

**ARIZONA COURT OF APPEALS**  
**DIVISION ONE**

BRIAN SYMONS,

Plaintiff/Appellant,

vs.

PJO INSURANCE BROKERAGE LLC,

Defendant/Appellee

Court of Appeals  
Division One  
No. 1 CA-CV 18-0477

Maricopa County Superior Court  
No. CV 2016-001029

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**ANSWERING BRIEF OF DEFENDANT-APPELLEE**  
**PJO INSURANCE BROKERAGE, LLC**

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## **INTRODUCTION**

Appellant claims that the trial court erred by permitting the admission of evidence not timely disclosed by the defense. Appellant is incorrect. No evidence was admitted at trial that had not been timely disclosed by Appellee.

Appellee timely disclosed its intent to present evidence of the standard construction industry practice by which general contractors transfer risk to their subcontractors by the use of subcontracts. Appellant knew, or should have known, based on the disclosures, that this evidence would include, among other things, reference to the terms of subcontracts requiring subcontractors to obtain and maintain a commercial general liability insurance policy, and to name the general contractor as an additional insured under that policy.

Appellant claims he was ambushed by Appellee's references to the insurance policy of the subcontractor, DE Electricians, Inc. (hereinafter "DE"), by which he had been employed at the time of his injuries. However, DE's contract with the general contractor, Black Stone Development, LLC (hereinafter "Black Stone"), was disclosed months prior to trial. That contract required, among other things, that DE obtain and maintain commercial general liability insurance policy, and that it name Black Stone as an additional insured under that policy.

Coverage in fact under the DE insurance policy was never an issue before the jury in the trial court, and reference to the existence of the DE policy, as a part of the evidence was required to explain the standard construction industry practice of risk transfer by which general contractors transfer risk to their subcontractors. The jury's verdict should be upheld.

## **STATEMENT OF THE CASE**

This is a professional negligence claim in which Appellant Brian Symons (hereinafter “Mr. Symons” or “Appellant”) is pursuing claims against PJO Insurance Brokerage, LLC (hereinafter “PJO”), as assignee of general contractor Black Stone. Black Stone purchased a commercial general liability policy from Underwriters of Lloyd’s of London (hereinafter “Lloyd’s”) which was procured for the company by PJO. After being injured on a job site while working for one of Black Stone’s subcontractors, Mr. Symons submitted a claim of coverage for his injuries to Lloyd’s which was denied. Black Stone’s principal claimed to have been surprised to find out it did not have coverage for subcontractor employees under the Lloyd’s policy.

After securing the assignment of claims from Black Stone, Mr. Symons filed suit against PJO. Mr. Symons alleged that PJO breached the applicable standard of care and that PJO was negligent in failing to include coverage for liability claims brought by employees of its subcontractors, and for failing to appropriately explain the subcontractors exclusion to Black Stone’s principal, David Rinehimer.

PJO asserted at trial that it did not breach the standard of care when it procured the commercial general liability policy for Black Stone. As support for its

denial of a breach of the standard of care, PJO's principal, Patrick O'Neill, testified regarding his communications with Mr. Rinehimer, prior to procuring the Lloyd's policy.

As further support for his defense, PJO also presented evidence regarding the standard construction industry practice by which general contractors transfer risk to their subcontractors by the terms of the contracts between these entities. Part of this risk transfer process involves requiring subcontractors to obtain and maintain their own policies of commercial general liability insurance, on which the general contractor is named as an additional insured, and to also indemnify the general contractor for any claims or losses arising from, or in any way connected with, the work performed.

The jury returned a verdict in favor of PJO. After the jury's verdict, Mr. Symons filed a motion for a new trial, based upon his claim that the trial court improperly permitted the admission of evidence, specifically, an insurance policy issued to Black Stone's subcontractor DE Electricians. The trial court denied the motion, finding that "reference to the DE Electricians insurance policy could not be precluded altogether. It was essential to the presentation of a defense to Plaintiff's claims to allow the jurors to hear about (1) the practice in the

construction industry for general contractors to require certificates of insurance from subcontractors, (2) that [PJO] received assurances from Black Stone that it did require certificates of insurance from its subcontractors, (3) that Black Stone understood that it was to be listed as “additional insureds” on subcontractors’ policies, and (4) that Black Stone assured [PJO] that its subcontractors did 100% of the construction work that it contracted out.”

