IN THE SUPREME COURT

STATE OF ARIZONA

SHEROLD D. ROAF, Plaintiff/Appellee, vs. STEPHEN S. REBUCK CONSULTING, LLC, et. al., Defendants/Appellants.	Arizona Supreme Court Case No.: _____ Court of Appeals Division One No.: 1 CA-CV 22-0620 Maricopa County Superior Court Case No.: CV2019-003654

PETITION FOR REVIEW

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I. INTRODUCTION.

This Court should grant review to address an unresolved legal issue of statewide importance, to provide litigants with clarity and predictability in cases where fault is undisputed, and to avoid the federal courts manufacturing inconsistent state law on an issue that has yet to be decided. This Petition arises out of a 2018 motor vehicle accident and subsequent tort lawsuit filed by Sherold D. Roaf against Francisco J. Celaya Ortiz (Ortiz) and his employer, Medstar Medical Transportation, LLC d/b/a Medstar Medical Transport (Medstar) and a Medstar entity that owned his vehicle, Stephen S. Rebuck Consulting (Rebuck). *Roaf v. Stephen S. Rebuck Consulting, LLC et al.*, 2023 WL 5036929 ¶¶ 1–2 (Ariz. Ct. App. 2023) (mem. dec.) attached hereto as Appendix A. As the litigation progressed, Ortiz and Medstar admitted Ortiz's negligence and that Ortiz was acting within the course and scope of his employment rendering Medstar vicariously liable for Ortiz's negligence. Appx. A ¶ 3. In other words, Defendants accepted 100% fault for the accident occurring, eliminating the need for the jury to apportion fault, and leaving only whether the accident proximately caused the claimed injuries, and the nature and extent of those injuries at issue.

Despite this admission, Roaf wished to continue to assert his claim for direct negligence against Medstar and, as evidence of Medstar's independent negligence, sought to use evidence of Ortiz's driving record and employment history. Appx. A ¶ 3. Medstar sought to preclude this claim, citing a rule espoused in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995). Appx. A ¶¶ 3–5, 8–10.

The *McHaffie* rule precludes a claimant from pursuing direct liability theories against an employer who has already admitted it is vicariously liable for an employee's negligence. *Bogdanski v. Budzik*, 408 P.3d 1156, 1161 (Wyo. 2018) (stating the *McHaffie* rule as "[O]nce an employer admits respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on other theories of imputed liability."). Many other states have adopted the *McHaffie* rule either completely or modified so that it applies only when a claimant is not seeking or is not entitled to punitive damages. *See id.* (listing some states that have applied the rule); *see id.* at 1162 n. 10 (declining to address application of rule in the case of punitive damages claims). "Arizona has neither adopted nor rejected the *McHaffie* rule." Appx. A ¶ 10. Despite this, many other states have adopted the rule such that it is sometimes referred to as the majority

rule. *See*, *e.g.*, *Finkle v. Regency CSP Ventures Ltd. Partnership*, 27 F.Supp.3d 996, 999–1000 (D. S.D. 2014) (examining 'majority' and 'minority' rules regarding precluding direct negligence claims and evidence when vicarious liability has been admitted).

Disturbingly, federal trial courts in Arizona have addressed the issue multiple times and ruled, incorrectly, that Arizona has rejected the *McHaffie* rule and adopted the minority approach. *See*, *e.g.*, *Salazar v. Flores*, 2019 WL 1254661 (D. Ariz. 2019); *Contreras v. Brown*, 2019 WL 1980837 (D. Ariz. 2019); *Ford v. Barnas*, 2018 WL 5312912 (D. Ariz. 2018). This Court should grant review and address this unresolved legal issue of statewide importance in order to provide clarity and predictability to litigants in cases where fault is undisputed, as well as to avoid the federal courts manufacturing inconsistent state law on an issue that has yet to be decided.

II. ISSUES DECIDED AND PRESENTED FOR REVIEW.

A. Whether the Court of Appeals erred by finding no prejudicial error in allowing Roaf to proceed against Medstar on separate claims of negligent hiring and vicarious liability when Medstar admitted it was vicariously liable for its employee's negligence.

