IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Petitioner*,

v.

THE HONORABLE KAREN A. MULLINS, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge,*

CARL DEROSIER, as Conservator for DUSTIN DEROSIER, an incapacitated adult, *Real Party in Interest*.

No. 1 CA-SA 17-0118
FILED 8-31-2017

Petition for Special Action from the Superior Court in Maricopa County
No. CV2010-032990
The Honorable Karen A. Mullins, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Michael J. Brown joined.

S W A N N, Judge:

¶1 The State of Arizona seeks special-action relief from a ruling precluding it from asserting comparative fault as a defense to a negligence action brought by an inmate who was attacked and injured while in custody. The attack was organized and facilitated by a group of inmates but physically carried out by one inmate. The State asserted the affirmative defense of "fault of non-party assailants" in its answer, but actively and successfully resisted the plaintiff's efforts to discover the identities of all witnesses to the attack and all suspected participants except for the inmate who landed the blows. By refusing to disclose that information, the State deprived the plaintiff of a meaningful opportunity to oppose the comparative fault defense. We therefore conclude that the superior court did not abuse its discretion by determining that the bare mention of the defense in the State's answer was insufficient to constitute substantial compliance with Ariz. R. Civ. P. ("Rule") 26(b)(5), and by therefore precluding it from asserting the comparative fault of nonparties as a defense.

FACTS AND PROCEDURAL HISTORY

¶2 In December 2009, Dustin DeRosier, an inmate in the custody of the Arizona Department of Corrections ("ADOC"), was the victim of an inmate attack soon after he was transferred from a psychiatric hospital to a medium-security facility.

¶3 In December 2010, DeRosier brought an action against the State of Arizona, asserting a claim for gross negligence. The State answered

and asserted numerous defenses: "Defendants further allege the affirmative defenses of Plaintiff's comparative and contributory fault, *fault of non-party assailants*, absolute and qualified immunity, failure to serve a compliant notice of claim, and failure to exhaust administrative remedies." (Emphasis added.) But though the State mentioned the fault of the assailants as a defense in the answer, it did not serve a separate nonparty-at-fault notice as required by Rule 26(b)(5). Nor did the State explain the facts underlying the nonparty-at-fault defense in its Rule 26.1 disclosures over the next five years—in fact, no disclosure even mentioned the defense until mid-2016.

¶4 By way of a public records request, DeRosier had, in early 2011, received a copy of ADOC's investigation report regarding the attack. Among other things, the report recounted an inmate interview that described a coordinated attack. The interviewee stated that two inmates, one of whom "was running the Run for the White Inmates," approached DeRosier to "check on his paperwork and charges." DeRosier told the inmates that he had struck a young child during a fight with a man on a bus, but the inmates did not believe that story. They reported the interaction to another inmate "who runs the building for the White inmates," and it was decided that DeRosier needed to be beaten. Inmate Jonathan Turner then beat DeRosier while other inmates stood in front of a window so that officers would not be able to see the beating. Later, Turner and another inmate worked together to ensure that DeRosier remained out of view. The report concluded that a conviction was unlikely because DeRosier suffered memory loss, the witnesses would not cooperate with a prosecution and no physical evidence confirmed that Turner executed the beating.

¶5 The names and inmate numbers of all inmate-interviewees and, with the exception of Turner, all inmates accused by interviewees, were redacted in the copy of the report that DeRosier obtained. In November 2012, DeRosier requested that the State produce an unredacted copy of the report. The State refused, citing security and privacy concerns. And in 2016, the State successfully moved for a protective order and obtained a ruling precluding DeRosier from reviewing an unredacted copy of the report.

¶6 A few months later, the State served a supplemental disclosure statement that added to the list of legal defenses the "comparative fault" of DeRosier's "assailants." The State asserted that it had timely raised that defense in its answer, and that it was permitted to identify "'phantom' non-parties at fault" in view of the ADOC

investigation's failure to identify with certainty who was responsible for the attack.

¶7 DeRosier moved to preclude the nonparty-at-fault defense, and he concurrently renewed his request for an unredacted copy of the ADOC report. The court denied the motion for an unredacted report. But the court also ruled that the State's nonparty-at-fault defense was precluded because it was untimely disclosed and the late disclosure had prejudiced DeRosier.

¶8 The State now petitions for special-action relief from the court's preclusion of the nonparty-at-fault defense. We granted the State's request to stay trial.