## **STATEMENT OF FACTS**

### **A. Underlying Personal Injury Case**

On or about December 12, 2012, Black Stone was the general contractor on a project to construct a residential property in Scottsdale, Arizona. Black Stone employed multiple subcontractors on the project, one of which was DE. On or about that date, Mr. Symons was working within the course and scope of his employment with DE when he was injured.

Mr. Symons attempted to walk down a board that was placed as a ramp over an unfinished set of concrete steps. As Mr. Symons stepped upon the board, the board collapsed, causing Mr. Symons to fall six feet to the ground and sustain serious and significant damage and injuries to his left ankle and foot.

At the time of the accident, Black Stone was insured by a standard general contractor commercial general liability policy through Lloyd's which was procured for the company by PJO. The Lloyd's policy did not provide coverage for liability claims brought against Black Stone by employees of its subcontractors.

Prior to filing the instant suit against PJO, Mr. Symons sued Black Stone and some of its subcontractors in the Superior Court for the State of Arizona, in and for the County of Maricopa, under case number CV2013-016066, for alleged

personal injuries suffered in an accident on a construction site. In that case, Mr. Symons alleged that Black Stone and its subcontractors negligently permitted the worksite to be kept in an unsafe condition, causing him injury.

A jury found Mr. Symons 20% at fault for his injuries and Black Stone 80% at fault and awarded total damages of \$587,840.85, resulting in a judgment against Black Stone in the amount of \$470,272.68. After the jury verdict, Mr. Symons reached a settlement with Black Stone in which Mr. Symons was assigned all “rights, title and interest in any and all claims, actions, causes of action, suits, contracts, agreements, promises, demands, known or unknown and liquidated or contingent, which Black Stone has now or may ever have against PJO” and its employees in exchange for his agreement not to execute the judgment upon Black Stone.

### **B. Professional Negligence Case Against PJO**

Mr. Symons filed suit against PJO on or about February 3, 2016. (Electronic Index of Record, hereafter “IR” 1.) In this case, Mr. Symons alleged that PJO breached the applicable standard of care and that PJO was negligent in failing to include coverage for liability claims brought by employees of its subcontractors.

(IR 1.) PJO asserted that it did not breach the applicable standard of care when it procured the commercial general liability policy for Black Stone. (IR 6.)

PJO is an independent insurance producer that sells essentially standardized products from various insurance carriers. Experts for both sides testified at trial that they were unaware of any general contractors' general liability policies available on the market at the time of the transactions between PJO and Black Stone that would cover Black Stone without exclusions for claims by employees of subcontractors. (Trial Transcript 2/28/2018 62:12 – 63:15; Trial Transcript 2/27/2018 84:24 – 86:1.) Construction industry practice is that injuries to subcontractors' employees are covered by the individual subcontractors' workers' compensation insurance. (Trial Transcript 3/1/2018 31:19 – 32:21.)

PJO procured for Black Stone a commercial general liability policy from Lloyd's. The policy contained an exclusion for bodily injuries to subcontractor employees which PJO's principal Mr. O'Neill explained to Black Stone's principal Mr. Rinehimer, both verbally and in writing. (Trial Transcript 80:22 – 83:17.)

Mr. O'Neill relied on Mr. Rinehimer's statements regarding his business operations, including Mr. Rinehimer's assertion that Black Stone was a "paper contractor," meaning that all work was performed by its subcontractors. (Trial

Transcript 2/27/2018 49:16-25). If Mr. Rinehimer had disclosed to PJO that Black Stone sometimes performed its own work, PJO would not have recommended the Lloyd's program because it was predicated on the applicant being a general contractor without employees that subcontracted all of its construction work and that obtained certificates of additional insurance from all of its subcontractors. (Trial Transcript 2/27/2018 82:25 – 83:15.)

Additionally, Black Stone had a duty to review the exclusions and terms of the policy provided in the quote prior to purchasing the policy, and the evidence at trial established that Black Stone's principal, Mr. Rinehimer, never read the policy. (Trial Transcript 2/28/2018, 7:14-17.)

A jury returned a verdict in favor of PJO. (IR 197.)

### **ISSUES PRESENTED FOR REVIEW**

1. Did the trial court abuse its discretion in permitting PJO to refer to DE's insurance policy?
2. Did the trial court abuse its discretion in denying Mr. Symons's Motion for New Trial?

