

ARIZONA SUPREME COURT

SHEROLD D. ROAF,

Plaintiff/Appellee,

vs.

STEPHEN S. REBUCK CONSULTING,
LLC, et. al,

Defendants/Appellants.

No. CV-23-0233-PR

Court of Appeals, Division One
1 CA-CV 22-0620

Maricopa County Superior Court
Case No.: CV2019-003654

**AMICUS CURIAE BRIEF OF ARIZONA MUNICIPAL RISK
RETENTION POOL**

Kristin M. Mackin, Bar #023985

William J. Sims III, Bar #010458

SIMS MACKIN, LTD.

2100 North Central Avenue, Suite 220

Phoenix, Arizona 85004

(602) 772-5500

kmackin@simsmackin.com

Attorneys for Arizona Municipal Risk Retention Pool

INTEREST OF AMICUS CURIAE

This brief is submitted by the Arizona Municipal Risk Retention Pool (“the Pool”). The Pool is a self-insurance and risk-management pool, owned and operated by the 77 cities and towns plus the League of Arizona Cities & Towns. This case raises issues of statewide importance to all employers and especially to municipal employers such as the Pool’s members.

The Pool and its members have a significant practical and financial interest in the admissibility of unduly prejudicial evidence of fault where the employer has admitted it is the sole responsible party – both direct and vicarious liability -- for the plaintiff-s damages. In such cases where the fault is uncontested and the sole issue for a jury is the extent of a plaintiff’s damages, the admission of superfluous evidence relevant to the uncontested issue of fault is prejudicial to employers and must be excluded. Admitting such evidence provides a plaintiff with a mechanism to argue for an increased or aggravated damage award in cases where punitive damages are not available, such as is the case with municipalities. *See* A.R.S. § 12-820.04. The Court of Appeals’ Decision, *Roaf v. Stephen S. Rebeck Consulting, LLC et al.*, 2023 WL 5036929 (Ariz. Ct. App. 2023) (mem. dec.) (the “Decision”), erodes at the protection for municipalities from punitive and exemplary damages and will have real and long-lasting impacts upon the Municipal Pool and each of its members.

I. The Decision sets a harmful precedent for employers.

The Decision summarily concludes the employer, Medstar Medical Transportation LLC (“Medstar”) failed to show it was prejudiced by the admission of its negligent employee’s driving records and criminal history *because* Medstar admitted responsibility for all of plaintiff’s damages. (Decision ¶ 10.) The Decision further concludes that any error is simple harmless because a jury is presumed to follow instructions. In doing so, the Decision presumes that potentially highly prejudicial and inflammatory evidence on an undisputedly uncontested issue will have no impact on the amount of damages a jury awards a plaintiff. As a result, the Decision affirms a pathway for a plaintiff to present evidence of fault to garner sympathy and sway a jury into awarding higher or aggravated damages where punitive damages are not requested or as in the case of the Pool’s members, even available.

The Decision recognized that the evidence, admitted over the employer’s objections, was relevant *only* to an uncontested issue and has no probative value to the issue of damages. Under the balancing test of ARE 403, the evidence had no probative value and its admission was clearly outweighed by the unfair prejudice and likely confusion to the jury caused by the admission of such evidence that should not have been taken into account in any way in determining plaintiff’s damages. The only reason for a plaintiff to introduce the evidence in this case

where liability and fault were uncontested would be to benefit from the potential prejudicial impact on the jury to cause the jury in determining plaintiff's damages.

Although a jury may be presumed to follow instructions, the Decision fails consider the effect of the admission of potentially unduly prejudicial evidence on the jury's evaluation and weight given to the evidence in considering the damages to award. The jury awarded a significantly higher percentage of fault to the employer rather than the driver-employee. The jury knew the employer would be ultimately responsible for all of the damages, but by allocating a higher percentage of fault to the employer, it conveyed an intention to punish the employer.

It is not reasonable to assume that the jury would have reached the same conclusion had it not been presented with the prejudicial evidence that that had no bearing on the contested issue of damages. Courts to have considered similar evidence have recognized its highly prejudicial nature. *See TT of Indian River, Inc. v. Fortson*, 232 So. 3d 19, 20 (Fla. Dist. Ct. App. 2017) ("When a defendant admits the entire responsibility for an accident and only the amount of damages is at issue, evidence regarding liability is irrelevant and prejudicial."); *Diaz v. Carcamo*, 51 Cal. 4th 1148, 1161, 253 P.3d 535, 545 (2011) (recognizing prejudice to employer when court admitted evidence of negligent employee's driving record after an employer has admitted responsibility for employee's negligence); *Werner Enterprises, Inc. v. Blake*, 672 S.W.3d 554, 633 (Tex. App. 2023) (dissent)

(recognizing “evidence necessary to prove derivative theories is likely to be unfairly prejudicial to the employee”); *c.f. Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App. 1990) (recognizing prejudicial nature of employee’s criminal history, which had minimal relevance to negligent assignment claim and no relevance employee’s negligence).

Outside of a case involving punitive damages, the introduction of evidence on uncontested issues of fault that have no bearing on the only contested issue – the measure of damage – will *only* serve to prejudice the employer and increase the jury award. The Decision affirms that a plaintiff may introduce irrelevant and prejudicial evidence of fault in a damage-only case where punitive damages are not at issue, providing a mechanism for a plaintiff to obtain an increased damage award without satisfying the burden for punitive damages.

This is particularly troublesome for Arizona municipalities, such as the Pool’s members, because punitive damages are statutorily barred. Ariz. Rev. Stat. Sec. 12-820.04 provides that “[n]either a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages.” There is no purpose for the introduction of the inflammatory and prejudicial evidence admitted in this case other than to aggravate damages or as an end run around the statutory prohibition against recovery of punitive and exemplary damages against a municipality and its employees acting within the

scope of their employment.

