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' REPLY BRIEF

Mark P. Breyer
Bar No. 16862
BREYER LAW OFFICES, P.C.
3840 E. Ray Road
Phoenix, AZ 85044
(480) 496-7309
minutes@BreyerLaw.com
Attorney for Appellant Brian Symons

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1. Defendant-Appellee PJO Concedes its Non-disclosure of a Central Exhibit; namely the DE Insurance Policy.

It is interesting that, at the outset of PJO's brief, PJO denies the blatant violation of ARCP 26.1. However, nowhere in PJO's brief – or anywhere in the record for that matter – is there evidence of disclosure of the DE insurance policy that became central to PJO's trial argument. PJO denies blatant violation of ARCP 26.1 yet cannot demonstrate disclosure of the document in the two years between the lawsuit being filed on February 3, 2016 and less than a month before the start of trial on February 26, 2018.

As the Court knows from the record, PJO's failure to participate in discovery was a pattern throughout litigation and thus an important consideration for this court's decision. Mr. Symons was required to file a "joint report" without any input from PJO, below, because PJO refused to respond to requests for input. (IR 13 and 14) Mr. Symons was required to also forced to ask the Court to vacate the mediation requirement because PJO would not respond to requests for proposed mediators or proposed dates for mediation. (IR 23 and 24)

PJO's failure to properly disclose this document was simply part of its pattern in this case. It is inconceivable that a party would simply overlook the document that same party later argued was vital ("hand-in-glove") to its defense. This is not one of those "close calls" or nuanced discussions of what should be disclosed and a party claiming unfair surprise. There is a clear, bright line between

a party arguing that there was non-disclosure of what a witness would say where the witness was already disclosed. Or, the same bright line exists, for instance, when a party, concerned with a new theory that was not disclosed, but that theory is based upon evidence that was already disclosed. Perhaps in those cases there is often a need to look at the details of the situation. Here, we have a key document not only blatantly undisclosed but its sole purpose misrepresented to the Court and counsel. This is a document that was central to the defense of PJO. This was a document that required – due to the legal issues it raised – deposition testimony, written discovery, expert witnesses, and perhaps lay witnesses, as well.

2. <u>If There is No Coverage Under the DE policy as a Matter of Law Then There Can be no Relevant Defense Based Upon the DE Policy.</u>

It is an odd argument being made on appeal by PJO that it does not matter if there was coverage provided under the DE policy. PJO simply argues that the "existence" of the DE policy is what mattered and not the terms of that policy. How can that be? If the DE policy did not provide any coverage whatsoever, then how can its existence be part of the defense of the case? There is no logical basis for using a policy as a defense to malpractice if that policy provided no additional protection to the insured. The only purpose of the DE Policy for the defense was to suggest – incorrectly - that there was coverage under the DE policy which excused the way in which this policy was sold and provided to the insured. To simplify, a central issue in the trial below was whether PJO fell below the standard

of care in the type and manner of the policy it provided to Black Stone so that Black Stone would be protected (or know of any risks of being unprotected so they could be avoided) in the event of an injury to someone on the job site. It must be kept in mind that there was no dispute in the testimony below about whether or not the DE policy would have provided coverage. In fact, as a result of the admission of this document without discovery to address it, the **uncontroverted** evidence for half of the trial below was that the DE policy would have provided liability coverage to Black Stone in Mr. Symons' negligence suit. Faced with that uncontroverted evidence, what other conclusion would the jury likely reach? As a result of allowing this evidence, it would appear to the jury that PJO did all it that was needed if there existed this uncontradicted, uncontroverted evidence that a particular insurance policy would have provided coverage but the parties chose not to avail themselves of such clear, undisputed coverage.

However, in fact, there was no such coverage provided by the DE policy. Unfortunately, the issue of insurance coverage was never briefed nor argued below until after trial because the DE policy and argument themselves were never disclosed as part of discovery. The DE policy does not provide coverage, and that is evident from settled Arizona law. This was not and should not have been allowed to be a jury issue. Interpretation of insurance policies is a question of law. *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127,

1132 (1982). Any insurance coverage issue in this case would have been simply resolved as a matter of law by the trial court. In essence, this "red herring" DE insurance coverage issue which was slipped into this trial would not have even surfaced before the jury. Even the trial court (after it was too late), recognized that basic insurance contract legal principle that insurance contract interpretation is a legal issue. *Id.*

