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 CV 2017-055421 (Consolidated)

APPELLANT BRIAN SYMONS' OPENING BRIEF

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I. Introduction

The plaintiff in this case won his first trial for an injury claim against a contractor. The significant verdict – due to a significant injury – was not covered by the million-dollar insurance policy of the contractor due to an alleged failure by the insurance agent in the sale of the insurance. Plaintiff, to collect on his judgment, needed to take an assignment of the claim and had to litigate a second case to trial. That plaintiff's opportunity for a trial was lost when ARCP 26.1 was blatantly violated and the Court allowed improper evidence before the jury. The court admitted its error and excluded the evidence halfway into the trial.

This is what happens when parties ignore A.R.C.P. 26.1. Cases should be tried on the merit and 26.1 should not be used as a sword, but when a party has its one chance at trial lost then the courts must take a firm stance or risk the disclosure rules becoming a mockery. Of course, in this case, there was a major error in any event as the document was improperly allowed into evidence for the first half of trial. A document the defendant argued was "hand-in-glove" to its defense, so hardly one that defense can now claim was not central to the defense verdict the defendant received.

As will be discussed below, the Court's error started when it was misled by defense counsel as to the purpose of the exhibit when it was first disclosed in the joint pre-trial statement.

The exhibit at issue was not disclosed with the initial A.R.C.P. 26.1 disclosure statement. It was not disclosed in time for the expert witness discovery cutoff when it must have been. It was not disclosed at the time of the final A.R.C.P. 26.1 disclosure deadline. It was not disclosed at the time of the motion in limine deadline. The document that the defendant argued was a key to their case was listed as an exhibit in this case for the first time approximately 4 weeks before trial.

6/13/16	Defendant's Initial 26.1 Disclosure Statement Due	Not disclosed
8/26/16	Plaintiff files plaintiff-only joint report due to inability to get response from defense counsel	Not disclosed
11/30/16	Expert Witness Areas Deadline	Not disclosed
12/30/16	Lay Witness Deadline	Not disclosed
9/6/16	Defendant files separate "joint report"	Not disclosed
2/2/17	Plaintiff requests mediation requirement vacated due to lack of Response for over two months from defendant	Not disclosed
2/21/17	Defendant requests 90 days continuance while objection to vacating mediation requirements	Not disclosed
4/1/17	Expert Witness Disclosure Deadline (initial)	Not disclosed
4/10/17	Deadline to Propound Discovery	Not disclosed

4/24/17	Defendant's Motion for Summary Judgment	Not disclosed
5/22/17	Defendant moves to extend discovery deadlines	Not disclosed
6/20/17	Defendant moves to allow third party complaint	Not disclosed*
6/30/17	Final 26.1 Disclosure Deadline (initial)	Not disclosed

*On the motion to add another party, the DE Policy was attached as an exhibit to get that party into the case, never as an argument that was a defense to the lawsuit that was headed towards trial.

The court made clear in its initial Order, in bold type, that "**No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except 1) upon order of the court for good cause shown or 2) upon a written or an on-the record agreement of the parties."**

And the impact on the ability of the plaintiff in this case to have his shot at a trial on the merits was lost as a result. If this was the defense that was going to be put forward, then the plaintiff had a right to know it at the start of the case. Certainly the plaintiff had a right to know it at the time of the expert discovery deadlines so plaintiff could have an expert rebut this exhibit and argument. The plaintiff absolutely should have had the right to know it before the final discovery cutoff so that the plaintiff could have addressed the issues raised by this defense

with his own experts, could have hired appropriate experts to refute the document and argument that was being made, and could have crafted a case that actually prepared for this defense.

The court allowed defense counsel to discuss this exhibit as part of its opening statement and through the first half of trial. Only then did the trial court realize that this document was not relevant in addition to being belatedly disclosed. And the belated disclosure is vital because it prevented the plaintiff from doing everything that he could have done to not only show the document should not have come in evidence, but to be able to refute the value of the document in front of the jury. Because of the timing of the court's ruling –halfway into trial - the plaintiff never even had the opportunity to address with the jury the issues that have been argued by the defendant.

When a party blatantly violates ARCP 26.1 and gets away with it, that behavior is encouraged. Plaintiff is not taking the position that the hyper-technical use of ARCP 26.1 is appropriate. But, instead, that the courts must clearly enunciate the fact that 26.1 is intended to be used for full disclosure to allow everybody to prepare for trial. And if a party blatantly violates that and misses the appropriate discovery time by more than 18 months leaving no time for another party to respond that this cannot stand. Moreover, even without the disclosure issue, the fact that an exhibit that is “hand-in-glove” with the defense’s argument at

trial is later found to have been improperly admitted requires a new trial for the plaintiff.

By way of background, Brian Symons, an employee of subcontractor DE Electricians, was injured on a construction site at which Black Stone Development, LLC was the general contractor. David Rineheimer, the Manager of Black Stone, notified DE Electricians' insurance carrier as well as his own insurance producer, PJO Insurance Brokerage, LLC, of the claim. Rinehimer then learned that, although all of his work was completed through subcontractors, the insurance policy he had purchased through PJO excluded coverage for injuries to his subcontractors and their employees. Neither DE Electricians' nor Black Stone's carrier provided Black Stone coverage. A jury found Black Stone largely liable for Symons' injuries and Black Stone subsequently assigned its claims against PJO Insurance Brokerage, LLC to Symons.