JURISDICTION

¶9 In this case, which is seven years old and only now ready for trial, review by appeal would not offer an equally plain, speedy, and adequate remedy. We therefore accept jurisdiction to determine a pure question of law. Ariz. R.P. Spec. Act. 1(a); *Vo v. Superior Court (State)*, 172 Ariz. 195, 198 (App. 1992).

DISCUSSION

¶10 We review the superior court's preclusion of the State's nonparty-at-fault defense for abuse of discretion. *Bowen Prods., Inc. v. French*, 231 Ariz. 424, 427, ¶ 9 (App. 2013).

¶11 At all times relevant to this special action, Rule 26(b)(5) provided that a party who seeks to allocate fault to a nonparty must, within 150 days of filing its answer (or, under the version of the Rule in effect when DeRosier filed the complaint, within ten days of service of a motion to set and certificate of readiness[1]), serve a notice on all other parties disclosing the nonparty's identity and location and the facts supporting the allegation of fault. The Rule provides that the trier of fact may not allocate any percentage of fault to a nonparty who is not so disclosed, except on stipulation of the parties or on motion showing good cause, reasonable diligence, and lack of unfair prejudice.

¶12 Rule 26(b)(5) implements A.R.S. § 12-2506, which allows the trier of fact to apportion fault among all tortfeasors, even those from whom the plaintiff may not recover. *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz.

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1 Motion-to-set practice was abolished in 2013.

431, 432–33 (App. 1996). The notice contemplated by the Rule is "a procedural requirement designed to alert parties in a timely fashion to the existence of other potential tortfeasors." *Bowen Prods.*, 231 Ariz. at 427 n.3, ¶ 10. The notice ensures that the plaintiff is made aware of a nonparty's fault and is given an opportunity to bring the nonparty into the action. *LyphoMed, Inc. v. Superior Court (Carter)*, 172 Ariz. 423, 427–28 (App. 1992). If the nonparty's identity is unknown, the notice need not provide the nonparty's identifying information—in *Rosner*, for example, a nonparty designation of "unknown attackers" was sufficient when the plaintiff was injured at the defendant nightclub during a brawl with unknown patrons who fled the scene. 188 Ariz. at 432. And a notice that is deficient for failure to reveal the factual basis for the nonparty's liability may be rendered sufficient by timely disclosures that provide that information. *Bowen Prods.*, 231 Ariz. at 427, ¶ 11. But the flexible rule in *Bowen* "does not mean that a party can salvage a defective notice simply by serving a last-minute disclosure. If the timing of disclosure prevents meaningful notice for long enough to cause prejudice, the court retains discretion to strike a notice of nonparty at fault." *Id.* at n.4.

¶13 Nothing in Rule 26(b)(5) precludes a party from complying with the notice requirement by including the required information in its answer. That is what the State contends it has done here. The State argues that it was sufficient to note the defense of "fault of non-party assailants" in its answer when DeRosier was aware of the facts underlying the assailants' fault. And in cases where seasonable disclosures adequately reveal the facts relevant to the defense, the State's position might have merit.

¶14 But here the State never disclosed, and actively resisted disclosing, the identifying information of all inmates believed to have participated in or witnessed the attack. That information was critical to DeRosier's ability to investigate and mount a rejoinder to the nonparty-at-fault theory. The fact that the State provided the name of the inmate believed to have physically carried out the beating was, in view of the group-organized nature of the attack, an incomplete and inadequate disclosure. Unlike the defendant in *Rosner*, the State has always had the information concerning the nonparties it contends were at fault. By withholding the balance of relevant identifying information, the State failed to provide the meaningful notice contemplated by Rule 26(b)(5), either in its answer or in its disclosure statement years later adding the "comparative fault" defense.

¶15 The State downplays the importance of its self-imposed secrecy concerning the names of the inmates who coordinated the attack and those who accused them. But the State has the benefit of its full investigation. And without the names, DeRosier had limited ability to investigate whether the State created conditions at the facility that made the coordinated attack easier to carry out or more difficult to detect. Though the record reveals that DeRosier believed by late 2016 that he had identified some of the inmates interviewed by ADOC, he cannot confirm those partial findings or compare information he may obtain from those individuals with their initial accounts. Without full disclosure, the nonparty-at-fault defense is unfairly stacked in the State's favor, and that is the essence of prejudice. We therefore perceive no abuse of discretion in the superior court's preclusion of the defense.

CONCLUSION

¶16 For the reasons set forth above, we accept jurisdiction and deny relief.

AMY M. WOOD • Clerk of the Court
FILED: AA