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SUPREME COURT
STATE OF ARIZONA

SHEROLD D. ROAF, Plaintiff/Appellee, v. STEPHEN S. REBUCK CONSULTING, LLC, et al., Defendants/Appellants.	**Case No. CV-23-0233-PR** Arizona Court of Appeals Case No. 1 CA-CV 22-0620 Maricopa County Superior Court Case No. CV 2019-0620 (Hon. Timothy J. Thomason)

RESPONSE TO AMICUS CURIAE BRIEF OF ARIZONA MUNICIPAL RISK RETENTION POOL

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Legal Argument

1. The issues related to liability are not the same as the issues related to damages.

Amicus Curiae Arizona Municipal Risk Retention Pool first argues that the Court of Appeals had "summarily" concluded Medstar Medical Transportation LLC ("Medstar") had failed to show that it was prejudiced by the admission of the driving records and criminal history of Francisco Celaya Ortiz ("Ortiz"). That is an inaccurate characterization of the Court of Appeals' analysis, which was not in any way "summary," but reflected a careful consideration of the facts and the law.

According to Amicus Curiae, there was no need for the jury to assess any sort of percentage of fault on the part of Medstar because Medstar had admitted responsibility for all of the damages that Sherold D. Roaf ("Roaf") suffered when Ortiz crashed a Medstar company vehicle into Roaf's car during the course and scope of his employment with Medstar. *AC Brief* at 3. That is also not an accurate characterization of the situation.

After all, the Court of Appeals had correctly explained that:

> Defendants have not shown that any alleged error prejudiced them. Medstar assumed liability for 100% of Roaf's damages resulting from the accident, irrespective of its direct liability for negligently hiring Ortiz. Thus, if the jury awarded Roaf any damages, Medstar was going to pay 100% of them.

Mem. Dec. ¶ 10.

There was no prejudice to Medstar because the amount of the damages was a

separate issue from liability. That is, the actual amount of the damages would be the same whether the jury decided that:

(1) Medstar was vicariously liable for employee Ortiz's negligent driving—which Medstar had admitted (*Mem. Dec.* ¶ 4); or

(2) Medstar was directly liable for negligently hiring Roaf—which Medstar had also admitted. *Mem. Dec.* ¶¶ 5-6.

Medstar's liability admissions have nothing to do with the amount of any damages. Indeed, Medstar itself told the jury that Medstar's own statements had taken care of "the liability phase" of the trial and that the jury should thus focus on calculating Roaf's damages. *Mem. Dec.* ¶ 4. The trial jury presumably did that, in accordance with the trial court's instruction that, if the jury found that Medstar was liable to Roaf, the jury then had to "decide the full amount of money that will reasonably and fairly compensate Roaf." ("Measure of Damages," IR-337).

"The jury system," after all, "is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions. Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions." *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009). *See also State v. Morris*, 215 Ariz. 324, 337 ¶ 55 (2007) ("Jurors are presumed to follow the judge's instructions."); *State v. LeBlanc*, 186

Ariz. 437, 439 (1996) (Court notes that "experience teaches us that [jurors] possess both common sense and a strong desire to properly perform their duties.").

The trial court made it clear to the jury that the jury *first* had to decide liability and *then* had to decide the proper amount of damages. ("Measure of Damages," IR-337). The trial-court-provided roadmap was liability first and damages second.

Amicus Curiae conflates the order of two distinct functions—the jury first finds duty, breach of duty, and causation; it then apportions "fault." *See Cramer v. Starr*, 240 Ariz. 4, 7 ¶ 12 (2016) ("UCATA is thus based on the concept of fault, which necessarily presupposes a duty, breach of duty, and causation.") (citing *Watts v. Medicis Pharmaceutical Corp.*, 239 Ariz. 19, 24 ¶ 22 (2016)).

The trial court properly instructed the jury that the party with the burden of proof had to persuade the jury that its claim was more probably true than not, that the evidence favoring that party outweighed the opposing evidence, and that in deciding whether a party had met that burden, the jury had to consider all of the evidence that bears on that claim. ("Burden of Proof," IR-337).

Jurors are presumed to follow each relevant instruction that trial courts give them. *State v. Newell*, 212 Ariz. 389, 403 ¶ 68 (2006). As a result, "absent some evidence to the contrary," Arizona courts "presume that the jury read and followed the relevant instruction." *State v. Ramirez*, 178 Ariz. 116, 127 (1994). Notably,

neither Medstar nor Amicus Curiae has identified evidence that the jury ignored the trial court's instructions to decide liability first and then to decide damages, with the burden of proof being on Roaf to prove the damages.