In his lawsuit against PJO, Symons claimed that the insurance producer fell below the standard of care for insurance producers by issuing Black Stone an insurance policy that excluded coverage for injuries to employees of subcontractors. As one hundred percent of Black Stone's work was completed through subcontractors, this coverage was key to Black Stone. Additionally, Symons alleged that PJO fell below the applicable standard of care when it failed to explain the Subcontractors Exclusion to David Rineheimer.

Four weeks before trial was set to begin, PJO Insurance Brokerage, LLC disclosed for the first time that it intended to introduce DE Electricians' insurance policy as an exhibit at trial. Prior to trial, PJO argued that it should be permitted to discuss DE Electricians' insurance policy, not to establish that it provided coverage for Symons' injuries, but to demonstrate that PJO was reasonable in procuring for Black Stone the policy that it did. Based on the Defendant's stated purpose for discussing DE Electricians' policy, the trial court allowed PJO to raise it despite Symons' objections and its late disclosure.

At trial, however, PJO argued that Black Stone's failure to pursue coverage under the DE Electricians' policy was an efficient intervening cause, asserting that it would have provided coverage if it had been pursued. At that time, no experts had been retained to examine whether the DE policy would have actually provided any coverage because it was not an issue raised by the Defendant during discovery. Symons has since hired an insurance expert to analyze DE Electricians insurance policy and that expert determined that it did not provide coverage for Symons' claims.

Once the trial judge realized how the Defendant actually intended to utilize the DE policy at trial, she correctly determined that it was irrelevant and confusing to the jury and excluded any future references to that policy. However, references to the policy were not excluded until after opening arguments and after both parties had

already testified and defense counsel made additional references to the policy despite the trial court's ruling. After the jury returned a defense verdict, Symons moved for a new trial but that Motion was denied.

The DE Electricians' insurance policy was not timely disclosed, no good cause was given for the late disclosure and its use at trial was highly prejudicial, requiring this case to be remanded for a new trial.

II. Statement of The Case

A. Appellate Jurisdiction

This Court has jurisdiction over the above-captioned appeal pursuant to Arizona Revised Statutes §§ 12-2101(A)(1) and (A)(5)(a), as Plaintiff/Appellant appeals from the Superior Court's denial of his Motion for New Trial and from a final judgment entered by the Superior Court in favor of Defendants/Appellees. (Index of the Record "IR" 241)

B. Nature of the Case and Course of the Proceedings

This appeal arises out of Black Stone's professional negligence claim against its insurance producer, PJO Insurance Brokerage, LLC ("PJO"), for falling below the standard of care for insurance professionals by failing to procure a suitable policy for Black Stone. (IR 1) Black Stone is a general contractor that performs one hundred percent of its work though subcontractors, yet PJO procured an insurance policy for Black Stone that excluded coverage for injuries to those subcontractors, leaving

Black Stone exposed to significant liability. (IR 51-57 ¶¶1, 27, 30) Exacerbating the weaknesses in the policy issued to Black Stone, PJO failed to explain the exclusions to David Rineheimer.

Symons was injured while working for DE Electricians on a construction project for which Black Stone was the general contractor. (Trial Transcript, 2/27/18, 102:21-103:25) Symons obtained a judgment against Black Stone and Black Stone subsequently assigned its claims against PJO to Symons. (Trial Transcript 2/27/18, Afternoon, 108:6-16, 109:2-7)

A four-day jury trial was held in February and March of 2018. (IR 201-204) The jury returned a defense verdict. (IR 197-98) On April 3, 2018, Plaintiff filed a Motion for New Trial. (IR 222-229) The trial court denied Plaintiff's Motion on June 28, 2018. (IR 235) On July 13, 2018, Plaintiff filed a Notice of Appeal and on July 19, 2018 Plaintiff filed an Amended Notice of Appeal. (IR 240-241)

III. Statement of Facts

This is an appeal arising out of a professional negligence claim based on PJO's failure to meet its standard of care as an insurance producer. (IR 1) Black Stone Development, LLC ("Black Stone") is a general contractor that builds homes entirely through the use of subcontractors. (IR 51-57, ¶1) David Rinehimer ("Rinehimer") is the sole Manager of Black Stone and Black Stone has no employees. (IR 51-57, ¶2)

On July 15, 2011, PJO issued the 2011 GL policy CBBART 28313 for policy period 07/15/2011 to 7/15/2012 (the "2011 Policy") to Black Stone. (IR 30-46, ¶9) The 2011 Policy was underwritten by Lloyd's of London. (IR 30-46, ¶9) The 2011 Policy excluded coverage for bodily injury to employees of subcontractors. (IR 30-46, ¶11)

The next year PJO renewed the 2011 Policy for policy period 7/15/2012-7/15/2013 (the "Policy"). (IR 30-46, ¶16) This Policy also excluded coverage for bodily injury to employees of subcontractors (the "Subcontractor Exclusion"). (IR 30-46, ¶17)

On December 12, 2012, Symons was injured while working on a Black Stone project as an employee of subcontractor DE Electricians. (IR 30-46, ¶18) Lloyd's of London denied coverage under the Policy based on the Subcontractor Exclusion. (IR 30-46 at ¶17) Black Stone and Rinehimer assigned their claims against PJO to Symons and Symons brought this lawsuit against PJO. (IR 30-46, ¶31)