## **LEGAL ARGUMENT**

### **A. Standard of Review**

#### **1. The trial court's permitting PJO to refer to DE's insurance policy**

In his Opening Brief, Appellant misstates the applicable standard of review. While appellate courts do review matters involving interpretation and application of court rules de novo, in this case, the trial court did not interpret court rules. Rather, the trial court made rulings regarding the admissibility of certain evidence offered by PJO. The superior court has broad discretion in determining whether a party properly disclosed evidence and whether that evidence should be admitted at trial. *Solimeno v. Yonan*, 224 Ariz. 74, 77, 227 P.3d 481, 484 (App. 2010).

#### **2. The trial court's denial of Motion for New Trial**

When reviewing the trial court's ruling on a motion for new trial, the Court must "view the facts in the light most favorable to upholding the trial court's ruling." *Murray v. Farmers Ins. Co. of Ariz.*, 239 Ariz. 58, ¶ 2, 366 P.3d 117, 119 (App. 2016). The Court "review[s] a denial of a motion for new trial for an abuse of discretion," and "[does] not weigh the evidence." *Keg Rests. Ariz., Inc. v. Jones*, 240 Ariz. 64, 78, ¶ 49 (App. 2016).

**B. The trial court properly permitted PJO to refer to DE’s insurance policy as part of the risk transfer practice typical in the construction industry.**

Appellant claims that the trial court erred in permitting PJO to refer to the DE insurance policy at trial. However, in a case such as this one, where the allegations of the Complaint claim deviation from the standard of care applicable to a professional, the trial court appropriately recognized that standard industry practices are clearly relevant. Thus, reference to the DE insurance policy could not be precluded altogether, because it was essential to educating the jurors about the standard construction industry practice of transferring risk from a general contractor to its subcontractors through the use of indemnification provisions and additional insurance requirements.

Generally, this Court “will affirm a trial court’s admission or exclusion of evidence absent a clear abuse of discretion or legal error and resulting prejudice.” *Yauch v. Southern Pacific Transp. Co.*, 10 P.3d 1181, 1186, 198 Ariz. 394, 399 (App.2000), citing *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 398, 949 P.2d 56, 58 (App.1997); *Gasiorowski v. Hose*, 182 Ariz. 376, 382, 897 P.2d 678, 684 (App.1994). In determining whether evidence was improperly excluded, this Court “view[s] the evidence in the light most favorable to its proponent, maximizing its

probative value.” *Yauch*, 10 P.3d at 1189,198 Ariz. at 402, citing *Conant v. Whitney*, 190 Ariz. 290, 292, 947 P.2d 864, 866 (App.1997); *State v. Petzoldt*, 172 Ariz. 272, 276, 836 P.2d 982, 986 (App.1991).

Contrary to Appellant’s claims of late disclosure by the defense, PJO complied with Rule 26.1 and disclosed its intent to present evidence regarding standard construction industry risk transfer practices well in advance of trial. In addition to generally asserting that it was not negligent, PJO disclosed the subcontract between Black Stone and DE as an exhibit to its second supplemental disclosure statement dated April 1, 2017. (IR 158 pp. 17-19.) That subcontract contains a provision requiring DE to obtain and maintain not only workers’ compensation insurance, but also commercial general liability insurance. (IR 158 pp. 17-19.) That subcontract also contains provisions requiring DE to name Black Stone as an additional insured under its commercial general liability insurance policy; to make DE’s insurance policy primary insurance with respect to its work at the project; and to indemnify Black Stone in the event of any “claims, actions, losses, judgments, or expenses. . . arising from the work performed or in any way connected with the work performed. . .” on the job site. (IR 158 pp. 17-19.)

Thus, although he now claims unfair surprise, Mr. Symons would have been on notice, based upon PJO's disclosure, that PJO intended to argue at trial that DE would have been required to obtain and maintain a commercial general liability insurance policy under the terms of its subcontract with Black Stone and to name Black Stone as an additional insured under that policy, in compliance with the terms of its subcontract with Black Stone. Mr. Symons could have expected PJO to make references to DE's contractual obligations as part of the evidence regarding standard construction industry risk transfer practices.

Appellant's claims that the trial court erred in permitting DE policy to be admitted into evidence. However, the DE policy was never admitted into evidence, and the jury was never permitted to receive a copy of the policy. Rather, Appellee asked the trial court to permit the jury to consider the existence of a policy of insurance issued to DE as one piece of evidence in support of its arguments regarding the general practice in the construction industry.