Amicus Curiae argues that the memorandum decision supposedly 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." *AC Brief* at 3. Amicus Curiae also contends the memorandum decision "affirms a pathway for a plaintiff to garner sympathy and sway a jury into awarding higher or aggravated damages where punitive damages are not requested or . . . even available." *AC Brief* at 3.

But there is nothing highly prejudicial or inflammatory, or likely to garner sympathy or sway a jury, in presenting evidence and argument that Medstar had negligently hired a bad driver. That was simply what Medstar did. In doing that, Medstar bears some of the responsibility for that bad driver's bad driving.

2. In our pure comparative-fault system, the jury properly did its job.

Amicus Curiae also argues that evidence concerning direct liability arising from negligent hiring "has no probative value to the issue of damages." *AC Brief* at 3. That is incorrect. Arizona is a pure comparative-fault state that has adopted a system requiring the trier of fact to assess percentages of fault among all named parties and properly designated nonparties at fault who may have caused or

contributed to causing personal injury or wrongful death. A.R.S. § 12-2508(B).

Under Arizona's comparative-fault scheme, "the trier of fact consider[s] the fault of all persons who contributed to the harm," and each person is responsible "for only his or her percentage of fault and no more." *Natseway v. City of Tempe*, 184 Ariz. 374, 376 (App. 1995). *See also* A.R.S. § 12-2506(C) (The trier of fact determines "relative degree of fault" of claimant, defendants, and nonparties.). Thus, negligence by a plaintiff will not bar an action for damages but will reduce those damages in proportion to the degree of the plaintiff's fault. This scheme is part of our constitutional framework under Ariz. Const. art. 18, § 5, which provides that: "The defense of contributory negligence . . . shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

To accomplish its job of assessing percentages of fault, the jury must be able to consider all evidence of fault committed by any party or properly designated nonparty at fault. That is all that the jury did in this case.

Of course, the jury did not have to assess any percentage of fault to Roaf, since the parties agreed that he had not been at fault in any way. In addition, there was no properly designated nonparty that could be at fault. So, the jury simply had to assess percentages of fault among the named defendants, Ortiz and Medstar. The jury did that, assessing 40% of the fault to Ortiz and 60% of the fault to Medstar. (IR-336).

Ultimately, since Medstar admitted it was vicariously liable for Ortiz's conduct as its driver, Medstar would pay all of the damages. But the issue for the jury was not who would foot the bill, whether it was Medstar, or its insurance company, or someone else. Instead, the issue for the jury was who was at fault for causing Roaf's damages, and what the percentages of fault might actually be.

But, contends Amicus Curiae, the jury "awarded a significantly higher percentage of fault to the employer rather than to the employee-driver." *AC Brief* at 4. First, 60% to the employer does not seem significantly higher than 40% to the employee. But in any event, assessment of percentages of fault rests in the trier of fact's sole discretion. The Arizona Legislature "defined fault broadly to include all types of fault committed by all persons." *Thomas v. First Interstate Bank of Arizona, N.A.*, 187 Ariz. 488, 489 (App. 1996). It was up to the jury to sort through the evidence and to consider all types of fault (direct or vicarious) committed by "all persons"—including by Medstar.

As for how the jury assessed percentages of fault, perhaps the jurors found the negligent hiring of a bad driver more reprehensible than the bad driving itself. Whatever the reason, there is no justification for trying to prognosticate about or psychologically dissect into the jury's mental processes. *See* Ariz. R. Evid. 606(b)(1) ("During an inquiry into the validity of a verdict in a civil case, a juror may not testify about any statement made or incident that occurred during the

jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."). At best, that is a futile exercise in speculation. At worst, it is an invasion of the jury's uniquely confidential and protected decision-making process.

Amicus Curiae argues the jury supposedly "conveyed an intention to punish the employer" by allocating a higher percentage of fault to Medstar than it had allocated to Ortiz. *AC Brief* at 4. That argument is pure guesswork unsupported by any facts. In the present case, there is no way Amicus Curiae or anyone else can know what the intention of the jury was or might have been.

As members of the legal profession, we are all aware that jurors "bring expectations and preconceptions with them to the jury box, actively search for causal explanations to make sense of the events described, and consciously or unconsciously process information so as to fill in missing blanks or interpret ambiguities in testimony in ways that may strongly influence their decisions." Shari Seidman Diamond and Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1860 (2001). No one can predict what juries will do before the verdict or know what their intention was once the verdict is announced.