PJO made much of the subcontract agreement between Black Stone Development and DE Electricians, Inc. requiring Black Stone to be named as an additional insured and also that Black Stone be indemnified by DE. Of course, there would have been no insurance coverage if the DE Policy -- this standard CGL policy -- happened to contain the standard and well-recognized ISO "contractual liability exclusion" which applies when an insured has "assumed another's liability" by agreeing to indemnify or hold another harmless. The DE Policy contains this particular standard ISO exclusion. Such an exclusion is valid and has been upheld by the Arizona Supreme Court. *Desert Mt. Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co*., 225 Ariz. 194, 236 P.3d 421 (Ariz. Ct. App., 2010); aff'd, *Desert Mt. Props. L.P. v. Liberty Mut. Fire Ins. Co*., 226 Ariz. 419, 250 P. 3d 196 (2011). For further rejecting the idea that the DE policy provided coverage, see the affidavit of Kyle Israel. (Exhibit 2 to Plaintiff's Motion for New Trial, IR 222-229)

Because of the late disclosure of the DE policy, the misleading statements to the Court and counsel as to its true purpose (to establish insurance coverage), it created an anomaly of having uncontroverted evidence of insurance coverage erroneously admitted for the jury's consideration. That produced two fundamental errors: First, any issue of insurance coverage in an insurance contract should have been decided by the Court as a matter of law. See S*parks, supra*. Second, if that had been done, there is no coverage under this standard CGL policy with standard ISO forms containing the standard contractual liability exclusion. See *Desert Mt. Props., supra*. PJO's argument that the its defense relied upon the existence of a policy – if that policy provided no coverage – is illogical and baseless and a policy that provided no protection cannot prove to be a defense for insurance producer malpractice.

3. <u>PJO Cannot Excuse Its Malpractice by Claiming Reliance on Insurance That PJO Concedes Did Not Exist at the Time of the Malpractice.</u>

Even if the DE policy had been disclosed, and even if the DE policy had provided coverage, it could not have been relevant at this trial because PJO concedes that the DE policy did not exist and was not known by PJO at the time of the alleged malpractice.

PJO admits that "the actual insurance policy obtained by DE likely did not exist at the time of Black Stone's purchase of the Lloyd's policy . . . thus reliance by either PJO or by Black Stone of specific terms . . . are not relevant to the jury's

consideration." (Appellee's brief, Page 15). Basically, PJO wants to now argue that the DE policy is something of an exemplar policy that shows how things are done in the construction industry. In other words, PJO argues that it did not commit malpractice because of the way these contracts generally work and the types of policies that are generally sold to general contractors of this type. That is where the discovery process is required. PJO had almost 2 years to develop this argument. It could have hired an expert in insurance coverage to explain these coverages and how these policies work. It could have provided exemplar insurance policies and PJO could have disclosed that he knew of and expected this type of insurance policy to exist. What PJO cannot do is use an actual insurance policy related to this incident after the fact and then argue to the jury that this policy would have provided coverage to Black Stone. Even if the DE Policy had been timely disclosed and its true purpose represented to the Court and counsel that policy could not have been relied upon by this defendant concerning the standard of care issue.

Put another way, in its Answering Brief, PJO concedes that the DE policy did not exist at the time of the alleged malpractice by PJO. If a document does not even exist at the time of the alleged malpractice by PJO, how can it be relevant to the jury's consideration as to whether that malpractice occurred? It simply cannot. Had PJO properly disclosed exemplar policies, had PJO properly had expert

witnesses -- not in the sale of insurance but in the interpretation and explanation of these policies -- it is potentially true that this argument could have been made. But the argument never could have been made by referencing a specific DE policy that was neither known nor in existence -- and thus could not have been relied upon by PJO at the time of the malpractice. That argument would have required actual preparation by PJO during the discovery process, if it was even valid and there were such policies that provided the protection claimed, which is doubtful.

4. PJO's Brief as to the Purpose of This DE Policy Stands in Stark Contrast to the Arguments it Made During Trial.

In its brief, PJO concedes "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." This Court may find that similar to the types of arguments that PJO made to convince the trial court to allow the DE policy (incorrectly) to be addressed during trial. However, it ignores the actual arguments made repeatedly at trial by PJO. Remarkably, PJO in its brief admits "the trial court correctly ruled that the DE policy itself should not be admitted as evidence for the jury's consideration. . . ."

