2015 IL App (1st) 141178-U

FOURTH DIVISION
September 3, 2015

No. 1-14-1178



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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| MIGUEL MANCHA, | ) | Appeal from |
| | ) | the Circuit Court |
| Plaintiff-Appellant, | ) | of Cook County |
| | ) | |
| v. | ) | 10-L-08924 |
| | ) | |
| AIMEE BILENDA, | ) | Honorable |
| | ) | Elizabeth Budzinski, |
| Defendant-Appellee. | ) | Judge Presiding |

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held*: Record on appeal was insufficient to determine whether plaintiff who prevailed in personal injury suit was also entitled to recover the costs of a videotaped evidence deposition of his treating physician which was used during the jury trial in lieu of live testimony, and plaintiff relied on an incorrect legal standard for reversal.

¶ 2 Miguel R. Mancha was injured in a motorcycle-car collision with Aimee E. Bilenda, he sued her, and she was ordered to pay most of his claimed damages and some of his claimed litigation costs for an award totaling $11,909. On appeal, Mancha contends the trial judge abused her discretion when she declined to award an additional $6,822 which Mancha incurred to depose one of his physicians, transcribe the testimony, and display the video during the jury trial.

¶ 3 We have pieced together the following facts and procedural history from a very limited record presented for our review. Although Mancha's appeal concerns his entitlement to litigation costs, the record he has provided consists primarily of the pleadings, discovery documents, and short, handwritten court orders. As discussed below, noticeably absent from the record are (1) an adequate record of the jury trial in which he purportedly became entitled to the litigation costs and (2) an adequate record of the hearing on the post-trial motion to determine whether the costs would be awarded.

¶ 4 Mancha and Bilenda collided at about 6:30 in the evening on August 4, 2008, in Homewood, Illinois, at the intersection of Dixie Highway and Evergreen Road, when Bilenda turned her vehicle left into the path of Mancha's oncoming motorcycle. Mancha was traveling at approximately 15 miles per hour when his motorbike struck at or behind the right rear tire of Bilenda's car. He fell or was thrown to the ground. He was not wearing a helmet. His glasses broke and his jeans and jacket tore.

¶ 5 Later that same day, a friend took Mancha to the emergency room at South Suburban Hospital, where he was treated primarily for neck pain and released. The bill for Mancha's visit to the emergency room and follow-up care later that month at the hospital was $8,524. The hospital bill was the primary expense that Mancha claimed in the personal injury lawsuit he filed on August 3, 2010. About a year after filing suit, which was three years after the accident, Mancha went to see neurosurgeon Dr. Michel H. Malek on June 20, 2011. Mancha complained of persistent neck and back pain, with tingling into his left arm. Dr. Malek noted that he would need Mancha's medical records and that Mancha should have MRI scans. Dr. Malek would subsequently state during his evidence deposition that a condition lasting more than a few months was considered "chronic." Dr. Malek's fee for the office visit was $330. Mancha did not

return to Dr. Malek or seek additional testing or treatment for neck or back pain from Dr. Malek or any other doctor. Thus, adding Dr. Malek's charge to his hospital bill, Mancha sought a total of $8,854 in medical expenses from Bilenda. He also sought damages for pain and suffering and "loss of normal life."

¶ 6 On March 6, 2012, in response to Bilenda's request to produce medical reports and statements, Mancha stated that he had no additional medical records, he was not being treated for any complaints or disabilities caused by the accident, he was claiming cervical disc protrusions, cervical and lumbar strain, and neck and back pain, and that for those conditions he was taking only Advil and Aleve. On April 21, 2012, in answer to Bilenda's interrogatories, Mancha stated that as a result of the accident, he was experiencing "chronic" back and neck "discomfort" which sometimes increased to a painful level, but that he "do[es] not go to doctors for this discomfort or pain." On March 6, 2012, in response to Bilenda's supplemental interrogatories, Mancha denied that he was currently seeing any medical professional for any complaint or disability that he attributed to the collision.

