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.: CV-23-0233-PR Court of Appeals Division One No.: 1 CA-CV 22-0620 Maricopa County Superior Court Case No.: CV2019-003654

APPELLANTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Tort law is about compensating losses. It is not about punishment. But that is exactly what this case was allowed to become. In the event of a negligence claim, a plaintiff must prove the existence of a duty, the breach of that duty, a causal link between the breach and the claimed harms, and the nature of those harms, i.e. damages. The extent of a defendant's moral culpability—the wrongfulness of their actions—does not enter into this equation. As a result, blaming the defendant is not part of a negligence claim nor is a particular defendant's prior conduct. Thus, when liability is admitted, the only questions that remain are whether the incident led to the claimed injuries and the amount of compensation required for those injuries.

When a plaintiff is allowed to call upon the jury to punish a defendant, that plaintiff is exceeding the goals of a simple negligence claim to the prejudice of the defendant. Here, Sherold D. Roaf (plaintiff) and Francisco J. Celaya Ortiz (defendant) were involved in a motor vehicle accident. Had that been the end of things, Roaf would have won a judgment in his favor, collected on Ortiz's personal insurance policy (if any), and perhaps recorded a deficiency judgment against Ortiz. But that isn't what happened. Ortiz happened to be working for an employer when he was involved in the motor

vehicle accident. As a result, Roaf was in a position to sue both Ortiz and his employer, Medstar Medical Transportation, LLC. Roaf sued for negligence related to the collision and also asserted theories of negligent hiring, negligent supervision, and vicarious liability. Medstar and Ortiz eventually admitted Ortiz was at fault for the accident and that Medstar was vicariously liable for its employee's negligence. Roaf never formally asserted a claim for punitive damages.

After protracted litigation, the matter proceeded to trial and Roaf was permitted to maintain his negligent hiring and supervision theories against Medstar even though, as a matter of law, those claims could not possibly alter the verdict. Medstar was already entirely liable for its employee's negligence. Medstar could not be extra liable nor could any of Ortiz's or Medstar's actions before the collision have increased Roaf's compensable damages from the collision. Despite all of this, Roaf was able to introduce evidence of Ortiz's driving record. Far worse, Roaf used that driving record to create a consistent narrative throughout the trial calling on the jury to punish Medstar. If Roaf wanted to pursue punitive damages, he could have sought those through legal process. He did not; likely because Arizona and this Court have strictly limited punitive damages. Civil law does not exist to

punish, but that's exactly what Roaf called on the jury to do—and the jury answered that call. That is the crux of the prejudice in this case and exactly why Arizona must adopt the *McHaffie* rule.

II. BACKGROUND

A factual overview of this matter is well summarized in Appellants' Petition for Review and the decision of the Arizona Court of Appeals. *Roaf v. Stephen S. Rebuck Consulting, LLC et al.*, 2023 WL 5036929. The prejudice to Medstar, however, is best illustrated by the trial record. During the trial, even though liability was no longer an issue whatsoever, Roaf was allowed to introduce evidence and push a narrative designed to convince the jury to punish Medstar. Worse still, Roaf was able to do so outside the legal framework for punitive damages. Had Roaf requested punitive damages in his pleadings, the claim would almost certainly have been defeated on summary judgment under this Court's standards set forth in *Swift Transportation Co. v. Carman*. Even if it had survived to trial, the jury would have received instructions on the role of punitive damages. They did not. Instead, they received a steady narrative that Medstar was a bad actor and needed to be punished.

On day one of the trial, during his opening statement, Roaf's counsel informed the jury, "There is this one question we intend to show that Mr. Ortiz shouldn't have been hired in the first place, and there's a claim for negligent hiring based on some prior traffic violations, prior unsafe driving that we would ask you consider at the conclusion of this case." [Tr. 4/11/2022, 170:3–7] Next, Roaf's counsel called his first witness—Ortiz—and almost immediately introduced Ortiz's employment file and driving record, ostensibly to prove up the redundant negligent hiring claim. [Tr. 4/11/2022, 240:4–5; 245–246] In fact, Roaf's attorney questioned Ortiz about prior driving citations in 2006, 2012, 2013, 2015, and 2016. [Tr. 4/11/2022, 247–250] Roaf's counsel called particular attention to citations in 2012 and 2016 for speeding and drew parallels for the jury between those prior citations and the collision that gave rise to this litigation. [Tr. 4/11/2022, 247–249]

