David L. Abney, Esq. (009001)
AHWATUKEE LEGAL OFFICE, P.C.
Post Office Box 50351
Phoenix, Arizona 85076
(480) 734-8652
abneymaturin@aol.com
Appellate Counsel for Plaintiff/Appellee

Timothy G. Tonkin, Esq. (020709)
Steven J. Jones, Esq. (031438)
PHILLIPS LAW GROUP, P.C.
3101 North Central Ave., No. 1500
Phoenix, Arizona 85012
(602) 258-8900
timt@phillipslaw.com
stevenj@phillipslaw.com
Attorneys for Plaintiff/Appellee

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)

PLAINTIFF/APPELLEE SHEROLD D. ROAF'S SIMULTANEOUS SUPPLEMENTAL BRIEF

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Introduction

In accordance with this Court's February 6, 2024 Minute Letter, Plaintiff-Appellee Sherold D. Roaf ("Roaf") submits his simultaneous supplemental brief.

The Rephrased Question

> "Did the Court of Appeals err 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 and when Roaf is not seeking punitive damages against Medstar?"

Legal Argument

1. Roaf had the right to present separate theories of liability to the jury. The jury had the duty to assess and allocate percentages of fault to each of the two defendants listed in the verdict form.

The facts establish that Sherold Roaf had the statutory right to present to the jury separate claims against Stephen S. Rebuck Consulting, LLC, Medstar Medical Transport, LLC ("Medstar").

Medstar had employed Francisco Ortiz as a driver. On January 12, 2018, in the scope and course of his work driving a van for Medstar, Ortiz crashed the van into the back of Roaf's Jeep. Roaf suffered severe, permanent personal injuries. Roaf sued Ortiz and Medstar.

In the Joint Pretrial Statement, the parties agreed there was "no comparative fault attributable to [Roaf]." (IR-276, ¶ I(I)). Based on that stipulation, there would be no percentage-of-fault blank on a jury verdict form to apportion to Roaf any

fault for causing the crash.

In the Joint Pretrial Statement, Ortiz and Medstar also both admitted that Ortiz was "solely at fault for causing the accident" and Medstar separately admitted it was liable for Ortiz's actions under the doctrine of respondeat superior. (IR-276, ¶ I(F), I(G) & III(O)).

In his opening statement to the jury, the lawyer representing both Medstar and Ortiz admitted that Ortiz was negligent and admitted the Ortiz "was at fault in causing the accident and whatever injuries ultimately you conclude Mr. Roaf suffered, we admit they were caused by the accident." *Trial-Transcript* 213:20-25 (04/11/2022).

In its instructions, the trial court explained: "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'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." *Trial-Transcript-Day05* 29:24 to 30:5 (04/18/2022).

The trial court instructed the jurors that, if they found for Roaf, they would need to "allocate fault between Mr. Ortiz's fault in connection with the accident itself, and [Medstar's] fault in connection in the negligent hiring, supervision, or retention of Mr. Ortiz." *Trial-Transcript-Day05* 33:3-9 (04/18/2022).

In closing argument, Roaf's lawyer explained to the jury that, ten minutes before the jury was seated, Medstar had admitted "to negligent hiring." *Trial-Transcript-Day05* 35:20-21 (04/18/2022). Then, in his own closing argument, the lawyer representing both Ortiz and Medstar told the jury: "We admit fault. We admit complete responsibility. All right." *Trial-Transcript-Day05* 95:14-15 (04/18/2022).

The jury verdict form that 7 jurors initialed on April 18, 2022, stated that:

> We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do finds [sic] plaintiffs full damages to be $4.625 million.
>
> We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do hereby allocate fault as follows:
>
> | | |
> |---|---|
> | Francisco J. Celaya Ortiz | 40% |
> | Medstar Medical Transportation, LLC | 60% |

(IR-336).

Those facts take us back to the rephrased question. Was there any prejudicial error in letting Roaf proceed against Medstar on separate claims of negligent hiring and vicarious liability when Medstar admitted that it was vicariously liable for Ortiz's negligence? The answer is "No."

Roaf had the right to allege alternate theories of liability under Rule 8(a)(3) of the Arizona Rules of Civil Procedure. That rule provides that a pleading stating a claim for relief "may include relief in the alternative or different types of relief."

