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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 04-20-2010  
PHILIP G. URRY, CLERK  
BY: GH

PRECISION HEAVY HAUL, INC. an ) 1 CA-CV 08-0107  
Arizona corporation, )  
) DEPARTMENT B  
Plaintiff-Appellant- )  
Cross-Appellee, )  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
TRAIL KING INDUSTRIES, INC. a ) Rule 28, Arizona Rules  
foreign corporation; CARLISLE ) of Civil Appellate Procedure)  
COMPANIES, INC. a foreign )  
corporation, )  
)  
)  
Defendants-Appellees- )  
Cross-Appellants. )

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Appeal from the Superior Court in Maricopa County

Cause No. CV 2002-019986

The Honorable Peter B. Swann, Judge

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED**

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W E I S B E R G, Judge

¶1 In this memorandum decision, we address the cross-appeal by defendant Trail King Industries, Inc. ("Trail King"), following a jury verdict in favor of plaintiff Precision Heavy Haul, Inc. ("Precision") in a negligence action. In a simultaneously filed opinion, we address Precision's appeal from the trial court's denial of prejudgment interest, which we reverse. In this decision, we consider Trail King's challenge to the admission of testimony by two of Precision's experts as well as the method used to select jury pools in the Maricopa County superior courts at the time this case went to trial. For reasons that follow, we uphold the admission of the expert testimony and the jury selection ruling.

#### **BACKGROUND**

¶2 Precision filed suit against Trail King and Carlisle Companies, Inc., and asserted claims based on negligence, strict liability, and breach of warranty. Precision alleged that it had purchased from Trail King a trailer designed to transport heavy loads, that Trail King had manufactured the trailer but that its negligent design and manufacture caused the trailer to fail and to damage the trailer and an energy transformer being transported on the trailer. Trail King's answer alleged that Precision had negligently used the trailer and that any damages "were caused or contributed to by [Precision's] own comparative

negligence or assumption [of] risk," which would bar or reduce its claims.

¶3 At trial, Precision's owner testified that his company had incurred \$694,550.87 in damages. Precision also offered the testimony of two experts concerning the cause of the accident that damaged the energy transformer. The jury returned a verdict finding Trail King 100 percent at fault and awarding \$694,550.87 in damages to Precision.

¶4 Trail King moved for a new trial and/or judgment as a matter of law and asserted that (a) the court should have stricken Precision's experts' testimony; (b) Precision had not properly disclosed the testimony of a former employee; (c) the verdict resulted from passion and prejudice; (d) insufficient evidence showed that the alleged defect caused the accident; and (e) Precision had not proved its right to collect the insured portion of the loss. Trail King sought leave to supplement its motion pursuant to Arizona Rule of Civil Procedure 59(c)(1).<sup>1</sup>

¶5 Trail King then amended its motion to argue for the first time that the process for selecting the jury panel "was an irregularity in the proceedings" that deprived it of a fair trial. Trail King said that it had discovered this issue on June 13, 2006; that on April 28, 2006 the issue had been

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<sup>1</sup>The Rule states in part: "The motion for new trial . . . may be amended at any time before it is ruled upon by the court."

identified in other cases and had been assigned for resolution to the Honorable William J. O'Neil of Pinal County; and asked that the issue be presented to Judge O'Neil.<sup>2</sup> The superior court transferred the issue to Judge O'Neil and did not rule on the pending motions.

¶6 In October 2007, Judge O'Neil issued a ruling finding that the Proximity Weighted Summoning ("PWS") System<sup>3</sup> used in Maricopa County did not violate applicable state statutes and that Maricopa County jurors "were selected randomly in that they were chosen in an unbiased manner, with no predetermination of who would be selected."<sup>4</sup> The superior court then set oral argument on Trail King's motions.

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<sup>2</sup>Trail King contends that it timely objected to the jury selection process, and Precision appears to agree. We note, however, that Precision did not have an opportunity to respond to the amended new trial motion before the issue was transferred to Judge O'Neil.

<sup>3</sup>Because Maricopa County covers an area of 9,226 square miles and extends 132 miles from east to west and 103 miles from north to south, jurors residing near the outer boundaries could be summoned to a courthouse many miles from home. The PWS system was intended to reduce this occurrence.

<sup>4</sup>The respondents appealed to this court, but on March 26, 2009, we dismissed the appeal for lack of jurisdiction because there was no "final judgment with regard to any completed matter" and no Rule 54(b) certification. *In re Jury Selection Process in Maricopa County*, 220 Ariz. 526, 528-29, ¶¶ 8-9, 207 P.3d 779, 781-82 (App. 2009). The holding, however, was "without prejudice to any party seeking relief from Judge O'Neil's ruling in the individual matter in which the ruling was relied upon." *Id.* at 531, ¶ 14, 207 P.3d at 784.

¶7 Trail King filed a second amended motion for new trial and at oral argument conceded that Judge O'Neil's ruling had disposed of the challenge to the PWS System. The trial judge, the Honorable Peter Swann, denied Trail King's motions and on January 22, 2007 issued a signed judgment. Precision appealed from the denial of prejudgment interest, and Trail King cross-appealed from the order denying the motions for new trial and from Judge O'Neil's order. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

## DISCUSSION

### Admission of Expert Testimony

¶8 We first consider whether the testimony of Precision's experts should have been stricken as unreliable. We will affirm the trial court's admission or exclusion of evidence unless we find a clear abuse of discretion or legal error and resulting prejudice. *Lohmeier v. Hammer*, 214 Ariz. 57, 60, ¶ 6, 148 P.3d 101, 104 (App. 2006).