¶ 7 On June 15, 2012, Bilenda responded to Mancha's request to admit facts. This document is the focus of Mancha's first argument on appeal. Bilenda denied that Mancha was suffering the injuries he was claiming in the lawsuit, denied that he had no prior complaints or treatment for those injuries, denied that the medical care was reasonable and necessary, and denied that the claimed amounts were fair and reasonable charges.

¶ 8 On October 1, 2012, Mancha answered Bilenda's supplemental interrogatories which posed questions concerning his attempts to be hired by the City of Chicago as a Firefighter/EMT in 2009 and by the Cook County Sheriff's Department in 2011. Mancha admitted that he took

physical abilities tests with both employers and said he could not recall the results of the firefighter's test but that he had passed the sheriff's deputy test.

¶ 9 Bilenda retained Dr. Dean G. Karahalios to evaluate Mancha's personal injury claim and received a written report dated December 4, 2012, that was critical of Mancha's claim. The written report was included in the record, but a transcript of Dr. Karahalios' trial testimony was omitted. The only statement in the report that was even somewhat favorable to Mancha's claim was that medical care he received during those two or three weeks after the accident "may have been related" to the accident. After that, however, Mancha was no longer symptomatic. Dr. Karahalios reached this conclusion by reviewing the police report, photographs, Mancha's medical records, Mancha's answers to Bilenda's interrogatories, records kept by the Cook County Sheriff's Merit Board, and records kept by the City of Chicago. Dr. Karahalios pointed out that Mancha had no complaints about his neck or back when he went to the hospital for follow up care or when he was seen by his primary care doctor between 2008 and 2011. In fact, in December 2009, Mancha denied having any neck or back pain when he sought his doctor's approval to take the Chicago firefighter's physical abilities test, and, although Mancha complained of neck and back pain to Dr. Malek in June 2011, in November 2011, Mancha had his doctor sign off on his participation in the physical abilities test administered by the Cook County sheriff's department. Dr. Karahalios also pointed out a problem Mancha would have by relying on images taken immediately after the accident which showed that some of his cervical discs were bulging: "Without an MRI immediately before the accident, it would be difficult if not impossible to say if these disc bulges were caused [by] the [accident]." "Statistically, these common findings are most likely degenerative and preceded the [accident]." Dr. Karahalios summarized that it was "very unlikely that the [motor vehicle accident] caused or exacerbated a

pre-existing spinal condition in any significant way" and that there was "no reasonable evidence to suggest that any symptomatic neck or back condition, if it [currently] exists, is causally related [to the collision]."

¶ 10 On June 19, 2013, Dr. Malek sat for a videotaped evidence deposition. Dr. Malek testified that he based his opinion on an oral history and physical exam when he saw Mancha for the first and only time on January 20, 2011. According to Dr. Malek, during the office visit, Mancha said he was experiencing neck and low back pain that started immediately after the accident, that the neck pain progressed to tingling in his left arm a few weeks after that, and that his low back bothered him more than his neck. The medical terms for these complaints were left cervical radiculopathy and nonradicular lower back pain. Dr. Malek considered these pains to be consistent with the motor vehicle accident that Mancha described to him. Tingling would suggest that a nerve root in the neck was irritated, compressed, or damaged and "[m]ost likely," it resulted from "compression from a disc herniation or a spur." Dr. Malek concluded:

> "[Mancha had] a pre-existing underlying degenerative condition in his cervical spine that was solid, asymptomatic, commensurate with his age and not likely to become symptomatic over his lifetime, but as a result of the injury of the above date, it's more likely than not that that condition was aggravated, precipitated, and/or accelerated resulting in the symptoms that he had had. That is to say, in plain English, that like any 33 year old, Mr. Mancha on that date had degenerative condition in his spine. Everybody his age has it, but it is likely that the accident aggravated that and rendered it symptomatic."