Neither Ortiz nor Medstar stipulated to have a specific percentage of fault assessed against either one of them. Because the parties had stipulated that Roaf was not at fault for causing the collision, there was no space in the verdict form for allocating any fault to Roaf. Thus, the jury was presented with a verdict form that solely had blank spaces, which were for the two named defendants.

Mandatory laws govern this situation. "In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury." A.R.S. § 12-2506(B). It does not matter what the theories of liability may be. The jury has a duty to determine and apportion "as a whole at one time" the "relative degrees of fault of all defendants." A.R.S. § 12-2506(C). That is so because, under Arizona law, every "defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault." A.R.S. § 12-2506(A).

2. The "*McHaffie* rule" is incompatible with Arizona's requirement that the trier of fact must assess and apportion percentages of fault.

Medstar and Ortiz advocate for adoption of the "*McHaffie* rule," which the Missouri Supreme Court announced in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995). *McHaffie* stated that the supposed "majority view is that once an employer has admitted respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability." (*McHaffie* is off kilter from the start, because it misstates the nature of a

claim against an employer for negligent hiring, training, supervision, and retention. That claim is not a claim for "imputed" liability; it is a claim for "direct" liability.).

Arizona cannot adopt the *McHaffie* rule or anything like it because, in Arizona, the trier of fact has the duty to assess and apportion percentages of fault among all named parties and properly designated nonparties at fault. A.R.S. §§ 12-2506(A), (B) & (C). It does not matter whether the claims are for direct, indirect, strict, vicarious, statutory, or some other form of liability.

By statute, "fault"—for purposes of assessing and apportioning "fault"—includes, but is not limited to, "negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product." A.R.S. § 12-2506(F)(2).

Further, whether there was a basis for any claim of punitive damages also would not matter to an Arizona jury's duty to assess and apportion percentages of fault among all named parties and properly designated nonparties at fault. Arizona's "statutes do not 'limit the application of comparative fault principles to negligence theories.'" *State Farm Ins. Cos. v. Premier Manufactured Systems, Inc.*, 217 Ariz. 222, 228 ¶ 30 (2007) (quoting *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 404 (1995)).

An Arizona jury must assess and apportion percentages of fault, whatever

may be the fault's nature, form, or description. To bring this home to our case, an Arizona jury dealing with alternative liability theories—such as an employer's vicarious liability for an employer's misconduct and an employer's direct liability for negligently hiring, training, supervising, and retaining that employee—must still assess and apportion percentages of fault among all named defendants and all properly designated nonparties at fault. That is an Arizona jury's statutory duty.

No *McHaffie* rule or any other rule, doctrine, principle, or argument can defeat an Arizona jury's statutory duty to assess and apportion degrees of fault among all named parties and properly designated nonparties at fault. This Court has, in fact, "repeatedly held that under [the Uniform Contribution Among Tortfeasors Act], the trier of fact must consider the fault of all parties and properly named nonparties in assessing and allocating percentages of fault." *Cramer v. Starr*, 240 Ariz. 4, 8 ¶ 15 (2016). That principle is true here as well.

In any event, it is worth pointing out that the *McHaffie* rule is not the majority rule in the United States. The following jurisdictions, and possibly more, have explicitly rejected, or would most likely reject, the *McHaffie* rule:

1. **Alabama:** *Poplin v. Bestway Express*, 286 F.Supp.2d 1316, 1319-20 (M.D. Ala. 2003) ("Alabama has recognized negligence under respondeat superior theory and theories of primary employer liability as separate causes of action, whether the employer admits liability for the employee's actions or denies agency.").

2. **Arizona:** *Quiñonez for and on Behalf of Quiñonez v. Andersen*, 144 Ariz. 193, 197 (App. 1984) ("Liability results under the rule . . . not because of

the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. Thus, the liability is direct and not derivative."). *See also Kopp v. Physician Grp. of Ariz., Inc.*, 244 Ariz. 439, 442 ¶ 12 (2018) (Where there is an independent ground for finding a principal liable, a judgment can be entered against it on that ground.) and A.R.S. §§ 12-2506(A), (B) & (C).