Whether or not Black Stone made a claim to DE's insurance provider, and whether or not such insurance would have provided coverage for the injuries suffered by Mr. Symons, were not relevant to the jury's determination of whether or not PJO was liable for professional malpractice. The jurors should not have been

allowed to interpret the contents of the DE insurance policy, and the trial court did not permit them to do so. The trial court correctly ruled that the DE policy itself should not be admitted as evidence for the jury's consideration, and the DE policy was not admitted.

Not only did the trial court not admit the DE insurance policy as evidence, in response to concerns expressed by Appellant's counsel regarding possible juror confusion about the DE policy, the trial court gave specific jury instructions regarding insurance coverage that clearly stated that the jury was not to consider whether or not Black Stone had any other insurance available to it, or whether or not it had pursued a claim with any other insurance provider. (IR 196.) Even though the jury never received the DE insurance policy as evidence for its consideration, these instructions explicitly told them that they could not consider whether other insurance coverage had been available to Black Stone. (IR 196.)

The trial court's ruling permitting PJO to talk about the existence of the DE policy, without revealing its contents to the jury for their interpretation, was legally correct and within the trial court's purview. There was no error and no abuse of discretion.

**C. Because the Trial Court did not abuse its discretion in permitting reference to the DE insurance policy at trial, its denial of the Motion for New Trial was proper.**

Appellant claims that the trial court should have granted his Motion for New Trial. However, a new trial was not warranted because the trial court neither abused its discretion nor committed error in permitting reference to the DE insurance policy during trial.

Appellant claims that the trial court erred “when it allowed PJO to utilize the DE policy despite PJO’s failure to show good cause for the late disclosure of that prejudice would not result.” (Opening Brief, p. 31.) The trial court did not permit PJO to admit the DE insurance policy as evidence. The trial court merely permitted PJO to refer to the existence of the DE policy as one piece of evidence in support of its arguments regarding the general practice in the construction industry. Such reference was a necessary part of the defense and required in order to give the jury a complete understanding of the reasonable expectations of both PJO and of Black Stone at the time that the Lloyd’s policy was procured.

Because there was no error in the trial, there were no grounds for a new trial, and the trial court did not err in denying Appellant’s motion for new trial.

**D. The question of coverage in fact for Black Stone under the DE insurance policy was not decided at trial and thus is not properly before the Court**

Appellant now argues there is no coverage for Black Stone under the DE insurance policy “as a matter of law.” However, this question was not before the jury in this case and was not determined during the trial. The actual insurance policy obtained by DE likely did not yet exist at the time of Black Stone’s purchase of the Lloyd’s policy through PJO; therefore, the exact contents of the policy could not have been known to either PJO or to Black Stone. Thus, reliance by either PJO or by Black Stone on the specific terms of such an insurance policy and its interpretation are not relevant to jury’s determination of the parties’ reasonable expectations and whether or not PJO breached the applicable standard of care in procuring the Lloyd’s policy for Black Stone.

Because coverage in fact was not an issue for the jury’s determination, expert testimony regarding whether or not coverage existed under the DE insurance policy was neither necessary nor relevant to the determination of the case. Rather, the jury was tasked with determining whether PJO’s principal deviated from the standard of care for someone in his profession. Reaching this determination required that the jury consider, among other things, the reasonable

expectations of Black Stone and of PJO at the time of the purchase of the Lloyd's policy and the standard practices of the construction industry as related to insurance procurement.

### **CONCLUSION**

There was no violation of Rule 26.1 in this case. The trial court properly excluded the actual DE insurance policy from evidence, while permitting PJO to refer to the existence of the policy as part of educating the jury regarding the practice in the construction industry for general contractors to require subcontractors to indemnify them for losses, obtain and maintain insurance, and include the general contractors as additional insureds on their policy.

Because no late-disclosed evidence was admitted by the trial court, the trial court neither erred nor abused its discretion in permitting PJO to refer to the existence of the DE insurance policy, or in denying Mr. Symons's motion for a new trial. Therefore, PJO respectfully requests the Court affirm the jury's verdict and the trial court's rulings.

DATED this 23<sup>rd</sup> day of January, 2019.

**RESNICK & LOUIS, P.C.**

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