Also, because "muscle and soft tissue component" would not have lasted for three years, "further investigation was warranted" and Dr. Malek recommended taking MRI scans of Mancha's

cervical spine and lumbar spine, followed by "some therapy" and medication for about four weeks, and then another evaluation. After an MRI scan, EMG, and a clinical evaluation, Dr. Malek could make a diagnosis. For a problem that has lasted three years after an injury, "the treatment is either surgery or live with it." Dr. Malek also testified that the treatment he rendered was reasonable and necessary treatment that was required as a result of the motor vehicle accident. On cross-examination, Dr. Malek conceded that he never saw any medical records from Mancha's visits to South Suburban Hospital, nor did he review any x-rays or CT scans that were taken. Dr. Malek did not testify about Mancha's medical bills**.**

¶ 11 Instead of calling Dr. Malek to testify in person during the jury trial that was conducted in early January 2014, Mancha played the videotaped deposition. A transcript of Dr. Malek's testimony was included in the record tendered for our review, but it is the only transcript provided and it is the only source of information about the trial other than the jury verdict form and the court order that was entered after the trial.

¶ 12 The jury's verdict was in Mancha's favor. The jury awarded $8,524 for medical care, which was the amount of his hospital bill only, a total of $4,708 for pain, suffering, and "loss of normal life," and then the jury reduced the award by 10% to reflect that Mancha's contributory negligence played a part in the accident. The trial judge entered judgment on the verdict and awarded "$11,908.80 plus costs."

¶ 13 After the trial, Mancha invoiced Bilenda for $19,187.65, which included the jury's award of $11,908.80 and $7,278.85 in "costs." Mancha itemized $456.75 in statutory fees, which consisted of $334 for filing the complaint in the circuit court, $60 for obtaining service of process by the sheriff's department, and $62.75 for subpoenaing to trial the investigating police officer and the hospital's record keeper. Mancha also wanted to be reimbursed for the $5,025 that

Dr. Malek charged for his deposition time. The remaining $1,797.10 consisted of $1,142.10 charged by the videographer and a court reporter who recorded Dr. Malek's testimony, $260 which the videographer charged to edit the video, and $395 which the videographer charged to play the video for the jury.

¶ 14 Bilenda disagreed that she was liable for most of the fees listed on Mancha's invoice and filed a motion for the trial judge to determine the appropriate payment of "costs." A court order in the record on appeal indicates there was full briefing by the parties and a hearing and that the judge awarded costs in the amount of $456.75, which is a figure that corresponds with the statutory fees for filing and serving the complaint and issuing subpoenas. The order, however, does not detail the court's reasons and Mancha has not tendered a transcript, bystander's report, or agreed statement of facts concerning that hearing. Accordingly, we cannot summarize the parties' oral arguments or describe why the court decided to award the $456.75, but reject the additional $6,822.10. Mancha's appeal is about those additional funds.

¶ 15 Mancha argues that the answers Bilenda gave to his request to admit facts were unfounded, forced him to present Dr. Malek's testimony to the jury and, that consequently, he is entitled by two procedural rules to charge the associated expenses to Bilenda. He contends the written questions he sent to Bilenda were appropriately intended to narrow the issues at trial and avoid the unnecessary production of proof, but Bilenda denied those facts without having a good faith basis for doing so. Further, Mancha contends this meant he had to put on medical evidence to prove his injuries and that the medical expenses he incurred were reasonable, necessary, and caused by the accident. Dr. Malek was his only medical care provider to testify, and thus, his statements must have been integral to the jury's award for medical expenses, pain and suffering, and loss of a normal life.

¶ 16 Mancha argues that Supreme Court Rule 219 is one of the procedural rules which entitle him to tax the evidence deposition costs to Bilenda and specifically her violation of the "good reasons" standard set out in paragraph (b) of that rule. Ill S. Ct. R. 219 (eff. July 1, 2002).