3. **Colorado:** When "an employer or principal acknowledges vicarious liability for an employee's or agent's negligence, a plaintiff's direct negligence claims against the employer or principal are not barred, a plaintiff may bring such claims, and conduct associated discovery, in addition to claims and discovery based on respondeat superior." Colo. Rev. Stat. Ann. 13-21-111.5.

4. **Florida:** *Trevino v. Mobley*, 63 So.3d 865, 867 (Fla. App. 2011); *Sanchez v. Discount Rock & Sand, Inc*., 84 F.4th 1293, 1294 (11th Cir. 2023) (Under Florida law, a vicariously liable employer may be separately liable as well where the alleged direct liability takes the form of negligent entrustment).

5. **Georgia:** *Quynn v. Hulsey*, 850 S.E.2d 725 (Ga. 2020) (In a wrongful death case, the employer of a driver whose truck struck and killed the decedent was not entitled to summary judgment on the estate's claims of negligent entrustment, hiring, training, and supervision based on the employer's admission that respondeat superior applied.).

6. **Illinois:** *McQueen v. Green*, 202 N.E.3d 268, 279 ¶ 42 (Ill. 2022) ("This court aligns itself with those jurisdictions that reject the *McHaffie* rule. Settled law allows a plaintiff to plead and prove multiple causes of action. Thus, so long as a good-faith factual basis exists for a plaintiff's claim of direct negligence against an employer, the plaintiff should be allowed to pursue such a claim in addition to a claim of vicarious liability.") (citations omitted).

7. **Iowa:** *Hardwick v. Bublitz*, 119 N.W.2d 886 (Iowa 1963) (negligent entrustment and owner liability statute); *McGraw v. Wachovia Securities, L.L.C.*, 756 F. Supp. 2d 1053, 1066-67 (N.D. Iowa 2010) ("Indeed, it is black letter law that a principal's liability under respondeat superior theory of vicarious liability for acts of an agent has nothing to do with a

principal's direct liability for the principal's own negligence that permitted or facilitated misconduct of an agent or employee.").

8. **Kansas:** *Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213, 1224-25 (Kan. 1998) (An "admission that the employee was acting within the scope of his or her employment does not preclude an action for both respondeat superior and negligent entrustment or negligent hiring, retention, or supervision.").

9. **Kentucky:** *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 336 (Ky. 2014) ("Indeed, the preemption rule would seem to conflict with well-established authorities that permit a plaintiff to bring all claims justified by the defendant's conduct, even conflicting claims.").

10. **Louisiana:** *Martin v. Thomas*, 346 So.3d 238 (La. 2022) (An employer sued for both direct negligence and vicarious liability for an employee's negligence is not automatically relieved from liability for direct negligence merely by stipulating that the employee was acting in the course and scope of employment.).

11. **Massachusetts:** *Or v. Edwards*, 818 N.E.2d 163, 170 n.12 (Mass. App. 2004) ("The theory of negligent hiring or retention . . . is distinct and different from the theory of respondeat superior.").

12. **Michigan:** *Perin v. Peuler*, 130 N.W.2d 4 (Mich. 1964) (negligent entrustment and owner liability statute).

13. **Minnesota:** *Lim v. Interstate System Steel Div., Inc*., 435 N.W.2d 830, 833 (Minn. App. 1989) ("Because we interpret Minnesota law to permit a plaintiff to proceed under both theories, we believe the trial court properly allowed admission of the previous incident and properly instructed on direct and concurrent causes.").

14. **Mississippi:** *Jackson Public School Dist. v. Bloom*, 875 So.2d 1100 (Miss. App. 2004).

15. **Nevada:** *Wright v. Watkins & Shepard Trucking, Inc.*, 972 F. Supp. 2d 1218, 1221 (D. Nev. 2013).

16. **New Hampshire:** *Trahan-Laroche v. Lockheed Sanders, Inc.*, 657 A.2d

417 (N.H. 1995).

17. **North Carolina:** *Prior v. Pruett*, 550 S.E.2d 166 (N.C. App. 2001)

18. **Ohio:** *Clark v. Stewart*, 185 N.E. 71, 76 (1933) (negligent entrustment and respondeat superior).

19. **Oklahoma:** *Fox v. Miz*e, 428 P.3d 314 (Okla. 2018).