Amicus Curiae cited several cases for the proposition that evidence on liability is supposedly irrelevant and prejudicial when a defendant has admitted liability. *AC Brief* at 4-5. But that misapprehends the steps in jury decision-making.

The jury first decides who is liable and then decides the damages that should be assessed against that party (or properly designated nonparty at fault).

Amicus Curiae claims the only contested issue is the measure of damages when defendants admit liability. *AC Brief* at 5. Amicus Curiae further insists that the only reason to introduce evidence concerning fault is to inflame and prejudice the jury. *AC Brief* at 5-6. But in Arizona, the trier of fact has a statutorily imposed duty to assess percentages of fault among all named parties and among all properly designated nonparties at fault. A.R.S. § 12-2506(B).

In order to make the needed assessment-of-percentage-of-fault bricks out of the evidentiary straw presented to the jurors, they must consider all the facts relevant to the fault of all named parties and properly designated nonparties at fault.[1] Amicus Curiae claims that, "where it is undisputed that a defendant does not contest its liability, apportioning fault under [the Uniform Contribution Among Tortfeasors Act] is pointless." *AC Brief* at 6. But the Arizona Legislature has decided that apportioning fault is not "pointless." Apportioning fault is, in fact, UCATA's main "point."

After all, under the Arizona comparative-fault system, a defendant is liable "only for the amount of damages allocated to that defendant in direct proportion to

[1] "Then the officers of the children of Israel came and cried unto Pharaoh, saying, Wherefore dealest thou thus with thy servants? There is no straw given unto thy servants, and they say to us, Make brick: and, behold, thy servants are beaten; but the fault is in thine own people." *Exodus* 5:15-16 (King James).

that defendant's percentage of fault." A.R.S. § 12-2506(A). When "assessing the 'percentage of fault' of each defendant, the fact-finder must assess the fault of any nonparties who have been timely and properly designated and who contributed to the injuries or damages." *Zuern by and through Zuern v. Ford Motor Co.*, 188 Ariz. 486, 490 (App. 1996). The fact-finder must consider the fault of all persons who contributed to the injuries or damages "regardless of whether the person was, or could have been, named as a party to the suit." A.R.S. § 12-2506(A).

Significantly, A.R.S. § 12-2506(B) only requires a jury "to consider the fault of all persons who contributed to the alleged injury"—not to apportion fault to any one particular person. Under the Arizona pure-comparative-fault system, "the jury is the sole arbiter of fact and law as to the defenses of contributory and comparative negligence." *Gunnell v. Arizona Public Serv. Co.*, 202 Ariz. 388, 394 ¶ 23 (2002).

The purpose of UCATA, and of A.R.S. § 12-2506, is to create "a system of several liability making each tortfeasor responsible for paying for his or her percentage of fault *and no more*." *Dietz v. General Elec. Co.*, 169 Ariz. 505, 510 (1991) (emphasis in original). The jury's fault assessment and the trial court's instructions to it, were proper and conformed with the spirit, purpose, and letter of Arizona substantive and procedural law.

Amicus Curiae also argues that the jury's fault assessment and the trial

court's instructions were improper and unnecessary because there supposedly is "only one responsible defendant" and that UCATA does not apply when the plaintiff is admittedly not at fault.

Amicus Curiae argues that UCATA can only apply where there is a plaintiff that is potentially at fault. *AC Brief* at 6-7. But the comparative-fault system requires the jury to assess the fault of *all* named parties. Indeed, the Arizona Legislature enacted A.R.S. § 12-2506 "to allow the trier of fact . . . to apportion fault among *all* tortfeasors based on the facts presented at trial." *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 433 (App. 1996) (emphasis added).

Since there was a stipulation that Roaf was not at fault, and there were no nonparties at fault, that left the two named defendants (Ortiz and Medstar) as the named parties against whom the trier of fact had the duty to assess percentages of fault. Indeed, under A.R.S. § 12-2506(C), "the relative degrees of fault of all defendants" and properly designated nonparties at fault, shall be determined and apportioned as a whole at one time by the trier of fact."