On January 30, 2018, Plaintiff filed a Motion in Limine regarding references to the insurance policy held by DE Electricians (the "DE Policy"). (IR 138) The Motion in Limine addressed the fact that PJO failed to disclose the DE Policy as a trial exhibit until four weeks prior to trial and that it had failed to demonstrate how the DE Policy was relevant to this case. (IR 138) In response, PJO merely stated that

the DE Policy had been attached as an exhibit to its Motion to Assert Third Party Complaint. (IR 157-164) During the Trial Management Conference, PJO argued that the DE Policy was vital for the purpose of allowing PJO to demonstrate that it acted reasonably and did not fall below the standard of care when it sold Black Stone the Policy. (Trial Management Conference Transcript, 56-58). Based on PJO's statements regarding its intended use of the DE Policy at trial, the Trial Court denied Symons' Motion in Limine regarding the DE Policy. (IR 170)

At trial PJO instead asserted that Black Stone's "decision not to pursue indemnification under the subcontract and not to pursue coverage as an additional insured" was an "efficient intervening cause." (Trial Transcript Day 3, 2/28/18 Morning, 37:18-23) PJO asserted at trial that Symons was trying to deal to PJO the risk that should have been shifted to DE Electricians rather than "play[ing] by the rules." (Trial Transcript Day 2, 2/27/18 Afternoon, 44:22-45:6) PJO even went so far as to assert that the DE Policy would have provided coverage for Symons' injuries if Black Stone had not "fail[ed] to turn the claim in." (Trial Transcript Day 2, 2/27/18 Afternoon, 72:5-9)

The DE Policy became a central point in PJO's defense regardless of the fact that PJO had not retained an expert witness to determine whether the DE Policy would have actually provided coverage for Symons' injuries and despite the fact that PJO did not know the DE Policy existed at the time it fell below the standard of care

and therefore could not have relied on it in meeting its standard of care. This did not stop defense counsel from claiming in Opening Statements that "He got DE Electricians, and I'll prove to you that *he was on their policy and it would cover him.*" (Trial Transcript Day 2, 2/27/18 Morning, 31:4-5) (emphasis added).

On February 28, 2018, the third day of trial, Symons again opposed PJO's use of the DE Policy by filing a "Motion to Preclude Argument or Witness Examination on Alleged Insurance Coverage Under the DE Electricians Policy; For Partial Judgment as a Matter of Law on DE Electrician Policy; And For Jury Instruction on DE Policy." (IR 191) In opposition, PJO argued, without the benefit of any expert opinion, that the DE Policy would have covered Symons' injuries. (IR 187-190) After Opening Statements and after both parties had testified, the Trial Court excluded any reference to the DE Policy. (Trial Transcript Day 3, 2/28/18 Afternoon, 22:12-22) The Trial Court recognized that references to the DE Policy were likely confusing to the jury and irrelevant because the lawsuit was not against DE Electricians or DE Electricians' insurance coverage. (Trial Transcript Day 3, 2/28/18 Afternoon, 22:12-22; Trial Transcript Day 3, 2/28/18 Morning, 29:7-30:6) The Trial Court also noted that there had been no legal determination that the DE Policy would have actually provided coverage and that it would be improper to allow the jury to interpret an insurance contract. (Trial Transcript Day 3, 2/28/18 Morning, 31:20-32:7).

The trial judge stated that "I'm concerned that we're really confusing things with regard to this DE Electricians policy" and "I'm really worried about this jury getting confused about something that may or may not be an issue," (Trial Transcript Day 3, 2/28/18 Morning, 29:9-11; 41:1-3)

The problem began with PJO's extremely late disclosure of the DE Policy as a trial exhibit. The DE Policy was not disclosed until January 26, 2018, exactly one month before trial and well past the discovery cut-off in the case. (IR 138). As a result, the Trial Court was asked to rule on the admissibility of an insurance policy without the benefit of any expert testimony and with very little time to analyze the same. (IR 222-229; Trial Transcript Day 3, 2/28/19 Morning, 33:10-34:25)

Even after the Trial Court correctly excluded any reference to the DE Policy, defense counsel ignored the court's order, asserting during Closing Statements that the DE Policy was relevant. (Trial Transcript Day 4, 3/1/18 Afternoon, 73:10-23) Symons' counsel objected to the improper statement and the trial court sustained the objection "because that contract is not in evidence that he's referring to." (Trial Transcript Day 4, 3/1/18 Afternoon, 73:10-23)

At the request of Symons' counsel, the trial court included curative instructions for the jury in an attempt to mitigate the harm done by the prejudicial references to the DE Policy. (Trial Transcript Day 4, 3/1/18 Afternoon, 29:11-23)

At the conclusion of trial, the jury returned a defense verdict. (IR 198). On April 3, 2018, Plaintiff filed a Motion for New Trial. (IR 222-229) The trial court denied Plaintiff's Motion on June 28, 2018. (IR 235) Judgment was signed on June 29, 2018. (IR 237) On July 13, 2018, Plaintiff filed a Notice of Appeal and on July 19, 2018 Plaintiff filed an Amended Notice of Appeal. (IR 240, 241)

IV. Statement of the Issues

Did the trial court commit reversible error by mis-applying Rules 26.1(f)(2), 37(c)(1) and 37(c)(4), Arizona Rules of Civil Procedure, to PJO's untimely disclosure of the DE Policy and its legal theory related to the DE Policy?

