find counsel—the judge did not rule on them. But once a judge appropriately addresses and resolves a request for recruitment of pro bono counsel, he need not revisit the question. *Pruitt*, 503 F.3d at 658; *cf.* *Childress v.*

Walker, 787 F.3d 433, 442–43 (7th Cir. 2015) (finding that it was an abuse of discretion to act on neither of the plaintiff's requests for counsel); *Dewitt v. Corizon, Inc.*, 760 F.3d 654, 657–59 (7th Cir. 2014) (finding that it was an abuse to deny the initial motions for counsel without explaining the reasoning and then to ignore subsequent requests). We find no error.

III. Conclusion

Accordingly, the judgment is REVERSED, and the case is REMANDED for further proceedings on the retaliation claims against Anderson, Cochran, Sanders, and Bailey. In all other respects, the judgment is AFFIRMED.

All Citations

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Footnotes

[1] We sua sponte recruited pro bono counsel for Thomas on appeal. Barry Levenstam, Remi J.D. Jaffre, and Jenner & Block LLP, accepted the appointment. They have ably discharged their duties. We thank them for their service to their client and the court.

[2] We note that the Third Circuit has said that the *Stone* balancing test applies to a request by a prisoner-plaintiff for production of nonparty inmate witnesses at a civil trial. *Jerry v. Francisco*, 632 F.2d 252, 255–56 (3d Cir. 1980). But in *Jerry* the magistrate judge and the district court *completely overlooked* the prisoner-plaintiff's motion to produce inmate witnesses to testify at his civil-rights trial. The court held that "[i]t was clearly error to fail to act on the motion and exercise the discretion." *Id.* at 256. More importantly, without analysis and in a single sentence, the Third Circuit imported the *Stone* balancing test to this situation. *Id.* ("We believe that the same considerations must be weighed in determining whether a writ of habeas corpus ad testificandum should be issued to secure the appearance of an incarcerated non-party witness at the request of an incarcerated plaintiff."). The court did not pause to consider that the concerns underlying *Stone*—namely, safeguarding a prisoner-plaintiff's access to the courts—are not implicated in precisely the same way when the inmate is a *witness* for the plaintiff rather than the *plaintiff himself*. Finally, and most significantly, the Third Circuit was not confronted with the ready alternative of live inmate testimony by video-conferencing technology, which is now widely available and was the mode of testimony the judge settled on here. For these reasons, *Jerry* is distinguishable.