On day two of the trial, Roaf's counsel continued to question Ortiz about his irrelevant and inflammatory driving record. [Tr. 4/12/2022, 7] Roaf's counsel went on to re-review Ortiz's driving record and moving violations, taking him through a pair of August 28, 2015 citations for speeding and driving without insurance, a February 29, 2016 citation for

speeding, and finally a 2013 citation for speeding. [Tr. 4/12/2022, 9–12] Roaf's counsel then highlighted for the jury that the 2018 crash led to Ortiz being cited for speeding, asking, "So the same danger that you exhibit in your driving history when you gave to the Defendant of not following reasonable or prudent speeds was the same danger that led to this crash; correct, sir?" [Tr. 4/12/2022, 12:23–13:1]

Later, on day five of the trial, Roaf's counsel used his closing to invite the jury to punish Medstar and bludgeoned the jurors with the irrelevant and inflammatory information introduced solely as a result of the unnecessary and legally improper negligent hiring claims. Roaf's counsel, after reiterating that Ortiz should not have been hired and that his driving record proved as much, argued, "So this all matters because it's important to my client and it's important to the community that, when a company does wrong, when a company puts people out on the roadway without the appropriate training, without the appropriate supervision . . ." [Tr. 4/18/2022, 36:10–14] At that point, Medstar's counsel objected but was overruled. [Tr. 4/18/2022, 36:15–17] Roaf's counsel went on to explain that the jury needed to apportion a separate percentage of fault to Medstar, that that percentage was up to the jury, and that, in determining that percentage,

the jury needed to take into account that "a wrong has been done here . . . ." [Tr. 4/18/2022, 37:11]

Finally, Roaf's counsel delivered his coup de grace: "as jurors," he explained, "you're acting as the conscience of the community. And with your verdict you get to say …" [Tr. 4/18/2022, 37:11–13] Medstar's counsel again objected and, though the trial court instructed Roaf's counsel to rephrase, the court refused to strike Roaf's call to punish an evil company, on behalf of the community, for the wrong it had done. [Tr. 4/18/2022, 37:14–19] Roaf's counsel used the opportunity to rephrase to minimize Ortiz's involvement and to once again excoriate Medstar.

Roaf's counsel argued, "With respect to the fault of Mr. Ortiz I want to be clear. We're not saying he's a bad guy. He made a mistake. But worked for a company that acted badly. All right. And that's why we insist[ed] on having that instruction – or having that allocation there." [Tr. 4/18/2022, 37:24–38:3] "The evidence shows that Medstar violated its own safety rule by not obtaining Ortiz's motor vehicle record history when he was hired. This is from his employment file which is in evidence. Nobody looked. Nobody checked. Remember during opening statement, when I said the company turns a blind eye. [If it] doesn't do its due diligence to make sure

that its drivers are safe. If someone gets hurt, they should be responsible for that harm." [Tr. 4/18/2022, 38:4–11]

The jury returned a $4.625 million dollar verdict in Roaf's favor, assigning 60% of fault to Medstar and 40% of fault to Ortiz. *Roaf*, 2023 WL 5036929. Though it is impossible to put a dollar figure on prejudice, the bizarre allocation of fault strongly suggests that the jury heeded Roaf's call. The record, as recited above, speaks for itself. Roaf used an improper and redundant series of claims to introduce a plethora of prejudicial and irrelevant evidence to, ultimately, backdoor in a punitive damages claim. Don't hate Ortiz; Medstar was bad. That was the message. The completely improper message. The message the jury received, to Medstar's extreme prejudice.

III. ARGUMENT

A. Allowing Roaf to proceed against Medstar on claims of negligent hiring after Medstar admitted the negligence of its employee and its own vicarious liability for that liability is legal error.

The *McHaffie* rule precludes a claimant from pursuing negligent hiring, supervision, and related theories against an employer who has already admitted vicarious liability for an employee's negligence. *McHaffie*

v. Bunch, 91 S.W.2d 822 (Mo. 1995). Appellants' Petition for Review provides a general overview of the rule, its status in Arizona, and the reasons that it presents a critical legal issue of statewide importance. In addition to those matters discussed in the Petition, there are finer distinctions of the *McHaffie* rule that bear discussion.