B. Whether the Court of Appeals erred by finding that the evidence supported the jury's verdict.

III. ADDITIONAL ISSUES PRESENTED BUT NOT DECIDED.

A. Whether a plaintiff may pursue direct liability claims against an employer in a motor vehicle negligence case when the employer has already admitted vicarious liability in accordance with *McHaffie*, 891 S.W.2d 822.

IV. BACKGROUND.

In January 2018, Ortiz rear-ended Roaf while Ortiz was driving in the course and scope of his employment with Medstar. Appx. A ¶ 2. Roaf sued Ortiz and Medstar in July 2019 alleging that Medstar was vicariously liable for Ortiz's negligence and directly liable for negligently hiring, retaining, or supervising Ortiz. *Id.* Roaf sought between $13 and $17 million dollars in his suit for compensatory damages but did not seek punitive damages. *Id.*

In November 2020, during the course of the litigation, Medstar and Ortiz admitted that Ortiz negligently caused the accident and that Medstar was vicariously liable for Ortiz's negligence. *Id.* at ¶ 3. Medstar and Ortiz moved *in limine* to preclude the negligent hiring and prevent the introduction of evidence associated with that claim. *Id.* Specifically, Medstar and Ortiz sought to exclude Ortiz's employment file and driving record on the basis of the rule outlined in *McHaffie*. *Id.* The motion was denied and Roaf presented his direct negligence claims at trial. *Id.*

Over repeated objections, the vicarious and direct negligent claims went forward and Roaf was allowed to present Ortiz's driving record and employment file at trial. *Id.* at ¶¶ 3–5. Adding to the confusion, the trial court itself initially agreed with the *McHaffie* approach, acknowledging that Arizona has not adopted a position on this rule, but the trial court later changed its mind and adopted a countervailing ruling. At closing, Roaf was permitted to refer once again to Medstar's independent acts in hiring and retaining Ortiz, further exhorting the jury to act as the "conscience of the community," despite Roaf not alleging punitive damages against Medstar and Ortiz. Trial Transcript Day 5, April 18, 2022 p. 37 ln. 6–13 attached as Appx. B. The jury ultimately allocated 60% of fault to Medstar and 40% to Ortiz and awarded Roaf $4,625,000 in damages. Appx. A at ¶ 7. Medstar and Ortiz moved for a new trial, but the motion was denied. *Id.*

The Court of Appeals issued a memorandum decision denying Medstar and Ortiz's appeal. *See generally id.* On appeal, Medstar asked the Court of Appeals to adopt the *McHaffie* rule which would preclude direct liability claims against an employer when the employer admits vicarious liability. *Id.* at ¶ 8. It argued that the evidence only aggravates the verdict. The Court of Appeals noted that "Arizona has neither adopted nor rejected

the *McHaffie* rule." *Id.* at ¶ 10. The Court of Appeals went on to decline to rule on whether the *McHaffie* rule applies in Arizona, finding instead that Medstar and Ortiz had failed to show prejudice. *Id.* The Court did not address the pseudo-punitive damages argument made by Plaintiff's counsel during closing. *Id.*

This Petition follows.

V. REASONS THE PETITION FOR REVIEW SHOULD BE GRANTED.

A. This Court should grant review because the key issues present critical legal questions of statewide importance with no controlling precedent in Arizona that are capable of evading review.

The Court of Appeals erred by failing to find prejudice in permitting Roaf's direct liability claims to go to trial, failing to find prejudice in the introduction of the evidence related to that improper and irrelevant claim, and by failing to tackle the application of the *McHaffie* rule. This Court should find that presenting Roaf's direct negligence claims and the associated evidence and argument *was* a prejudicial error based on the admission of irrelevant evidence and the pseudo-punitive damages argument that evidence fostered. Further, this Court should resolve whether Arizona follows the *McHaffie* rule. Whether claimants are permitted to

pursue direct liability claims in the face of an admission of vicarious liability is a legal question of statewide importance that is unaddressed by any Arizona precedent. It is also an issue that has been addressed by a number of states without a clear majority of states either accepting or rejecting the rule. Thus, there is no indication of how trial courts in Arizona should address such issues which will lead to *ad hoc* rulings, inconsistent application of the law, and a complete lack of certainty for litigants.