¶ 17 As a general rule, litigants pay their own expenses and it is unusual for a court to shift the obligation from one party to another. *House of Vision v. Hiyane*, 42 Ill. 2d 45, 51-52, 245 N.E.2d 468, 472 (1969) (indicating attorney fees and the ordinary expenses of litigation are not allowable to a successful party unless there is a specific statute or agreement between the parties). That each party must bear his own attorney fees and costs, absent statutory authority or a contractual agreement is known as the "American Rule." *Country Mutual Insurance Co. v. Styck's Body Shop, Inc.*, 396 Ill. App. 3d 241, 251, 918 N.E.2d 1195, 1204 (2009). This is such a firmly established principle in the American courts that our supreme court has referred to it as being "ingrained in our system of jurisprudence." *House of Vision*, 42 Ill. 2d at 52, 235 N.E.2d at 472.

¶ 18 The rule Mancha first cites, Rule 219(b), however, is not a means for routinely awarding fees and expenses to a prevailing party. *Exchange National Bank of Chicago v. DeGraff*, 110 Ill. App. 3d 145, 162, 441 N.E.2d 1197, 1208-09 (1982). Rather, the rule applies in extraordinary circumstances, as follows:

> "(b) Expenses on Refusal to Admit. If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter of fact, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making the proof, including reasonable attorney's fees.

> Unless the court finds that there were *good reasons* for the denial or that the admissions sought were of no substantial importance, the order shall be made." (Emphasis added.) Ill S. Ct. R. 219 (eff. July 1, 2002).

In other words, Rule 219(b) is relevant only when a party has "unreasonably" denied facts under oath. *DeGraff*, 110 Ill. App. 3d at 162, 938 N.E.2d at 1208.

> "Thus, if a party has a reasonable basis on which to dispute a fact, it has 'good reason' for its denial of that fact in a request to admit. For instance, in a lawsuit over a car accident, a party has good reason to deny that the traffic light was green if it knows of a competent witness who says that the light was red. In such a case, a jury's eventual finding that the light was green would not subject the denying party to the payment of expenses under Rule 219(b)." *McGrath v. Botsford*, 405 Ill. App. 3d 781, 793, 938 N.E.2d 589, 599 (2010).

¶ 19 Rule 219(b) is just one of the rules enacted to curb a litigant's misconduct or untimeliness during the discovery phase of a lawsuit. Ill S. Ct. R. 219(b) (eff. July 1, 2002). For instance, if a party fails to respond within 28 days to a request to admit a fact or a request to admit the genuineness of a document, the rules provide that the unanswered request is deemed admitted. Ill. S. Ct. R. 216(c) (eff. July 1, 2014). If a party refuses to answer a question during a deposition, fails to answer a written interrogatory, fails to comply with a request to produce a document, or fails to allow for the inspection of property, then the rules allow the opponent to ask the court to compel an answer or compliance with the request and to also ask for an award of expenses incurred in obtaining the court's intervention. Ill. S. Ct. R. 219(a) (eff. July 1, 2002). Furthermore, if a party "unreasonably fails" to comply with any of the discovery rules or any order entered under these rules, then the opponent may motion the court to order additional

consequences, such as to stay the proceedings until there is compliance or to debar the "offending party" from filing any other pleading or maintaining any claim or defense related to the issue. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). In lieu of or in addition to these consequences, the court may also enter a sanction, such as the payment of attorney fees or a monetary penalty. Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶ 20 The specific discovery rule Mancha relies on is not a means of automatically shifting expenses simply because a plaintiff has succeeded in proving his claim. Rule 219 is in place to encourage litigants to "play by the rules" of discovery so that cases are decided on the basis of facts rather than gamesmanship. *Lubbers v. Norfolk & Western Ry. Co.*, 105 Ill. 2d 201, 213, 473 N.E.2d 955, 961 (1984) (discovery is supposed to enable counsel to decide in advance of trial what the evidence is likely to be and what legal issues may be credibly argued); *Campen v. Executive House Hotel, Inc.*, 105 Ill. App. 3d 576, 588, 434 N.E.2d 511, 519 (1982) (trial court, in exercising its discretion, may appropriately consider the need for using sanctions as "a general deterrent which will provide a strong incentive for *all* litigants to fully and accurately comply with the discovery rules" (Emphasis in original.)); *Buehler v. Whalen*, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1977) (discovery procedures are meaningless unless courts unhesitatingly impose sanctions proportionate to the circumstances). When full and fair discovery occurs, the playing field is leveled, there is no unfair advantage or surprise, and the truth emerges so that cases are decided on the basis of the facts available. *Kaull v. Kaull*, 2014 IL App (2nd) 130175, ¶ 80, 26 N.E.3d 361.