First, contrary to discussion before the Arizona Court of Appeals, precluding direct liability claims against a vicariously liable employer is not incompatible with a comparative fault system such as Arizona's. In 2011, the California Supreme Court concluded that allowing negligent supervision, hiring, or entrustment claims where an employer admits vicarious liability would "subject the employer to a share of fault in addition to the share of fault assigned to the employee, for which the employer has already accepted liability." *Diaz v. Carcamo*, 253 P.3d 535, 544 (Ca. 2011). This, the California court determined, was true even in a comparative fault system where a jury must normally allocate fault among all tortfeasors. *Id.* at 543.

Arizona law is compatible with the California Supreme Court's conclusion on this point. In Arizona, there is a statutory exception to the apportionment of fault insofar as vicarious liability is concerned. Under Arizona's comparative fault statutory scheme, liability is "several only and

is not joint, except that a party is responsible for the fault of another person, or for payment of the proportionate share of another person, if . . .[t]he other person was acting as an agent or servant of the party." A.R.S. § 12-2506(D)(2). Thus, there is no barrier to adopting the *McHaffie* rule as a result of Arizona's comparative fault statute.

Second, the *McHaffie* rule acknowledges and resolves three major problems created when negligent hiring and supervision claims are allowed despite the employer's admission of vicarious liability. All three of those issues were present in the trial in this case. Specifically, prohibiting the superfluous negligent hiring claim keeps irrelevant and inflammatory evidence out, prevents confusing the jury about the actual contested issues, and prevents the jury from assigning the employer a double portion of fault. Robert A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of* Respondeat Superior, 10 WYO. L. REV. 229, 235 (2010).

At bottom, the *McHaffie* rule, particularly as modified to exclude situations where punitive damages are before the jury, prevents the myriad of legal errors introduced when a plaintiff gets the opportunity to demonize an employer in what is properly a simple negligence matter. Among the

many states that have adopted the *McHaffie* rule, the reasoning is the same. Keeping direct liability claims that cannot lead to any additional liability serves only to inflame the jury and prejudice the defendants. *See Bogdanski v. Budzik*, 408 P.3d 1156, 1161 (Wyo. 2018). Arizona can, and should, adopt the *McHaffie* rule to prevent legal error and severe prejudice.

B. Medstar was clearly prejudiced by the legal error in permitting the superfluous claims of negligent hiring and supervision.

The trial court's failure to preclude the superfluous direct liability claims against Medstar was not only error, but prejudicial error. First, allowing the negligent hiring claim permitted Roaf to circumvent Arizona Rule of Evidence 404 and introduce irrelevant prior act evidence in the form of Ortiz's driving record dating as far back as twelve years before the collision which gave rise to Roaf's claims. Second, the continued presence of the negligent hiring claim allowed Roaf's counsel to repeatedly advance a narrative painting Medstar as a bad actor. Finally, Roaf's counsel was permitted to use this inadmissible evidence and improper argument to invite the jury to judge and punish Medstar.

i. Medstar was prejudiced by the introduction of inadmissible evidence including Ortiz's driving record.

Arizona Rule of Evidence 404 prohibits the introduction of prior bad act evidence to prove action in conformity therewith. Ariz. R. Evid. 404. In other words, in the context of civil law, instances of prior negligent action cannot be used to show a character trait for acting negligently. Ariz. Prac., Law of Evidence § 402:2 (4th ed.). Thus, in a normal motor vehicle accident negligence action, the defendant driver's driving history would be excluded by Rule 404. This is because a driver's past driving tells jurors *nothing* about that driver's negligence—or lack thereof—during a specific incident.

Here, Ortiz's driving history was even less relevant than in a normal case. All that a driver's driving history could possibly weigh on in a negligence case is whether that driver breached the relevant standard of care. Here, Defendants admitted Ortiz had breached his duty of care and further admitted that Ortiz's employer, Medstar, was responsible for his actions through the doctrine of *respondeat superior*. Thus, no information about Ortiz or Medstar's breach of a duty of care was relevant when this matter went to trial. Nevertheless, merely by alleging a redundant claim for negligent hiring, Roaf was able to evade both Rule 404's prohibition on prior

bad act evidence and Rule 402's general prohibition on introducing irrelevant evidence. *See* Ariz. R. Evid. 402.