The trial court therefore has the duty to ensure that the trier of fact determined and apportioned "as a whole at one time" the relative degrees of fault of the two defendants. That is what the trial court did in the present case. Amicus Curiae cannot rewrite the mandatory requirements of the statutory comparative-fault scheme to suit its viewpoint. The trial court complied with the statutory rules;

the trier of fact complied with them; the trial was fair for all concerned. Indeed, A.R.S. § 12-2506(F)(2)'s "broad definition of fault" *required* the trier of fact "to compare fault among all tortfeasors." *State Farm Ins. Co. v. Premier Manufactured Systems, Inc.*, 217 Ariz. 222, 228 ¶ 30 (2007). Thus, the jury had the duty to compare the fault of employer Medstar with the fault of employee Ortiz. That is what the jury evidently did.

Amicus Curiae claims the parties had agreed that apportionment of fault was not needed because there was supposedly "only one responsible defendant." *AC Brief* at 6-7. The record reflects no such agreement. Amicus Curiae is confusing the willingness on the part of the employer to be found vicariously liable with the mandatory apportionment of percentages of fault among all defendants that UCATA requires.

Amicus Curiae also describes the trial as a "damages-only trial." *AC Brief* at 7. The description is incomplete because it overlooks the jury's duty to assess and apportion the damages based on the percentages of fault of the named parties. A.R.S. §§ 12-2506(B)&(C). *See also Piner v. Superior Court*, 192 Ariz. 182, 187-89, ¶¶ 20-25, 30 (1998) (A.R.S. § 12-2506(B) does not "require limiting liability by apportioning damages but by apportioning fault.").

Amicus Curiae claims there is supposedly some sort of "prejudicial effect [in] admitting evidence of fault in a damages-only trial when fault is uncontested."

AC Brief at 7. But with two named defendants, the trial court and the trial jury had no choice. The trial court had a duty to instruct the jury that it was to assess percentages of fault among the named defendants. A.R.S. §§ 12-2506(B)&(C). The trial court complied with that duty. And the trial jury then had a duty to follow that instruction—which the jury did.

Before the defense lawyer made his closing argument to the jury, the trial court instructed the jury on fault:

> Allocation of fault. You will be asked in the verdict form to allocate fault between Mr. Ortiz's fault in connection with the accident and Medstar Medical Transportation LLC's fault in connection with the negligent hiring, supervision, or retention of claims. We'll go over that in the verdict form, but the percentages must add up to 100 percent.

TrialTranscript-Day05 at 29:24 to 30:5 (April 18, 2022).

The trial court provided additional instruction on fault-related matters when discussing the verdict form:

> There's basically two components of the verdict form.
>
> We the jury, duly-impaneled and sworn, in the above-entitled action upon our oaths do find Plaintiff's full damages to be. And you will fill that in.
>
> And then the second component is that allocation of fault:
>
> We the jury, duly-impaneled and sworn, in the above-entitled action upon our oaths do hereby allocate fault as follows. And then you allocate fault between Mr. Ortiz's fault in connection with the accident itself, and medical -- Medstar Medical Transportation LLC's fault in connection in the negligent hiring, supervision, or retention of

Mr. Ortiz.

TrialTranscript-Day05 at 32:21 to 33:9 (April 18, 2022).

Amicus Curiae argues Medstar "admitted negligence—both its negligence and its employee's negligence." *AC Brief* at 9. It is true that, in closing argument to the jury, without telling the jury whether he was making an admission for Medstar, or for Ortiz, or for both, their attorney stated: "We admit fault, we admit complete responsibility. All right." *TrialTranscript-Day05* at 95:14-14 (April 18, 2022).

By using the word "we," the defense lawyer admitted that both the employer *and* the employee were at fault and responsible. But what the defense lawyer failed to do was to stipulate or state what percentage of fault was to be assessed to the employer and what percentage of fault was to be assessed to the employee. Under A.R.S. §§ 12-2506(B)&(C), in accordance with the trial court's instructions, the jury would have understood it was to allocate percentages of fault between Ortiz's fault for driving negligently and Medstar's fault for negligently hiring, supervising, and/or retaining Ortiz. *TrialTranscript-Day05* at 29:24 to 30:5; 32:21 to 33:9 (April 18, 2022).

Conclusion

There is no support in the trial-court record for Amicus Curiae's contention that the jury improperly allocated percentages of fault to the employer and to the employee. The trial court properly instructed the jury; the jury properly followed

those instructions. In this intensely fact-specific case, which lacks any novel (or even mundane) issues of statewide importance, there is no reason to grant the petition for review.

DATED this 13th day of November, 2023.

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