¶ 21 We review the trial court's ruling on Bilenda's motion to determine costs for an abuse of discretion. *McGrath*, 405 Ill. App. 3d at 789, 938 N.E.2d at 595.

¶ 22 Mancha argues that Bilenda's lack of "good reasons" for denying his interrogatories is demonstrated by two facts. First, she presented no medical evidence at trial to rebut Dr. Malek's testimony and her own medical expert admitted at trial that Mancha suffered some injury and that much of his medical care was related to the accident. Second, her attorney made a similar concession during closing arguments that the emergency room bills were causally related to the accident. Also, emphasizing that the rule uses the word "shall," Mancha argues, "Rule 219(b) is cast in mandatory terms where a defendant cannot demonstrate it had 'good reasons' for the denial."

¶ 23 We are not persuaded that Mancha is entitled to any additional costs under Rule 219(b), because the record is incomplete. Mancha has not included any trial transcripts other than Dr. Malek's in the record on appeal. We cannot review the scope of Mancha's medical evidence or confirm Mancha's contention that Bilenda's medical expert and attorney made concessions during their respective testimony and arguments. Without a trial transcript, or an acceptable substitute, we have no way of knowing what occurred in the courtroom. Apart from Dr. Malek's testimony, we do not know what testimony or evidence was given or what arguments were made. We do not know if Mancha relied solely on Dr. Malek or had additional witnesses to establish his claim. Furthermore, the trial was only a part of the proceedings at issue. Mancha focuses his argument on the pre-trial phase when the parties were exchanging questions and on the trial itself, yet he is appealing from a ruling on a post-trial motion. In order to review that post-trial ruling, we need to be informed of that post-trial hearing. The record lacks a hearing transcript, or bystander's report, or agreed statement of facts about that proceeding.

¶ 24 Mancha contends the trial court abused its discretion, but he has not provided this court with the information necessary to evaluate his argument. He cites *Vicencio v. Lincoln-Way*

*Builders, Inc.*, 204 Ill. 2d 295, 299, 789 N.E.2d 290, 293 (2003), for the proposition that the governing standard of review is an abuse of discretion. He is correct, but that case does not elaborate on the standard. Other cases, such as *Turner Investors*, tell us that the standard is a deferential one and that a "logical predicate to such deference is that the circuit court make and the appellate court be able to discern an informed and reasoned decision." *Turner Investors v. Pirkl*, 338 Ill. App. 3d 676, 682, 789 N.E.2d 323, 328 (2003) ("We look to the record to determine whether it sheds enough light on the basis for the court's decision denying sanctions to permit us to determine whether there was an adequate *basis* for the court's decision or whether there was an abuse of discretion."). Stated another way, a trial judge must be fully informed of the facts and legal principles in order to soundly exercise his or her discretion. Misapprehension of the facts or application of the wrong legal principles would demonstrate an abuse of discretion. *In re Estate of Smith*, 201 Ill. App. 3d 1005, 559 N.E.2d 571 (1990) (vacating and remanding where the trial court was not informed of the facts); *In re Marriage of Pond and Pomrenke*, 379 Ill. App. 3d 982, 987-88, 885 N.E.2d 453, 458 (2008) (an abuse of discretion does not occur when a reviewing court merely disagrees with a trial judge, but only when the trial judge "acts arbitrarily, acts without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice"); *McGrath*, 405 Ill. App. 3d at 789, 938 N.E.2d at 596 (same); *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 646, 913 N.E.2d 1077, 1082 (2009) (an abuse of discretion occurs when no reasonable person would take the same position as the trial court).