The mere introduction of this inadmissible evidence was highly prejudicial such that the jury's verdict must be overturned. *See*, *e.g.*, *Henson v. Triumph Trucking, Inc.*, 180 Ariz. 305 (App. 1994) (admission of evidence of driver's prior bad acts in the form of drug abuse two to eight years prior to the collision was prejudicial error). As discussed *supra*, the bulk of Roaf's counsel's direct examination of Ortiz consisted of tracing Ortiz's driving history from 2006 through 2016 and drawing parallels between that history and the collision. These pervasive references to inadmissible, irrelevant, and inflammatory evidence are clearly prejudicial error. The prejudice was only heightened by Roaf's counsel's subsequent arguments.

ii. Roaf was improperly permitted to argue for punitive damages, despite never requesting punitive damages and this case falling far below Arizona's punitive damages threshold.

Roaf's counsel repeatedly referred to Medstar as having done wrong, having acted badly, and otherwise being morally blameworthy. This is directly at odds with Roaf's failure to formally seek punitive damages and Arizona's strict limits on punitive damages. Punitive damages exist to "serve

two functions: punishment and deterrence." *Swift Transportation Co. v. Carman*, 253 Ariz. 499, 505 ¶ 20 (2022). "But courts do not aim to punish and deter all negligent conduct by way of punitive damages, only that which involves 'some element of outrage similar to that usually found in a crime.'" *Id.* (citations and quotations omitted). Roaf did not request punitive damages, was not entitled to punitive damages, and should not have been permitted to call on the jury to punish Medstar.

To obtain punitive damages in a negligence case, a plaintiff 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). This is a threshold test that a plaintiff must meet before ever calling upon a jury to punish a defendant on behalf of the community. Roaf never met either threshold test. Despite this, his arguments throughout the case, which relied on Ortiz's driving record, called on the jury to punish Medstar. Permitting those arguments was prejudicial error.

iii. Roaf used these improperly admitted prior bad acts and his overall pseudo-punitive theory for the sole purpose of exhorting the jury to punish Medstar.

Roaf never formally requested punitive damages and, as a result, his counsel avoided words like "punishment" or "punitive." Furthermore, there was no jury instruction to find punitive damages as a separate category of damages. But Roaf nevertheless used Ortiz's improperly admitted prior bad acts and a narrative of pseudo-punitive damages to call on the jury to punish Medstar. This began on day one of the trial and continued, subject to multiple objections, through closing arguments. Roaf's counsel convinced the jury to go beyond compensation and, instead, to engage in the role of protector of the community. There were numerous instances of these calls to punish Medstar and protect or avenge society at large. But those calls came to a head during closing arguments.

Critically, in closing, Roaf's counsel called on the jury to act as the "conscience of the community." Roaf's counsel also called on the jury to protect the "community" when a "company does wrong." These arguments clearly called for exemplary or punitive damages. A negligence claim is about private compensatory damages rather than punitive exemplary damages; the "community" and its "conscience" and a defendant's

"wrong[fulness]" have *nothing* to do with the kind of negligence claim at issue in this case. By permitting Roaf's counsel's repeated arguments about Medstar's alleged wrongdoing and the jury's role of acting as the "conscience of the community," the trial court injected prejudicial error.

It is impossible to put a dollar figure on the prejudice created by the errors in this case. But it is also unnecessary. Prior bad acts are inadmissible in actions for simple negligence related to a motor vehicle collision. Evidence of a breach of the standard of care is irrelevant, and thus inadmissible, in an action where breach has already been admitted. Calling on the jury to punish or make an example of a defendant is absolutely forbidden in the absence of a valid punitive damages claim. Here, no such claim was made. Thus, Roaf could not present that claim to the jury and permitting him to do so was prejudicial error that requires the jury's verdict be vacated.

IV. CONCLUSION

The trial court and Court of Appeals erred in failing to preclude Roaf's superfluous negligent hiring and supervision claims. This rose to the level of prejudicial error when Roaf was allowed to introduce a trove of inadmissible evidence. That prejudicial error became overwhelming when Roaf used the inadmissible evidence to paint Medstar as evil and deserving

of punishment. This Court should adopt the majority or *McHaffie* rule as discussed in Appellants' briefs. Further, this Court should find prejudicial error, reverse the Court of Appeals' and trial court's rulings, and remand for new trial.

RESPECTFULLY SUBMITTED this 16th day of February, 2024.

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