20. **Oregon:** *Erickson v. Christenson*, 781 P.2d 383 (Or. App. 1989) (Claims for respondeat superior and negligent supervision may proceed simultaneously.).

21. **Pennsylvania:** *Keifer v. Reinhart Foodservices, LLC*, 2012 WL 368047, 15 (W.D. Pa. 2012).

22. **Rhode Island:** *Mainella v. Staff Builders Indus. Services, Inc.*, 608 A.2d 1141, 1145 (R.I. 1992) (The "liability of an employer in the negligent supervision or hiring of an unfit employee is an entirely separate and distinct basis from the liability of an employer under the doctrine of respondeat superior.").

23. **South Carolina:** *James v. Kelly Trucking Co*., 661 S.E.2d 329, 330-32 (S.C. 2008) (A plaintiff is not precluded from maintaining a negligent employment cause of action even "after an employer stipulates that it is vicariously liable for its employee's negligence.").

24. **South Dakota:** *Rehm v. Lenz*, 547 N.W.2d 560, 566 (S.D. 1996) (It "should be acknowledged that employers can be held responsible for the negligent acts of their employees under a respondeat superior theory, and that negligent hiring and supervision of an employee may also give rise to liability.").

25. **Tennessee:** *Ali v. Fisher*, 145 S.W.3d 557, 564 (Tenn. 2004).

26. **Utah:** *Ramon v. Nebo School District*, 493 P.3d 613, 618 ¶ 17 (Utah 2021) (Because direct negligence and vicarious liability claims are not redundant and have distinct elements, a plaintiff may proceed separately on both claims.).

27. **Vermont:** *Haverly v. Kaytec, Inc.*, 738 A.2d 86, 95 (Vt. 1999) ("Negligent supervision is a form of direct liability . . . distinct from respondeat superior liability, though the two may co-exist.").

28. **Virginia:** *Fairshter v American Nat. Red Cross*, 322 F.Supp.2d 646, 654 (E.D. Va. 2004).

29. **West Virginia:** *Evans v. Sanchez Rubio*, 2007 WL 712291, 2 (S.D. W. Va. 2007).

3. Medstar suffered no unfair prejudice.

Medstar claims it was somehow unfairly prejudiced because the jury did its statutory duty in assessing and apporting percentages of fault between Medstar (employer) and Ortiz (employee) after Medstar admitted it was vicariously liable for Ortiz's negligent driving. In its petition for review, Medstar claimed that the Court of Appeals had erred "by failing to find prejudice in permitting Roaf's direct liability claims to go to trial" and by "failing to find prejudice in the introduction of the evidence related to that" supposedly "improper and irrelevant claim." *PR* at 6.

Medstar asks this Court to 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." *PR* at 6.

According to Medstar, the supposed prejudice somehow occurs when an employer has vicarious liability for its employer's poor driving and a plaintiff introduces supposedly inadmissible and supposedly "prejudicial prior act evidence

in the form of driving and employment records for the nominal purposed of proving the employer's liability for the employees [sic] acts." *PR* at 9.

According to Medstar, that evidence is not admissible and serves no purpose because that evidence supposedly lets a plaintiff "argue that the employer is somehow additionally liable for placing the employee on the road." *PR* at 9-10. According to Medstar, that will allegedly "prejudice employers of all sizes statewide and expose them to the" supposed "risk of inflated verdicts and inconsistent legal rules." *PR* at 10.

Medstar also argues that, unless Arizona adopts the *McHaffie* rule, claimants will be permitted "to pursue, as Roaf did below, a 'conscience of the community' argument without meeting the threshold required to assert a punitive damages claim in Arizona." *PR* at 11. Medstar argus that the Court of Appeals' decision supposedly "failed to account for the prejudicial effects of Roaf introducing confusing and redundant claims, introducing irrelevant evidence, and using all of this to argue that the jury should punish Medstar in a case where no punitive damages were claimed or permissible." *PR* at 13-14.

That seems to be the essence of Medstar's rambling prejudice argument. But it cannot stand up to critical analysis. First, in closing argument, Roaf's lawyer never asked the jury to punish anyone. As trial lawyers often do, Roaf's lawyer did briefly give into the impulse to make a "conscience of the community" argument.