Did the trial court abuse its discretion when it denied Symons' Motion for New Trial?

V. Argument

A. The Applicable Standard of Review.

Appellate courts review de novo matters involving interpretation and application of court rules. *State v. Fitzgerald*, 232 Ariz. 208, 210 ¶10, 303 P.3d 519, 521 (2013); *see also Allen v. Sanders*, 240 Ariz. 569, 571 ¶19, 382 P.3d 784, 786 (2016); *see also State v. Newell*, 212 Ariz. 389, 401 ¶52, 132 P.3d 833, 845 (2006) (appellate courts review the trial court's application of the law de novo). "[W]e review de novo questions of alleged legal error, including those relating to

evidentiary rulings." *Each v. Southern Pacific Transp. Co.*, 198 Ariz. 394, 399 ¶10, 10 P.3d 1181 (App. 2000).

The denial of a Motion for New Trial is reviewed for an abuse of discretion. *See Matos v. City of Phoenix*, 176 Ariz. 125, 130 (App. 1993).

This Court is asked to review the trial court's application of Rules 26.1(f)(2), 37(c)(1) and 37(c)(4), A.R.C.P, which should be reviewed de novo. This Court is also asked to review the trial court's denial of Symons' Motion for New Trial for an abuse of discretion.

In the event the Court finds any of these issues to involve mixed questions of law and fact, the applicable standard of review is de novo. *See State v. Derello*, 199 Ariz. 435 ¶8, 18 P.3d 1234, 1237 (App. 2001).

B. <u>The Trial Court Committed Reversible Error When it Mis-Applied Arizona Rules of Civil Procedure 26.1(f)(2), 37(c)(1) and 37(c)(4)</u>

The Arizona Rules of Civil Procedure clearly and forcefully require litigants to be forthcoming with evidence and not participate in "trial by ambush." Rule 26.1(a)(8), A.R.C.P. requires parties to timely disclose, in a formal disclosure statement, all evidence, documents or electronically stored information the disclosing party plans to use at trial, including any material to be used for impeachment.

Rule 26.1(f)(2), A.R.C.P., states that

> [a] party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order - or in the absence of such a deadline, later than 60 days before trial - must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

Rule 37(c)(1), A.R.C.P. states that "[u]nless the court specifically finds that such failure caused no prejudice or orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 *may no*t use the information, witness or document as evidence at trial . . . ." (emphasis added).

Finally, Rule 37(c)(4), A.R.C.P. states that

> A party seeking to use information, a witness, or a document that it first disclosed later than the deadline set in a Scheduling Order or a Case Management Order, or--in the absence of such a deadline--60 days before trial, must obtain leave of court by motion. The motion must be supported by affidavit and must show that:
> (A) the information, witness, or document would be allowed under the standards of Rule 37(c)(1); and
> (B) the party disclosed the information, witness, or document as soon as practicable after its discovery.

PJO disclosed the DE Policy as a trial exhibit four weeks before trial was set to begin, far beyond all discovery deadlines in this case. (IR 16) It did not even attempt to show good cause for its failure to timely disclose the document, instead claiming that, because it had been attached to a motion for leave to add a third-party complaint, it should be admitted. (IR 157-164) PJO also did not disclose the document as soon as practicable after is discovery, as required by Rule 37(c)(4)(B)

as it admittedly had the document in its possession at least seven months prior. (IR 157-164)

A formal disclosure statement alerts all parties to the disclosing party's intention to utilize a document at trial, something that is clearly not accomplished by attaching the document as an exhibit to a motion for leave to add a third-party complaint. PJO failed to comply with the Rules of Civil Procedure and blindsided Plaintiff one month before trial.

PJO's late disclosure caused extreme prejudice to Symons as he was unable to have an expert witness offer a coverage opinion on the DE Policy since all discovery deadlines had long since passed. PJO took advantage of it's late disclosure by declaring, without a legal determination or any expert coverage opinions, that the DE Policy would have covered Symons injuries if Black Stone had just pursued the coverage. (Trial Transcript Day 2, 2/27/18 Morning, 31:4-5; Trial Transcript Day 2, 2/27/18 Afternoon, 44:22-43:6, 72:5-9)

As undersigned counsel argued to the trial court during the Pretrial Conference:

> I should have had a year to do discovery on that. I should have talked to my expert about it. I could have cross-examined — or deposed their expert on this issue. This is made up out of whole cloth last minute, because at some point they may have included it as an exhibit to a totally separate issue.
>
> The bottom line, Your Honor, is that cases should be tried on the merits whenever possible. No one should be disclosing, three weeks

> before trial and four weeks before trial, things that they them claim are hand in glove, very relevant, very important issues. If that's what they are, then about a year ago, at a minimum, you should be bringing those to my attention.
>
> This is not fair to my client. My client, my — my client was hurt four years ago. My client filed this lawsuit after another trial two years ago. My client had to have me beg in pleadings to move discovery along to get to this point. Discovery has ended.