¶ 25 When a record is insufficient to support an appellant's claim, we may presume that the information that was omitted would support the trial court's ruling. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984); *Coleman v. Windy City Balloon Port, Ltd.*, 160

Ill.App.3d 408, 419, 513 N.E.2d 506, 514 (1987) (when a record is lacking crucial facts, we may presume that the circuit court acted properly by entering the challenged order and that the order is supported by whatever was omitted from our consideration).

¶ 26 As the appellant, Mancha had the burden of presenting a sufficiently complete record of the proceedings to support his claim of error. *Foutch*, 99 Ill. 2d at 391-92, 459 N.E.2d at 959. Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005) *mandates* that the record on appeal contain a report of the trial court proceedings, consisting of a transcript or, if no transcript is available, a bystander's report or an agreed statement of facts. The appellant must provide the reviewing court with a complete record of the proceedings at issue. Assertions in an appellant's brief, such as the ones Mancha has made, are not acceptable substitutes for a report of proceedings in compliance with Rule 323. *Teitelbaum v. Reliable Welding Co.*, 106 Ill. App. 3d 651, 661, 435 N.E.2d 852, 860 (1982). In the absence of an adequate record, a reviewing court may presume that a trial court order was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959.

¶ 27 In her response brief, Bilenda pointed out that this appellate record is deficient. Nevertheless, Mancha filed his reply brief without attempting to supplement the record with the missing information. Mancha states in his reply brief that when he made the same argument in the trial court, without supporting it with trial transcripts, Bilenda did not make an issue of their absence. Mancha contends that Bilenda's citation to *Foutch* and discussion of an appellant's obligation is really just elevating form over substance. We disagree. As we said, the rule is a mandate, not a choice. If Mancha had attached a trial transcript to the brief he filed in the trial court, then the record would have been complete when it was compiled for our review. Instead, Mancha depended upon the trial judge to recall the trial arguments and testimony. The trial judge

might have been able to recall what occurred in her courtroom, but we cannot. Our role is to consider the facts, not a party's characterization of the facts. Mancha's disregard of Rule 323, particularly when Bilenda pointed out the error in time for Mancha to correct it, is not justified.

¶ 28 Because the record is deficient, we find that Mancha had waived his argument that Rule 219 entitled him to Dr. Malek's $5,025 professional fee and the court reporter and videographer charges associated with the physician's deposition. *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959.

¶ 29 Mancha next contends that Supreme Court Rule 208 and section 5-108 of the Code of Civil Procedure is an alternative basis for him to recover all the costs associated with Dr. Malek's deposition, other than the physician's own fee. Ill. S. Ct. R. 208 (eff. Nov. 1, 2011); 735 ILCS 5/5-108 (West 2012). He concedes that the Illinois Supreme Court has already rejected Rule 208 as a basis for awarding a physician's professional fee for sitting for a deposition. *Vicencio*, 204 Ill. 2d at 305, 789 N.E.2d at 296. Thus, this argument concerns only the $1,797.10 that was charged by the videographer and the court reporter. Mancha does not develop any argument that is specific to section 5-108, and so we disregard his mention of the statute and focus our analysis on Rule 208.

¶ 30 Two paragraphs of the rule are relevant. The first paragraph specifies that a party shall pay his or her own fees and charges:

> "(a) Who Shall Pay. The party at whose instance the deposition is taken shall pay the fees of the witness and of the officer and the charges of the recorder or stenographer for attending. The party at whose request a deposition is transcribed and filed shall pay the charges for transcription and filing. The party at whose request a tape-recorded deposition is filed without having been transcribed shall pay the charges for filing, and if such deposition is subsequently transcribed the party requesting it shall pay the charges

for such transcription." Ill. S. Ct. R. 208(a) (eff. Nov. 1, 2011).