It appears that PJO is willing to repeatedly argue – to get the DE policy discussed at trial and to try to persuade this Court on appeal – that there are limitations to the use of the DE policy and that showing there was coverage under

that policy was not the purpose for testimony and comment at trial. This brings into play PJO's **stated** purpose for the DE policy's use and PJO's **actual** purpose for the DE policy's use. PJO's 's actual statements in opening statement, the testimony elicited through the PJO agent, the cross-examination of Mr. Rinehimer the owner of Black Stone, the argument during closing argument, and the actual arguments to the trial court during trial stand in stark contrast to that stated purpose of the DE policy.

Repeatedly in its brief, PJO returns to the position that the mere "existence" of the DE policy and the framework in the construction industry are the reasons for the evidence to be admitted. Some additional examples on appeal of this stated purpose include:

> 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. **(Emphasis added.)** (Appellee Answering Brief, pp. 2, 13).
>
> 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. (Appellee Answering Brief, p. 4).
>
> Construction industry practice is that injuries to subcontractors' employees are covered by the individual subcontractors' workers' compensation insurance. (Appellee Answering Brief, p. 8).
>
> . . . 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." **(Emphasis added.)** (Appellee Answering Brief, p. 13).

It is obvious, however, that the "actual purpose," as opposed to the "stated purpose" for the DE policy evidence at trial was simply and blatantly to (1): present evidence to the jury that there was, in fact, insurance coverage under the DE policy. And (2): If only Black Stone and Mr. Symons had just availed themselves of that coverage there would have been no problem. In fact, blatant examples of that actual purpose at trial of "establishing insurance coverage" abound:

> . . . I'll prove to you that he was on their policy **and it would cover him**. [Mr. Symons] **(Emphasis added.)** (Trial Transcript Day 2, Opening Statement, 2/27/18 31:4-5)

> Black Stone's decision not to pursue indemnification under the subcontract and not to **pursue coverage as an additional insured** created intervening causation. **(Emphasis added.)** (Trial Transcript Day 3, 2/28/18 Morning, 37:18-23)

> The DE policy would have **provided coverage for Mr. Symon's injuries** if Black Stone had not been **remiss by failing "to turn the claim in." (Emphasis added.)** (Trial Transcript Day 2, 2/27/18 Afternoon, 72:5-9).

> Mr. O'Neill from PJO testified that he would have **expected coverage** under the DE policy. **(Emphasis added.)** (Trial Transcript Day 2, 2/27/18 Afternoon, 73:19-21)

Obviously, days of argument and testimony that there was additional insurance coverage under the DE policy which the parties could have utilized but chose to ignore (all of which testimony was unrefuted, uncontradicted, and uncontroverted due solely to the non-disclosure) is not cured with a simple curative

instruction. The choice of PJO to pursue the document's introduction, discussion, and argument at trial meant PJO was accepting the near-certainty of reversal if that document did not provide coverage or if the document should not have been allowed pursuant to ARCP 26.1. As that is the case, reversal is the only appropriate, fair result.

Finally, PJO would have this Court believe that the contents of the DE policy were not revealed to the jury – in spite of direct evidence cited and Mr. Symons's opening brief that show that this is not the case. (Opening brief, pages 26-27)

CONCLUSION

Mr. Symons suffered serious injuries and a jury found in his favor in his first trial against the general contractor, Black Stone, for negligence. The defendant in that trial, Black Stone, was left without liability insurance coverage to pay for that verdict. Therefore, Mr. Symons accepted an assignment of the claims against the agent, PJO, for falling below the standard of care in the way PJO handled its duties as an insurance agent.

PJO then failed to appropriately participate in much of the litigation below, and failed to develop the necessary evidence during discovery. In apparent final preparation for trial, PJO disclosed a new document which created a new theory for the defense. It was error to allow this document in evidence, an error belatedly

recognized by the trial court. By that time, the damage was done. Mr. Symons is entitled to a trial on the merits, without the use of non-existent insurance coverage as an excuse for the malpractice of the defendant.

Wherefore, Mr. Symons requests this Court remand this case for a new trial.

RESPECTFULLY SUBMITTED this 11th day of February, 2019.

BREYER LAW OFFICES, P.C.

/s/ Mark. P. Breyer
Mark P. Breyer, Esq.
3840 E. Ray Road
Phoenix, AZ 85044
Attorney for Plaintiff/Appellant
Brian Symons