(Pretrial Conference Transcript, 2/14/18 72:9-73:1)

In determining whether a party has shown good cause for its failure to timely disclose evidence, the court may consider the (1) willfulness or inadvertence of the party's conduct, (2) prejudice to either side that may result from excluding or allowing the evidence, (3) opposing counsel's action or inaction in attempting to resolve the dispute, and (4) the overall diligence with which the case has been litigated," *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 288, 896 P.2d 254, 258 (1995). PJO has known that Symons was an employee of DE Electricians from the outset of this litigation and nothing prevented PJO from obtaining and disclosing the DE Policy as a trial exhibit. Indeed, PJO admitted to having had the document in its possession for approximately seven months prior to its disclosure. (IR 157-164) Additionally, had PJO diligently litigated this case, it would have hired and disclosed an expert witness to testify regarding the coverage available under the DE Policy within the time limits of the trial court's Scheduling Order. All of these factors indicate the trial court's admission of the late-disclosed evidence was erroneous.

The trial court clearly mis-applied Rules 26.1(f)(2), 37(c)(1) and (c)(4), A.R.C.P., when it allowed PJO's late-disclosed evidence to be utilized at trial without a showing of good cause or that no prejudice would result. "Given the clear intent of the rules, untimely disclosure can never be excused where, as in this case, it is solely the result of a failure to engage in timely trial preparation." *Jones v. Buchanan*, 177 Ariz. 410, 413-414, 868 P.2d 993, 996-997 (App. 1993). Where a party fails to show good cause for its untimely disclosure, "the trial court ha[s] *no choice* but to exclude" the evidence. *Id*. (emphasis added) ("No good cause appearing for the untimely disclosure, the trial court had no discretion but to exclude the evidence.") militating against the use of late disclosed evidence gain strength as the trial nears. "Late disclosure will prejudice the opposing party if there is insufficient time to investigate fully and prepare rebuttal before the date for final supplementation of disclosures. Prejudice is also inherent when a trial must be continued after the parties have spent time and resources in preparation. The rule requires full, early and continuous disclosure. Gamesmanship at any stage of the proceedings should be addressed strongly." *Link v. Pima* County, 193 Ariz. 336, 340 ¶10 972, P.2d 669, 673 (App. 1998) (citation omitted). The Judgment must be reversed based on the trial court's clear mis-application of Rules 26.1(f)(2), 37(c)(1) and (c)(4).

C. The Trial Court Abused its Discretion When it Denied Plaintiff's Motion for New Trial.

i. The Trial Court Erred By Allowing the DE Policy to be Referenced at Trial

The erroneous admission of the untimely-disclosed DE Policy was raised again in Symons' Motion for New Trial. As discussed above, the DE Policy that PJO made a central point of its defense was not disclosed until January 26, 2018, exactly one month prior to trial and well after the discovery cut-off had passed. (IR 138) The scheduling order issued by the trial court clearly states that "[n]o party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except 1) upon order of the court for good cause shown, or 2) upon a written or upon-the-record agreement of the parties." (IR 16)

As discussed above, the Arizona Rules of Civil Procedure clearly require timely disclosure of documents to be used at trial and, where no good cause is shown for failure to timely disclose, "the trial court ha[s] no choice but to exclude" the evidence. *Jones*, 177 Ariz. at 413-414, 868 P.2d at 996-997. Because the DE Policy was disclosed after discovery had concluded, neither side was able to have the policy analyzed by an expert to provide guidance as to whether it would have provided coverage for Symons' injuries, much less disclose such experts to testify at trial.

PJO used its late disclosure to its strategical advantage at trial, making unsubstantiated claims that the DE Policy would have provided coverage for

Symons' injuries. Without any experts weighing in on whether the DE Policy provided coverage, PJO was able to craft and present an incorrect analysis of the DE Policy. (IR 187-190) Without the benefit of an expert witness on the subject, Symons was left unable to counter these baseless claims.

ii. PJO Claimed One Purpose for Utilizing the DE Policy at Trial in Order to Have it Admitted.

Prior to trial, PJO argued that the DE Policy was a vital piece of evidence and that it would be used to demonstrate that PJO did not fall below the standard of care by showing the reasonableness of PJO's actions when it sold the Policy to Black Stone.

> MR. STRASSBURG: One of the key facts is the coverage available under the subcontractor's policy, this DE Electricians.
> DE Electricians is the employer of Mr. Symons and was the provider of the worker's compensation coverage under their policy. Now the —
> THE COURT: Is this what goes to your comparative negligence?
> MR. STRASSBURG: No.
> THE COURT: No?
> MS. BRIGGS: Not exactly.
> MR. STRASSBURG: Not exactly, Judge. This is what goes to the reasonableness of the disclosures of the exclusion in the Lloyd's policy —
> THE COURT: Okay.
> MR. STRASSBURG: — that my guy made when he sold it.

(Final Pre-Trial Conference Transcript, 2/14/18, 56:2-16)

> And so the policy, the DE policy itself, is the hand in glove — it works hand in glove with the Lloyd's policy, and it explains whey a contractor in the position of Mr Rineheimer would buy a policy from my guy which excluded the primary risk.
> THE COURT: Okay —

> MR. STRASSBURG: It's because he knew it was covered under the subcontractor's policy.

(Final Pre-Trial Conference Transcript, 2/14/18, 58:12-18)

iii. At Trial PJO Used the DE Policy for a Very Different Purpose.

At trial, PJO instead argued that PJO should not be liable because the DE Policy was not utilized by Black Stone and would have provided coverage if pursued by Black Stone:

> The efficient intervening cause here is the decision not to pursue indemnification under the subcontract and not to pursue coverage as an additional insured. Those decisions by the plaintiff have prejudiced — have damaged us and caused an efficient intervening cause.