The other relevant paragraph states that the court has the discretion to shift the fees and charges: "(d) Taxing as Costs. The fees and charges provided for in paragraphs (a) through (c) may, in the discretion of the trial court, be taxed as costs." Ill. S. Ct. R. 208 (eff. Nov. 1, 2011).

¶ 31 According to our supreme court, the standard for an award of deposition-related costs such as a videographer and court reporter under Rule 208 is that the deposition was "necessarily used at trial." *Vicencio*, 204 Ill. 2d at 308, 789 N.E.2d at 298. The supreme court contrasted necessity with "convenience." *Vicencio*, 204 Ill. 2d at 308, 789 N.E.2d at 298 (indicating the record was unclear as to whether an evidence deposition "was used at trial as a matter of necessity or a matter of convenience"). The supreme court held, "A deposition is necessarily used at trial only when it is relevant and material and when the deponent's testimony cannot be procured at trial as, for example, if the deponent has died, has disappeared before trial, or is otherwise unavailable to testify." *Vicencio*, 204 Ill. 2d at 308, 789 N.E.2d at 298. The phrase "otherwise unable to testify" encompasses a witness who is beyond the subpoena power of the court. *Peltier v. Collins*, 382 Ill. App. 3d 773, 779, 888 N.E.2d 1224, 1229 (2008) (affirming the trial court's ruling that a doctor's residence in Wisconsin outside the subpoena power of the Illinois courts rendered the doctor "otherwise unable to testify" as that phrase was used in *Vicencio*).

¶ 32 Mancha's reliance on *Myers* for a different standard is misplaced, because *Myers* is an intermediate appellate court opinion that predated *Vicencio*. *Myers v. Bash*, 334 Ill. App. 3d 369, 778 N.E.2d 320 (2002). In *Myers*, the majority considered "necessarily used at trial" to be a lenient standard, in part because physicians have busy schedules and their time is expensive. *Myers*, 334 Ill. App. 3d at 374-75, 778 N.E.2d at 323-24. A dissenting justice would have taken a

harder stance and remarked that there was a split in the various appellate court districts as to whether "necessarily used at trial" meant the witness had died or disappeared or just had a demanding schedule that did not allow him or her to testify at trial. *Myers*, 334 Ill. App. 3d at 376, 778 N.E.2d at 325. The *Myers* opinion was issued in late 2002, and in mid 2003, the Illinois supreme court issued *Vicencio* in order to "resolve a split among the appellate districts." *Vicencio*, 204 Ill. 2d at 297, 789 N.E.2d at 292. Accordingly, *Vicencio* is controlling and the question is whether Dr. Malek's testimony could not be procured at trial. *Vicencio*, 204 Ill. 2d at 308, 789 N.E.2d at 298.

¶ 33 Mancha states that Dr. Malek's evidence deposition "was taken to accommodate his busy schedule and to allow as little disruption to his practice as possible." This argument might have been persuasive when *Myers* was in effect, but it is not effective under the *Vicencio* standard that has been in place for more than a decade. Thus, Mancha has not met his burden of showing that the videotaped deposition was necessarily used at trial and that the judge abused her discretion by declining to award on the basis of Rule 208 the videographer and court reporter fees incurred by the creation and use of the videotape.

¶ 34 We conclude the appellate record is insufficient to address the appellant's primary argument and that the appellant's secondary argument relies on outdated case law. We hold that the trial court did not abuse its discretion in declining to award as "costs" the various fees that Mancha incurred to depose Dr. Malek, transcribe the testimony, and display the videotaped deposition during the jury trial. Therefore, we affirm the trial court's order**.**

¶ 35 Affirmed.