

## ***Spring v. Bradford***

**Citation:** No. CV-17-0068-PR, 2017 WL 4767137 (Ariz. Oct. 23, 2017).

**Date Filed:** October 23, 2017

**Author:** Vice Chief Justice Pelander

**Joined by:** Chief Justice Bales, Justices Brutinel, Timmer, Bolick, Gould, and Lopez.

**Facts:** Emma Spring sued Timothy Bradford, D.C., for medical malpractice. Spring alleged Bradford negligently performed a chiropractic adjustment that damaged her cervical spine. Each party secured two expert witnesses to testify at trial. Upon both parties' agreement, the trial court invoked Rule 615 which excludes any prospective trial witnesses from the courtroom during other witnesses' testimony.

Spring presented expert testimony from Dr. Alan Bragman and Dr. Daniel Lieberman. During cross-examination, Spring's counsel learned that Bradford's counsel had provided Dr. Allan Hamilton (expert witness for Bradford) with a transcript of Dr. Lieberman's trial testimony. Before testimony resumed the next day, Spring's counsel learned that Bradford's counsel had also provided Dr. Robert Iverson (other expert witness for Bradford) with a transcript of Dr. Bragman's trial testimony.

**Procedural history:** The case is currently before the Arizona Supreme Court. The trial court held there was a violation of Rule 615 on the part of Bradford, but did not presume prejudice. Instead, the trial court provided Spring an opportunity to show prejudice but determined Spring failed to do so. To remedy Bradford's violation of Rule 615, the trial court provided the jury with two curative instructions relating to Bradford's violations of the Rule. Nonetheless, the jury returned a verdict in favor of Bradford. Spring moved for a new trial but was denied. The trial court held the curative instructions provided to the jury and Spring's opportunity for cross-examination prevented prejudice to Spring.

The court of appeals affirmed the trial court by holding Rule 615 does not have an automatic exemption for expert witnesses unless a party can show the expert witness's presence to be essential.<sup>1</sup> The court said a superior court may exercise its discretion regarding whether such a showing has been made.<sup>2</sup> The court noted Bradford never attempted such a showing, so it held the superior court did not err when it found Bradford violated Rule 615.<sup>3</sup>

Further, the court of appeals found the trial court did not err by declining to presume prejudice as a result of Bradford's Rule 615 violation.<sup>4</sup> The court stated it is the responsibility of the party asserting a Rule 615 violation to show prejudice.<sup>5</sup> It also found no error in

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<sup>1</sup> Spring v. Bradford, 388 P.3d 849, 851, 853 (Ariz. Ct. App. 2017).

<sup>2</sup> *Id.* at 853.

<sup>3</sup> *Id.* at 854.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (citing Kosidlo v. Kosidlo, 607 P.2d 15, 18 (Ariz. Ct. App. 1979)).

allowing the curative instructions to act as Spring's remedy to Bradford's Rule 615 violation.<sup>6</sup>

The Arizona Supreme Court granted review to determine (1) whether prejudice should be presumed upon the occurrence of a Rule 615 violation and (2) what a party must show for a Rule 615(c) exception to apply for a witness.

**Issue:** Arizona Rule of Evidence 615 states a trial court, at a party's request, "must order witnesses excluded so that they cannot hear other witnesses' testimony."<sup>7</sup> Does this rule, when invoked, prohibit a party from providing prospective trial witnesses with transcripts of prior witnesses' trial testimony?

**Holding:** Yes, Rule 615, when invoked, prohibits a party from providing prospective trial witnesses with transcripts of prior witnesses' testimony. Such a violation of Rule 615 is not presumptively prejudicial, but a trial court is to impose some corrective action even when no prejudice is shown. Further, Rule 615(c) requires a trial court to permit "a witness to hear (or read) a prior witness's testimony if a party shows that such an exception is essential to that party's claim or defense."<sup>8</sup> A witness does not automatically fall within this exception solely because of the witness's status as an expert.