(Trial Transcript Day 3, 2/28/18 Morning, 37:18-23)

During its cross-examination of Patrick O'Neill (PJO), defense counsel exposed PJO's real purpose behind showing the DE Policy:

> Q. And what's happening in this case is something different that what the plaintiff is trying to do is rather than play by the rules and transfer the risk down to the sub's policy to the sub can stand behind its work and control the prevention of loss, Black Stone is trying to divert, by means of this assignment, this deal to you, your company, the risk that routinely is shared — is shifted to the subcontractors. Is that your understanding?
> A. Yes, correct.

(Trial Transcript Day 2, 2/27/18 Afternoon, 44:22-45:6)

During trial defense counsel explicitly stated its purpose to the trial court:

> COURT: And so is your argument going to be he didn't fall below the standard of care because there was this other coverage that should have

been available, or is it that Black Stone didn't mitigate their damages by trying to make a claim on DE's policy?
. . .
MS. BRIGGS: To the extent that we can argue about whether it would be — actually be covered if a claim had ever been made and so forth. .
.

(Trial Transcript Day 2, 2/27/18 Afternoon, 64:9-13; 65:3-5)

During defense counsel's examination of Patrick O'Neill, he testified that he expected the DE Policy would have provided coverage for Symons' injuries:

Q. And as an employee of DE, would you expect that Mr. Symons negligence would be the responsibility of DE?
A. I do.

(Trial Transcript Day 2, 2/27/18 Afternoon, 69:6-8)

O'Neill even testified that Black Stone chose to give up its rights under the DE Policy.

Q. But by failing to turn the claim in, Black Stone passed on having the defense — with a defense attorney, investigator, claims handling throughout this entire process over this two-year period, right?
A. Correct.

(Trial Transcript Day 2, 2/27/18 Afternoon, 72:5-9)

Rather than focusing on whether PJO had met its standard of care, as defense counsel claimed it would, O'Neill was then asked by defense counsel whether the DE Policy would have likely covered Symons' injuries if the claim had been submitted to DE's carrier.

Q. Is there any way you can think of that anybody could determine what would have happened had the claim of Symons been turned into

the DE carrier and defense attorney and a proper investigation had been done to work up the file?
A. You know, it's anyone's guess. I don't — I feel in my mind and my opinion, but I feel it would have been different, but I wouldn't obviously swear to it, but I feel it would be different absolutely because you would have, you know — like this case, you have a battery of lawyers, you have not unlimited — well, you get to spend enormous amounts of money to do all of these things, where if you had to pay for yourself, money is tight.

(Trial Transcript Day 2, 2/27/18 Afternoon, 72:17-73:4)

He then went so far as to testify that he thinks the DE Policy would have provided coverage.

Q. And customary you'd expect it to be covered under the DE policy?
A. I would have, yes. That's my expectation, yes.

(Trial Transcript Day 2, 2/27/18 Afternoon, 73:19-21)

All of this testimony regarding the application of the DE Policy led to confusion for the jury and blindsided Plaintiff and the Court given PJO's initial assertions regarding the use of the DE Policy.

MR. STRASSBURG: Judge, I think the plaintiff has left the jury with the belief that if the Lloyd's policy doesn't cover, then Mr. Symons' damages are the full $475,000. And that, Judge, is not so.
THE COURT: Why is it not so?
MR. STRASSBURG: Because the DE policy did cover that amount. The plaintiff, for whatever reason, chose not to pursue it and can hardly claim that it was damaged by something that was brought about by its own actions.

(Trial Transcript Day 3, 2/28/18 Morning, 30:13-21)

> THE COURT: But it sounds like they made a demand on DE and DE turned them down.
> MR. STRASSBURG: No, DE did not respond.
> THE COURT: Okay. So what more should Mr. Rinehimer have done?
> MR. STRASSBURG: Sued DE. Enforced his indemnity rights under his subcontracts. That's why he made DE sign that subcontract and he had those rights and he voluntarily gave them up.

(Trial Transcript Day 3, 2/28/18 Morning, 39:8-16)

In recommending the Policy to Black Stone, PJO could not have relied on the DE Policy, a policy that was not known to exist at the time Black Stone's Policy was purchased. Whether or not PJO fell below the applicable standard of care had to be judged as of the time the Policy was procured, not retrospectively. Yet, rather than simply arguing as a general principle that PJO expected other types of coverage to be issued, it repeatedly argued that the DE Policy applied in this case and provided coverage. In PJO's Opening Statement defense counsel claimed:

> He got DE Electricians, and I'll prove to you that he was on their policy and it would cover him.

(Trial Transcript Day 2, 2/27/18 Morning, 31:4-5)

> So DE Electricians has a policy of liability insurance which covers them . . . but that's the form that in effect issues a separate policy to Black Stone as an additional insured on the subs policy.

(Trial Transcript Day 2, 2/27/18 Morning, 34:4-5, 9-11)

> We'll also prove to you that Black Stone in its subcontracts when it hired DE required that the subcontractor, right here, contractor as well as its employees shall be named as an additional insured. 2010, see the form. That's in Black Stone's own form hub subcontract. And everyone

> they hire they make them sign this and it requires them to be named as an additional insured under the subcontractors plan.