But it rapidly went nowhere and did not harm Medstar. This is what happened:

> Roaf's lawyer: But a wrong has been done here, and as jurors you're acting as the conscience of the community. And with your verdict you get to say –
>
> Defense lawyer: Objection, Your Honor. Conscience of the community?
>
> The Court: Yeah. Why don't you rephrase that.
>
> Defense lawyer: Move to strike.
>
> The Court: I'm not going to strike, but why don't you just rephrase that.
>
> Roaf's lawyer: Sure. With your verdict you can address or allocate the fault as long as they add up to 100 percent. It could be 95 and 5. It could be 50/50 as long as they add up to a hundred percent.

Trial-Transcript-Day05 37:11-23 (04/18/2022).

And that was that. The truncated "conscience of the community" statement did not ask the jury to punish Medstar. The statement was made in the context of reviewing the verdict form. It was not a call to punish Medstar. In context, and in light of the fact that the "conscience of the community" argument stopped as soon as it started, Medstar suffered no prejudice. *Cota v. Harley Davidson*, 141 Ariz. 7, 15 (App. 1984) (Court of appeals rejects the argument that telling the jury to "send a message" was an improper request for punitive damages.).

In addition to that, Medstar has not shown any prejudice to itself or to other employers confronting claims of direct and vicarious liability. Because "prejudice

is not presumed but must appear from the record," to justify reversing a case, "there must not only be error, but the error must have been prejudicial to the substantial rights of the party." *Creach v. Angulo*, 189 Ariz. 212, 215 (1997). If that showing is not made, any "error is deemed harmless." *Id*.

Indeed, unless justice requires otherwise, any error by the court or a party, "is not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment." Ariz. R. Civ. Proc. 61. "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." *Id*. In Arizona, that rule is both procedural and constitutional. *See* Ariz. Const. art. 6, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.").

As for the larger picture, there is no prejudice in presenting evidence and argument to an Arizona jury to support the proposition that an employer is both vicariously and directly liable for the consequences of an employee's negligent driving. Arizona jurors, after all, have the unique statutory duty of assessing and apportioning fault among all named parties and properly designated nonparties at fault. Here, where Medstar and Ortiz did not, as far as the record discloses, stipulate with Roaf as to their respective percentages of fault—the jurors had to perform the fault assessment and allocation. Roaf had the right to present argument

and evidence to the jury to help it in assessing and apportioning percentages of fault. Under Arizona's statutory scheme, all other plaintiffs have that right, as well.

Conclusion

In Arizona, whether the *McHaffie* rule is the majority or minority rule is a matter of mere academic interest. An Arizona plaintiff who has alleged claims of direct and vicarious liability against an employer is entitled to present argument and evidence to help the trier of fact perform its statutory duty of assessing and apportioning percentages of fault among all named parties and properly designated nonparties at fault—even if the employer has admitted that it is vicariously or directly liable. Under the joint operation of A.R.S. §§ 12-2506(A), (B) & (C), no other result is possible.

DATED this 20th day of February, 2024.

AHWATUKEE LEGAL OFFICE, P.C.

/s/ David L. Abney, Esq.
David L. Abney
Appellate Counsel for Plaintiff/Appellee

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- William H. Doyle, Esq., Brandon D. Millam, Esq., Nathan R. Andrews, Esq., **DOYLE HERNANDEZ MILLAM**, 1313 East Osborn Rd., Suite 220, Phoenix, AZ 85014, wdoyle@doylelawgroup.com, bmillam@doylelawgroup.com, (602) 240-6711, nandrews@doylelawgroup.com, Attnys for Defendants-Appellants Stephen S. Rebuck Consulting, LLC, dba Medstar Medical Transport; Medstar Medical Transportation, LLC dba Medstar Medical Transport; and Francisco J. Celaya Ortiz and Jane Doe Celaya Ortiz.
- Kristin M. Mackin, Esq. and William J. Sims, III, **SIMS MACKIN, LTD.**, 2100 N. Central Ave., Ste, 220, Phoenix, Arizona 85004, kmackin@simsmackin.com, wsims@simsmackin.com, Attnys for Amicus Curiae Arizona Municipal Risk Retention Pool.

/s/ David L. Abney, Esq.
David L. Abney