**Disposition:** The trial court's finding that there was a Rule 615 violation is affirmed.

**Rule:** In the event of a Rule 615 violation, prejudice is not presumed. Rather, an objective likelihood of prejudice must be demonstrated by the moving party. Further, a party seeking an exception under Rule 615(c) must make a fair showing that a witness is required for the management of the party's case before a party engages in a Rule 615 violation in order for a Rule 615(c) exception to be granted.

**Reasoning:**

- **No Automatic Exception for Expert Witnesses:** The court used the plain language of Rule 615(c) to determine that there is no differentiation between types of witnesses.<sup>9</sup> The court noted that when an Arizona rule of evidence is identical to a federal rule of evidence, the court is to look to federal law.<sup>10</sup> Accordingly, the court cited federal court jurisprudence declining to differentiate between types of witnesses.<sup>11</sup> For a witness to be deemed essential, the court held the requesting party must make "a fair showing" that "the expert witness is in fact required for the

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<sup>6</sup> *Id.* at 851

<sup>7</sup> *Spring v. Bradford*, No. CV-17-0068-PR, 2017 WL 4767137, at \*1 (Ariz. Oct. 23, 2017).

<sup>8</sup> *Id.* at \*1.

<sup>9</sup> *Id.* at \*3.

<sup>10</sup> *Id.* at \*2 (citing *Hernandez v. State*, 52 P.3d 765, 767 (Ariz. 2002)).

<sup>11</sup> *Id.* at \*3 (citing *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 630 (6th Cir. 1978)).

management of the case.”<sup>12</sup> The court stated such a showing must be made before a Rule 615 violation occurs in order for the witness to be excepted under Rule 615(c).<sup>13</sup>

- **Providing a Trial Transcript Is Akin To Allowing the Witness to Hear the Testimony.** The court held “[t]he purpose of Rule 615 is ‘to prevent witnesses from ‘tailoring’ their testimony to that of earlier witnesses and to aid in detecting testimony that is less than candid.”<sup>14</sup> The court reasoned Bradford violated this purpose by providing defense counsel’s expert witnesses the transcribed trial testimony of Spring’s experts.<sup>15</sup> The court acknowledged that Rule 615 only expressly denies witnesses from *hearing* the trial testimony of other witnesses if the Rule is invoked, but it held the Rule’s purpose would be frustrated if this backdoor channel were permitted and cited federal case law holding the same.<sup>16</sup>
- **Showing of Prejudice.** The court held there is no presumption of prejudice in the event of a Rule 615 violation.<sup>17</sup> Rather, an “objective likelihood of prejudice” must be demonstrated.<sup>18</sup> The court noted that Bradford’s expert witnesses did not vary their testimonies from their prior reports or depositions and there was a lack of any indication Bradford’s witnesses altered their testimonies after reading the testimonies of Spring’s experts.<sup>19</sup> The court used these facts to conclude the trial court did not err in determining Spring was not prejudiced.<sup>20</sup>

In light of the jury instructions the trial court gave, the opportunity Spring was afforded to show that the defense experts’ testimony was altered or affected by Bradford’s violations of the Rule, and the lack of any demonstrated prejudice, the trial court did not abuse its discretion in denying Spring’s request to strike or preclude their testimony.<sup>21</sup>

The court also noted that a Rule 615 violation involving expert witnesses is less likely to be prejudicial than a Rule 615 violation involving fact witnesses.<sup>22</sup>

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<sup>12</sup> *Id.* at \*7 (quoting *Morvant*, 570 F.2d at 630).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (quoting *United States v. Ell*, 718 F.2d 291, 293 (9th Cir. 1983)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing *United States v. Jimenez*, 780 F.2d 975, 980 (11th Cir. 1986)).

<sup>17</sup> *Id.* at \*4.

<sup>18</sup> *Id.* at \*6.

<sup>19</sup> *Id.* at \*5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*6.

<sup>22</sup> *Id.* at \*5.