B. No Arizona precedent controls on maintaining claims of direct and vicarious liability against an employer when that employer has already admitted vicarious liability.

The Court of Appeals is correct, "Arizona has neither adopted nor rejected the *McHaffie* rule." Appx. A ¶ 10. In 1967, this Court declined to overturn a trial court's refusal to admit evidence of a railroad worker's incompetence when the employer had already admitted vicarious liability. *Lewis v. Southern Pacific Co.*, 102 Ariz. 108 (1967). Subsequently, in *Pruitt v. Pavelin* and *Quinonez v. Anderson*, Division One of the Court of Appeals held that *Lewis* was no longer binding law because the *Lewis* Court had predicated its decision on negligent hiring not being an independent cause of action whatsoever. *See Pruitt v. Pavelin*, 141 Ariz. 195, 201–02 (App. 1984); *Quinonez v. Anderson*, 144 Ariz. 193, 197–98 (App. 1984). *Quinonez* went on to opine

that a negligent hiring theory was necessary in addition to a *respondeat superior* theory when the claimant sought punitive damages against the employer for the purposes of supporting the punitive damages. 144 Ariz. at 197–98. But *Quinonez* did not address the *McHaffie* rule and, if anything, only deepened uncertainty about whether or not this state might adopt the rule. Moreover, though *Quinonez* was dismissive of *Lewis*, the Court of Appeals in *Quinonez* did not, and could not, overrule the Supreme Court's opinion in *Lewis*.

Even though *Quinonez* did not address the issue presented by the *McHaffie* rule, several federal district courts have concluded that *Quinonez* not only addresses the rule but resolves it in favor of the "minority approach" of rejecting *McHaffie*. *See*, *e.g.*, *Salazar*, 2019 WL 1254661 (allowing direct negligence claims after admission of respondeat superior while describing Arizona as following the minority approach). Consequently, not only did the Court of Appeals in *Roaf* correctly note that Arizona has neither rejected nor adopted the *McHaffie* rule, but it is also clear that the District Court in and for the District of Arizona is operating on the assumption that binding precedent exists where it does not. Accordingly, Defendants urge this Court to accept review, address the *McHaffie* rule, and adopt the rule.

C. Whether the *McHaffie* rule applies is an important legal issue of statewide importance.

The *McHaffie* rule addresses whether a plaintiff can pursue direct liability theories against an employer when the employer has admitted vicarious liability. In *McHaffie*, the Missouri Supreme Court adopted a rule that completely barred direct liability claims against an employer that had admitted vicarious liability for an employee's conduct. Subsequent cases in other states adopted similar versions of the rule that made exceptions for cases where a plaintiff sought punitive damages.

Personal injury negligence claims are common in Arizona, as are motor vehicle accidents giving rise to such suits. Similarly, employees often drive within the course and scope of their employment exposing their employer to liability for even routine traffic collisions. But, absent the *McHaffie* rule, a key inequality divides traffic collisions involving individuals in their individual capacity and employees acting within the course and scope of their employment. Without the *McHaffie* rule, a plaintiff may, as here, introduce otherwise inadmissible and prejudicial prior act evidence in the form of driving and employment records for the nominal purpose of proving the employer's liability for the employees acts. In other

circumstances, that evidence is inadmissible. When an employer has already admitted liability, the evidence serves no purpose whatsoever. Despite this, plaintiffs pursuing an additional direct liability claim may introduce otherwise inadmissible evidence to argue that the employer is somehow additionally liable for placing the employee on the road. But there can be no additional liability to apportion when 100% of fault is admitted. Nevertheless, that is what occurred in the case below and what is likely to continue to occur without the *McHaffie* rule. The continued inequity that occurs in the absence of adopting *McHaffie* can prejudice employers of all sizes statewide and expose them to the risk of inflated verdicts and inconsistent legal rules.

