



## Alerts

### Illinois Appellate Court Affirms Default Judgment Against Attorney After He Repeatedly Fabricated Expert Witness Disclosures "From Whole Cloth"

April 22, 2024

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#### Brief Summary

The First District Appellate Court in Illinois held that the trial court (Judge Patrick J. Sherlock) was correct in entering a default judgment against an attorney in a legal malpractice action after the attorney repeatedly fabricated his expert witness disclosures "from whole cloth."

#### Complete Summary

On February 22, 2019, plaintiff filed a professional negligence action against the defendants. Plaintiff alleged he retained defendants in 2010 and "used defendants as his primary lawyer for several years." In 2012, defendants asked plaintiff to invest in a company known as Credit Union Mortgage Utility Banc, Inc. (CUMU). Defendants proposed that plaintiff deposit money into the defendants' trust account to be held in escrow pending a valuation of the company and the drafting of corporate documents.

Plaintiff then deposited \$400,000 with defendants, which defendants allegedly misappropriated. As of July 2021, plaintiff had not received any shares in CUMU, and defendants refused to return his \$400,000. Plaintiff thus filed an action against defendants for professional negligence, breach of fiduciary duty, conversion, and spoliation of evidence.

On November 4, 2020, defendants disclosed Mary Robinson as an expert witness (the "Robinson Disclosure"). Defendants stated that Robinson "will testify that, based on Illinois Supreme Court Rules and IARDC regulations, that defendant did not commit any legal malpractice." Discovery closed on September 30, 2021. On November 10, 2021, plaintiff moved to bar Robinson from testifying, alleging that "[d]efendants did not actually retain Ms. Robinson or even contact her about this case."

Plaintiff attached an email exchange between his counsel and Robinson, which confirmed that Robinson had not been retained. On February 8, 2022, the trial court struck the Robinson Disclosure, finding that it was "woefully inadequate" and that it was unclear whether the defendants ever retained Robinson.

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Defendants were given additional time to supplement their disclosures. Shortly after that, defendants disclosed Michael Favia as their new expert. In the Favia Disclosure, defendants attested that Favia had reviewed a lengthy list of documents. Defendants further attested that Favia had reached certain opinions, including that defendants did not breach their duty of professional care to plaintiff.

On March 15, 2022, plaintiff filed an emergency motion to strike the Favia Disclosure. In response, Favia's office contacted plaintiff and told him that Favia had not been retained or received any documents. Defendant had contacted Favia about being retained as an expert, but "that was it." Plaintiff requested that the court bar defendants from presenting any experts and impose sanctions. Defendants responded that Favia had initially agreed to be their expert but later "excused himself from the matter." Within 48 hours of learning of this, defendants retained a new expert witness, Michael Raiz. Defendants then filed a second amended expert disclosure (the Raiz Disclosure).

At a March 22, 2022, evidentiary hearing on plaintiff's sanctions motion, the court heard testimony from Robinson, Favia, Raiz, Husain's co-counsel James Pittacora, and Husain. Robinson testified that "she never spoke with either defendants or their counsel about offering expert testimony in the case, did not review any documents, has formed no opinions, and defendants never retained her to offer opinions in this case."

Favia testified that he spoke with defendants about offering expert testimony, but he did not review any documents or form any opinions. Raiz testified that he spoke with defendants about being an expert and "if given time, he would be able to offer opinion testimony." Raiz testified he only "reviewed five documents and a string of emails, ... not defendants' entire document production," and never formed any "opinions or conclusions."

Pittacora, Husain's co-counsel, signed the interrogatory answers disclosing Robinson as defendants' expert but admitted that he "had never spoken with Robinson" and "relied upon Husain's prior work product." It was Husain, not Pittacora, who signed the Favia and Raiz Disclosures.

Husain testified that he spoke with Robinson, and she agreed to give her opinions on the case. No corroborating evidence (e.g., emails, telephone call logs, notes, or draft reports) supported Husain's testimony, which was "flatly contradicted" by Robinson's "credible testimony." Husain also testified that he spoke with Favia, who agreed to give opinions on the case. Husain's testimony that Raiz agreed to provide opinions in the case was impeached by other evidence.

On March 29, 2022, the trial court issued a written order finding that "Husain's testimony was, in a word, nonsense." Concluding that defendants' conduct was "an abuse of the discovery process," the trial court concluded that "Husain made up the disclosures from whole cloth – 3 times!" The court found that Husain acted "outrageous[ly]" in "fabricat[ing] evidence to support his case." The court barred the defendants' experts, allowed the plaintiff to file a petition for the attorney's fees, struck defendants' answer, and entered judgment on the issue of liability in favor of the plaintiff.

The trial court subsequently granted plaintiff's motion for summary judgment on the issue of damages for \$400,000 plus \$160,219.18 in prejudgment interest. The court also awarded fees in the reduced amount of \$23,831.05.

On appeal, defendants argued that their conduct, which they characterized as an "error in presentation," did not "rise to the level of sanctionability." In the alternative, they argued that the sanctions imposed by the trial court were excessive.

The appellate court held that the record amply supported the trial court's finding that defendants violated Rule 213(f)(3) on three separate occasions by fabricating opinions. All three experts testified that the opinions attributed to them in the disclosures were not their opinions. The court agreed with the trial court that defendants were obviously aware that their "experts" had not reached the opinions disclosed. The appellate court thus affirmed the trial court's rulings.

## Significance of Decision

This decision is significant because it demonstrates the ethical obligations attorneys must follow under the Illinois Supreme Court Rules and Rules of Professional Conduct and the potentially severe consequences of their failure to comply.