(Trial Transcript Day 2, 2/27/18 Morning, 35:7-14)

iv. The Trial Court Properly Excluded References to the DE Policy Only After Opening Statements and Testimony From Both Parties.

After Opening Statements and after both parties had testified, the trial court properly recognized that the DE Policy was irrelevant to the issue of whether PJO had met its standard of care and was confusing to the jury.

> And here's where I think we're getting confused . . . But this is a case where the plaintiff has alleged that the defendant fell below the standard of care with regard to the procurement of the insurance policy. That's what our case is about. And, you know, I had sort of had the impression that where the DE Policy came in was failure to mitigate damages or really failure to mitigate damages, but I'm beginning to think that whether or not the policy would have covered him is not necessarily relevant because this is not a lawsuit against DE or DE's insurance coverage.
> And with regard to a failure to mitigate damages claim, he would have to — Mr. Rinehimer would have had to have known that there was other coverage out there and not sought it. And he's testified that he contacted DE and asked DE to cover him and they didn't. So I'm just not sure how relevant this policy is.

(Trial Transcript Day 3, 2/28/18 Morning, 29:18-30:12)

The trial court specifically found that there was no determination as to whether the DE Policy would have provided coverage.

> THE COURT: We don't have a determination that that's the real insurance. I mean, that's certainly your argument that that's the real insurance. The one thing I'm not going to do, and I don't think it's proper to do, is put that policy in front of this jury and have the jury

> interpret an insurance contract. The case law is that's a legal question that's for the court to do, to interpret an insurance contract.

(Trial Transcript Day 3, 2/28/18 Morning, 31:25-32:7)

The trial court correctly noted that whether or not the DE Policy provided coverage was a legal issue.

> THE COURT: And the additional insured is where? Because what I'm trying to figure out is, I would need to read the language of the contract, but it almost seems like it is a legal issue because somebody is added as an additional insured to protect them, but there's a distinction between did Black Stone — I know what the answer is. Black Stone got sued and the jury found Black Stone's negligence, not DE's negligence. And it's a DE employee. But I think it is a legal issue.

(Trial Transcript Day 2, 2/27/18 Afternoon, 49:11-19)

The trial court noted that references to the DE Policy were likely very confusing to the jury.

> THE COURT: And I'm concerned that we're really confusing things with regard to this DE Electricians policy.

(Trial Transcript Day 3, 2/28/18 Morning, 29:9-10)

> THE COURT: I'm really worried about this jury getting confused about something that may or may not be an issue.

(Trial Transcript Day 3, 2/28/18 Morning, 41:1-3)

v. Defense Counsel Continued to Reference the DE Policy in Closing Arguments.

Despite the trial court's ruling mid-trial that no further reference could be made to the DE Policy, and over plaintiff's objection, defense counsel ignored the

trial court's ruling during Closing Arguments. PJO's counsel argued that Exhibit 42, the DE subcontract with Black Stone, was relevant and used that exhibit. Exhibit 42 was a demonstrative exhibit which demonstrated the entire DE Policy argument that the trial court had excluded.

> Based on this language in article four of the subcontract, Defense Exhibit [42], did you think that DE, the subcontractor, had an obligation in the subcontract to indemnify and hold Black Stone harmless from any losses, actions, judgments that arose in any way connected?
> Answer: Yeah.
> That was his expectation.
> MR. BREYER: I would just —
> THE COURT: Are you objecting?
> MR. BREYER: I will note the objection.
> THE COURT: The objection is sustained because that contract is not in evidence that he's referring to the contract. So the objection is sustained.

(Trial Transcript Day 4, 3/1/18 Afternoon, 73:10-23)

> MR. BREYER: Just real quick for the record, Your Honor, I would again renew one thing and share another. I would renew again the request for an additional curative instruction based upon the use of Exhibit 42 and discussing at length and showing the DE policy and what it's supposed to — what it was supposed to do, number one. And number two —
> MR. STRASSBURG: Never showed the DE policy.
> MR. BREYER: Your Honor, he showed his exhibit that has DE's policy, Exhibit 42.
> THE COURT: and you put up there one of the witnesses discussing the transcript from the discussion.
> MR. BREYER: Discussed it at length.

(Trial Transcript Day 4, 3/1/18 Afternoon, 82:18-83:5)

vi. There is No Coverage Under the DE Policy As a Matter of Law.

The use of the DE Policy at trial was particularly problematic because it was disclosed as a trial exhibit just four weeks before trial. (IR 138) As a result, neither party had hired experts to analyze the DE Policy and make determinations of coverage. The deadline for expert discovery was a full year prior to trial. As a result, PJO was asking the court to make legal determinations regarding the DE Policy without any expert input.

Symons was, however, able to hire an expert witness to evaluate the DE Policy prior to filing his Motion for New Trial. Kyle Israel is an attorney who has handled hundreds of similar contractual claims representing virtually every type of party to transactions similar to those involved in this case. (IR 222-229) He analyzed the DE Policy and determined that there is no coverage for Symons' claims afforded under the DE Policy. (IR 222-229, Exhibit 2) This demonstrates that the DE Policy should have been excluded from trial entirely and there was never any "risk transfer" in place. It also demonstrates that Black Stone did not fail to utilize the DE Policy as PJO argued repeatedly at trial. Finally, Mr. Israel noted that any argument regarding the DE Policy was a violation of the collateral source rule because a negligent insurance agent may not avoid liability simply because the injured plaintiff (Black Stone) could have utilized other insurance coverage. (IR 222-229, Exhibit 2) All of this was properly presented to the trial court in Symons' Motion for New Trial.

vii. Arizona Law Supported Granting a New Trial.