Finally, the adoption or rejection of the *McHaffie* rule is of particular importance in Arizona given Arizona's limits on punitive damages and the RAJI's in Arizona. First, as this Court recently reiterated in *Swift Transportation Co. v. Carman*, punitive damages in Arizona "serve two functions: punishment and deterrence." 253 Ariz. 499, 505 ¶ 20 (2022). Thus, to be entitled to punitive damages in a negligence case, a claimant must show a defendant's conduct was "outrageous, oppressive or intolerable" and "create[d] [a] *substantial* risk of tremendous harm." *Id.* at 506 ¶ 24

(citations and quotations omitted) (alterations in original). Without the *McHaffie* rule, claimants are permitted to pursue, as did Roaf below, a "conscience of the community" argument without meeting the threshold required to assert a punitive damages claim in Arizona. This is incompatible with this Court's recent opinion in *Swift Transportation Co*.

Second, Arizona has adopted the Revised Arizona Jury Instructions (RAJI) for use in trial courts. Those instructions include "Instructions for Personal Injury Trials Where Liability Has Been Admitted or Judicially-Determined." RAJI (Civil) PIFI Note 1 (7th Ed.) states:

> In cases where neither liability for the injury-causing event nor comparative fault are at issue, instructing a jury concerning fault and liability-related concepts can confuse or mislead jurors, and waste time. In these "Damages Only Trials," the jury only needs to determine what injuries were caused by the event, and the amount of damages flowing from those injuries. Superior court judges asked the committee to draft instructions for use in "Damages Only Trials." The following recommended instructions are the result of that effort.

These instructions ought to apply when a defendant has admitted liability and fault but, in cases such as the one below, an employer's admission of fault makes no difference to the admission of additional evidence regarding the employer's conduct. This fallacy of apportionment

under the statute in these circumstances, in turn, renders both the instruction and entire idea of an employer admitting vicarious liability an exercise in futility. Clarity on the *McHaffie* rule is a matter of statewide importance that impacts a large number of cases and legal issues in Arizona. Moreover, without a decision, federal courts will continue to decide Arizona law on their own and important principles of Arizona law will be undermined. Thus, this Court should resolve Arizona's adoption or rejection of the *McHaffie* rule as a matter of statewide importance.

D. Without a ruling, litigants and courts will be left to guess at what evidence is and isn't available in tort lawsuits against employees and their employers.

With no controlling ruling in Arizona, trial courts may be faced with recurrent motions to preclude direct liability claims when vicarious liability has been admitted. Moreover, Arizona's trial courts will have to resolve those motions by looking to other states because the rule has not been addressed in Arizona. The record in this case, for example, showed the superior court itself went back and forth between the two approaches. Many states have expressly adopted some form of the *McHaffie* rule. *See Bogdanski*, 408 P.3d at 1161 (rule has been applied by California, Missouri, Arkansas, Idaho, and Colorado Supreme Courts; also applied by intermediate

appellate courts in Florida, Illinois,[1] Texas, and New York). A number of other states have expressly rejected the *McHaffie* rule. *See McQueen v. Green*, 202 N.E.3d 268, 278–79 ¶ 41 (Il. 2022) (noting that caselaw seems to be "evenly divided" between adopting and rejecting *McHaffie*; the Illinois Supreme Court ultimately rejected *McHaffie* in *McQueen*). In at least one case, a state court adopted the rule only to have that state's legislature abolish the rule by statute. *See Ferrer v. Okbamicael*, 390 P.3d 836 (Co. 2017) (adopting the *McHaffie* rule); *but see Brown v. Long Romero*, 495 P.3d 955, 957 ¶ 4 n. 2 (Co. 2021) (noting *Ferrer* had been abrogated by the legislature). This split between states will only exacerbate Arizona's silence on the *McHaffie* rule by leaving trial courts to pick between dueling state opinions while facing already full calendars. Thus, this Court should address address—and adopt—the *McHaffie* rule.

V. CONCLUSION.

The Court of Appeals erred by finding no prejudice to Defendants. The decision failed to account for the prejudicial effects of Roaf introducing confusing and redundant claims, introducing irrelevant evidence, and using

[1] The Illinois Supreme Court would later reject the *McHaffie* rule in *McQueen v. Green*, 202 N.E.3d 268 (Il. 2022).

all of this to argue that the jury should act to punish Medstar in a case where no punitive damages were claimed or permissible. Defendants urge this Court to accept review, address and adopt the *McHaffie* rule, and reverse.

RESPECTFULLY SUBMITTED this 6th day of September, 2023.

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