Excluding evidence relevant only to an uncontested issue of fault where it is undisputed that there is only one responsible defendant is not inconsistent with Arizona's Uniform Contribution Among Tortfeasors Act ("UCATA"), A.R.S. §§ 12-2501 to -2509. The purpose of UCATA is to allocate "responsibility among all parties who caused the injury, whether or not they are present in the action."

Piner v. Superior Court In & For Cnty. of Maricopa, 192 Ariz. 182, 188, ¶ 22, 962 P.2d 909, 915 (1998). In *Piner*, this Court recognized UCATA was intended to cure the "'deep pocket' problem of a defendant only minimally at fault yet liable for the full amount of damages." *Id.* However, where it is undisputed that a defendant does not contest its liability, apportioning fault under UCATA is pointless.

Where an employer admits full responsibility for an accident and punitive damages are not asserted, UCATA should not be used by plaintiffs to introduce evidence with no probative value to the issue of damages under the guise of having to apportion fault. Although the Response argues apportionment of fault is required between the defendants despite the employer's admission of negligence – both direct and under vicarious liability – at the same time it concedes that fault need not have been apportioned to Plaintiff because the parties' agreed the plaintiff was not at fault. UCATA does not simply apply to fault of defendants, by any

tortfeasor, including a plaintiff and non-party. If Plaintiff agrees fault does not need to be apportioned to plaintiff if all parties agree that Plaintiff was not at fault, it is unclear why the same would not apply when defendants agree apportionment is unnecessary because there is only one responsible defendant. Under these circumstances, any additional evidence only confuses the jury as to what evidence is relevant at which stage, and creates significant potential for the jury to take into consideration irrelevant evidence of fault and increase damages. It also wastes judicial resources; if an employer admits it is solely responsible for the negligence of it and its employee, it is an unnecessary exercise to require a jury to hear evidence only to allocate percentages of fault. The damages-only trial should be limited only to evidence relevant to damages. As the Decision noted here, the driving record and criminal history were irrelevant to damages, and yet, it was admitted and its admission found to be merely harmless error.

The cases cited in the Response to the Petition for Review concerning comparative fault do not address the prejudicial effect of admitting evidence of fault in a damages-only trial when fault is uncontested. In *McQueen v. Green*, 202 N.E.3d 268 (Ill. 2022), both the employer's direct negligence and employee's negligence, as well as punitive damages, was tried to a jury and therefore, evidence of the employer's direct negligence was relevant to contested issues. Notably, however, the jury in *McQueen* had found that an employee was not negligent, but

that the employer, who had admitted vicarious liability, was liable under theories of negligent training, supervision, or entrustment. *Id.* at 279, ¶¶ 44-45. The *McQueen* court held the direct negligence claims against the employer were not barred by the jury’s verdict that the employee was not negligent. *Id.* In Arizona, an “employee must have committed a tort” before an employer can be liable for negligent hiring. *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App. 1990); *Kuehn v. Stanley*, 208 Ariz. 124, 130, ¶ 1, 91 P.3d 346, 352 (App. 2004).

The other cases cited in the Response do not address what can be presented to a jury when an employer admits fault on behalf of itself and its employee. In *Ramon v Nebo School District*, 493 P3d 613, 618, ¶ 17 (UT 2021), evidence of the employer’s direct liability was admissible where the employer denied its employee was negligent. The court did not, however, rule on an the issue of the admissibility of the employee’s driving record, reserving the decision for the trial court. *Id.* at 619, at ¶ 23. In both *Lorio v Cartwright*, 768 F. Supp. 658, 660 (N.D. Ill. 1991) and *Wright v Watkins*, 972 F. Supp. 2d 1218, 1220 (D. Nev. 2013), negligence of the employer and employee was still at issue at the time of the motion to dismiss and summary judgment motions, respectively. The Response’s citation from the dissent of the en banc opinion *Werner Enterprises* is interesting in that the dissent presents a detailed and compelling argument for adoption of the

McHaffie/Admissions Rule, as the Petition argues this Court should adopt here. 672 S.W.3d. at 633-35 (that a plaintiff may assert multiple theories of liability “does not mean that a plaintiff should be permitted to introduce evidence supporting those multiple theories where such evidence would serve only to establish that which is already undisputed: that the employer is liable for the damages attributable to the employee's negligence”).

Here, the employer admitted negligence – both its negligence and its employee’s negligence – and admitted that it was the only responsible party. There was no allegation of any non-party at fault and the parties apparently agreed the plaintiff was not liable for any contributing fault. This case does not raise an issue of preventing a plaintiff from presenting alternative theories of liability. The issue is whether it is harmless error for a plaintiff to introduce evidence that is relevant only to an uncontested issue of fault, with no relevance to damages, over a defendant’s objections that the evidence is highly prejudicial. The *only* benefit to a plaintiff of the admission of such evidence is to elicit sympathy from the jury and increase the damage award. The Decision’s summary conclusion that the admission of such evidence is merely harmless error disregards the absence of any probative value of the evidence, the prejudicial nature of the evidence and confusion to the jury by its presentation, and presents an avenue for a plaintiff to present aggregating evidence of damages in cases where such damages are not

sought or allowed, such as under A.R.S. § 12-820.04.

II. Conclusion

The Pool respectfully requests this Court accept review of the Petition to address and minimize the repercussions of the Decision on all Arizona employers.

Respectfully submitted this 24th day of October 2023.

SIMS MACKIN, LTD.

/s/ Kristin Mackin _____

Kristin M. Mackin
William J. Sims III
Attorneys for Arizona Municipal Risk Retention Pool