Rule 59(a)(1), Arizona Rules of Civil Procedure ("A.R.C.P."), states that:

> The court may, on motion, grant a new trial on all or some of the issues — and to any party — on any of the following grounds materially affecting that party's rights:
>
> (A) any irregularity in the proceedings or an abuse of discretion depriving the party of a fair trial; . . .
>
> (F) error in the admission or rejection of evidence, error in the giving or refusing jury instructions, or other errors of law at trial or during the action; . . .
>
> (H) the verdict, decision, findings of fact, or judgment is not supported by the evidence or is contrary to law.

In *Henry v. HealthPartners of Southern Arizona*, 203 Ariz. 393, 55 P.3d 87 (App. 2002), the court addressed a similar situation and its decision to grant a new trial was upheld on appeal.

> The trial court's 'rule on the case' set out a framework for the trial, and the parties made strategic decisions accordingly. Having been told there would be no mention of settlement or identification of nonparties as previous parties to the case, Henry adopted a strategy that minimized Mar's culpability. Only after she had presented such a case did the trial court, persuaded by TMC that the Complaint's allegations were admissible, reverse itself. As the trial court recognized in its order granting Henry's motion for new trial, the timing of its reading of the allegations unfairly prejudiced Henry. Thus, there was, essentially, an '[e]rror in the admission or rejection of evidence.' that resulted from the timing of the admission of evidence. Therefore, we cannot say that the trial court abused its discretion in granting Henry a new trial.

Id. at 399 ¶20, 55 P.3d at 93 (internal citations omitted).

In this case, the trial court clearly committed reversible error in allowing PJO to use the DE Policy at trial when no good cause was shown for its untimely disclosure. Once the trial court understood PJO's true purpose for raising the DE Policy as well as the problems presented by discussion of coverage under the DE Policy without sufficient expert opinion and opportunity for the court to make a legal determination regarding coverage, it excluded any reference to the DE Policy. (Trial Transcript Day 3, 2/28/18 Afternoon, 22:12-22) However, the trial court abused its discretion when it failed to recognize the extent to which Symons was prejudiced by PJO's references to the DE Policy and denied Symons' Motion for New Trial. (IR 235)

"[A] court abuses its discretion when it commits an error of law in reaching its decision or the record fails to provide 'substantial support' for the decision." *American Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 511 ¶11 (App. 2009) (citation omitted).

In 1926, the Arizona Supreme Court delineated the trial judge's duty to grant new trials in certain situations:

> The trial court may weigh the evidence, and, if they think injustice has been done, should grant a new trial. It is their duty to supervise the verdict of the jury and grant a new trial if the verdict in the opinion of the court is against the weight of the evidence, or if it is arbitrary and manifestly or clearly wrong, or if it appears to be the result of passion, prejudice [or] misconduct of the jury.

Huntsman v. First Nat'l Bank, 29 Ariz. 574, 578, 243 P. 598, 600 (1926).

In this case, the trial court mis-applied Rules 26.1(a)(8), 26.1(f)(2), 37(c)(1) and 37(c)(4) when it allowed PJO to utilize the DE Policy despite PJO's failure to show good cause for the late disclosure or that prejudice would not result. (IR 157-164) The use of the untimely-disclosed DE Policy created extreme prejudice to Symons as the trial court did not have sufficient time or the benefit of expert opinion in order to make a legal determination whether the DE Policy provided coverage for Symons' injuries and whether it was relevant in this case. As a result, the jury was expressly told that the DE Policy would have provided coverage for Symons' injuries if only Black Stone had pursued that coverage. This Court now knows, and the trial court knew at the time it ruled on Symons' Motion for New Trial, that these claims were patently false, misleading and extremely prejudicial. (IR 138)

This Court can determine, de novo, that the trial court mis-applied Rules 26.1(a)(8), 26.1(f)(2), 37(c)(1) and 37(c)(4), A.R.C.P. and that, as a result of that mis-application and the extreme prejudice suffered by Symons at trial, its denial of Symons' Motion for New Trial was an abuse of discretion.

VI. Conclusion

PJO clearly violated the Arizona Rules of Civil Procedure when it disclosed what it claimed to be an extremely important document and an extremely important legal theory four weeks before trial. PJO did not even attempt to demonstrate good cause for its failure to disclose the DE Policy and its related legal theory within the

deadlines set by the trial court and the Rules of Civil Procedure. As a result, the trial court had no discretion to allow the use of this evidence at trial. The trial court's failure to preclude this evidence constitutes reversible error, subject to this Court's de novo review.

Given the trial court's egregious error in admitting this untimely-disclosed evidence, its denial of Symons' Motion for New Trial was an abuse of discretion. During the first three days of trial PJO relied heavily on the DE Policy and its theory of risk transfer to the great disadvantage of Symons who was ambushed with this theory after all discovery deadlines had passed. It is precisely this situation that requires a new trial and the trial court abused its discretion in denying Symons' Motion for New Trial. For the foregoing reasons, Plaintiff/Appellant Symons respectfully requests this Court vacate the Judgment and order a new trial in this matter.

RESPECTFULLY SUBMITTED this 13th day of November, 2018.

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