¶9 Trail King acknowledges that in *Logerquist v. McVey*, 196 Ariz. 470, 488, ¶ 52, 1 P.3d 113, 131 (2000), our supreme court held that the reliability of an expert's testimony is a matter for the jury's resolution but questions the validity of this holding. Although Trail King urges us to transfer this issue to the supreme court for reconsideration of its holding,

we decline to do so. Trail King may seek additional review, if it chooses, in the normal course.

¶10 Trail King next asserts that this court “has the power to strike unjustified expert testimony” and to enter judgment in its favor. The cases it cites, however, do not so hold. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 27, ¶¶ 14-17, 13 P.3d 763, 769 (App. 2000), did not concern admission of expert testimony. *Reeves v. Markle*, 119 Ariz. 159, 164, 579 P.2d 1382, 1387 (1978), held that on review of the grant of a new trial, appellate courts do not “weigh the evidence” but require only that substantial evidence support the ruling. In *Ehman v. Rathbun*, 116 Ariz. 460, 462, 569 P.2d 1358, 1360 (App. 1977), the trial court ordered a new trial after finding insufficient foundation for an expert’s testimony, and we found no abuse of discretion. *Id.* at 463, 569 P.2d at 1361. None of these cases empower us to strike the expert testimony or to enter judgment for Trail King.

¶11 Trail King cites *State ex rel. Romley v. Fields*, 201 Ariz. 321, 35 P.3d 82 (App. 2001), to contend that the trial court failed to ensure that the expert testimony satisfied Arizona Rules of Evidence 702, 703, and 403.<sup>5</sup> Rule 702 states

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<sup>5</sup>*Fields* held that expert testimony based on actuarial data that was intended to predict recidivism in sexually violent commitment proceedings was not subject to a *Frye* hearing and thus was subject to the evidentiary rules governing expert evidence. *Id.* at 328, ¶ 22, 35 P.3d at 89.

that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise.” (Emphasis added.) Trail King asserts without citation of authority, however, that an expert’s opinion must “be substantiated by testing, analysis, calculation, [and] peer review.” It contends that Casey Ewbank’s theory of the accident was “a naked hypothesis” and that Roger Gallagher’s testimony was unreliable because he never calculated the force necessary to make the transformer lean or tip over.

¶12 Nonetheless, *Logerquist* held that “[q]uestions about the accuracy and reliability of a witness’ factual basis, data, and methods go to the weight and credibility of the witness’ testimony and are questions of fact” and that it is for the jury “to determine accuracy, weight, or credibility.” *Id.*, 196 Ariz. at 488, ¶ 52, 1 P.3d at 131. Trail King had an opportunity to fully cross-examine the experts, to scrutinize their opinions, and to offer countervailing opinions. Furthermore, the court instructed the jury that it could believe all, some, or none of the expert testimony and that it should give the testimony the weight it thought proper. But, we find no error in the court’s failure to make an initial determination of reliability.

*Logerquist* rejected the notion that the trial judge should consider the "reliability and credibility of qualified witnesses and exclude testimony if there is not a 'valid connection' between the testimony and the 'pertinent inquiry.'" *Id.* at 488, ¶ 52, 1 P.3d at 131. The evidence only need be "relevant, the witness must be qualified, and the evidence must be the kind that will assist the jury." *Id.* at 489, ¶ 57, 1 P.3d at 132.

¶13 The trial court found that the testimony would assist the jury, that the experts had extensive experience in the heavy haul industry, and that lack of physical testing went to the weight of the testimony. Thus, Trail King has not shown an abuse of discretion in admission of the proffered evidence under Rule 702, and it fails to explain why Rules 703 or 403 required its exclusion.

### **Jury Selection**

¶14 Trail King next challenges Judge O'Neil's determination that the Maricopa County jury selection process in use when this case went to trial complied with Arizona law.<sup>6</sup> It argues that the jury selection process violated A.R.S. § 21-312 (2002)<sup>7</sup> and -313 (2002).<sup>8</sup> However, we do not reach this argument

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<sup>6</sup>*In re the Jury Selection Process in Maricopa County*, 220 Ariz. at 527, ¶¶ 2-3, 207 P.3d at 780, may provide useful background.

<sup>7</sup>A.R.S. § 21-312 provided:



because Trail King has failed to show any prejudice resulting from the jury selection process.

¶15 This court recently has held that such a showing is required. *Ritchie v. Krasner*, 221 Ariz. 288, 295, ¶ 63, 211 P.3d 1272, 1289 (App. 2009). We held that to achieve reversal of a jury verdict for errors in the selection process, a party must "show actual prejudice, i.e., that the jurors who actually served were not fair and impartial." *Id.* (Citation omitted.) See also *State v. Morris*, 215 Ariz. 324, 334, ¶ 43, 160 P.3d 203, 213 (2007) (even if some jurors were improperly excused,

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A. The jury commissioner . . . shall conduct the drawing by randomly selecting names of prospective jurors from the master jury list. The jury commissioner . . . shall publicly draw from the master jury list the number of names designated in the order.

B. The names of prospective jurors drawn from the master jury list shall be designated the master jury file.

The statute was repealed effective December 31, 2007. See 2007 Ariz. Sess. Laws, ch. 199, § 13 (1st Reg. Sess.).

<sup>8</sup>A.R.S. § 21-313 had provided: "In any county where data processing equipment is used the jury commissioner . . . shall cause the device to be programmed to ensure the random selection of names on the master jury list." The statute was amended effective December 31, 2007. See 2007 Ariz. Sess. Laws, ch. 199, § 15 (1st Reg. Sess.). The amended statute still allows use of an automation system and requires that the device must "be programmed to ensure random selection procedures." It also states that "the courts shall use random selection procedures throughout the juror selection process" to qualify or summon potential jurors, to assign them to panels, or to call them for voir dire. A.R.S. § 21-313 (Supp. 2008).

