

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

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

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The Arizona Municipal Risk Retention Pool (“the Pool”) files this Supplemental Amicus Curiae Brief to request this Court find that it is prejudicial error to allow a plaintiff to proceed against an employer on separate claims of negligent hiring and vicarious liability when the employer admits it is vicariously liable for its employee’s negligence when punitive damages are not sought.

The question reframed by this Court is of critical importance to the Pool, which is owned and operated by 77 public-entity members. The State has declared as a matter of public policy that punitive damages are not available against a public entity, which is codified in A.R.S. § 12-820.04. When punitive damages are legislatively unavailable and fault is admitted, the presentation of alternative theories of negligent hiring and vicariously liability serves only as a vehicle for the introduction of irrelevant, cumulative evidence of fault that bears no relevance to compensatory damages.

Under such circumstances, evidence of an employee’s poor driving record to support a direct negligence claim has no probative value and can only serve to substantially prejudice the employer. The court of appeals in *Ogden v. J.M. Steel Erecting, Inc.*, 201 Ariz. 32, 41, ¶ 40, 31 P.3d 806, 815 (App. 2001), recognized the prejudicial nature that evidence relating to an employee’s driving history has on a jury by allowing a jury to draw inferences about an employer’s knowledge and liability. Admissibility of evidence that may normally affect the result of the

jury cannot be presumed to be harmless error. *Readenour v. Marion Power Shovel, a Div. of Dresser Indus., Inc.*, 149 Ariz. 442, 451–52, 719 P.2d 1058, 1067–68 (1986).

The substantial prejudice to a public employer that admits fault is heightened with the admission of such evidence because the evidence serves no purpose other than to cause the jury to believe the public employer acted with malice or otherwise cause the jury to inflate the compensatory damage award. Evidence relevant only to punitive damages should never be admissible in a case against a public entity, but the Court of Appeals Decision here creates a mechanism for its introduction simply by pleading and presenting alternative theories of direct and vicarious negligence even when an employer admits vicarious liability.

Other courts to have considered the issue of the admissibility of evidence of direct negligence liability where an employer has admitted vicarious liability for the negligent act of an employee and where no punitive damages are sought have held evidence of direct liability is prejudicial and/or excluded evidence of direct liability due to its highly prejudicial nature in those cases. *See, e.g., Badillo v. Home City Ice Co.*, 666 S.W.3d 259, 262 (Mo. Ct. App. 2023) (dismissing direct negligence claim where punitive damages not sought for direct liability claim, recognizing that “evidence of an employer’s conduct . . . could be relevant and material to a claim for punitive damages based on a *direct* theory of liability . . . , it

is not relevant or material to a claim that rests solely on vicarious liability”); *Carothers v. City of Water Valley*, 242 So. 3d 138, 144–45 (Miss. Ct. App. 2017) (upholding dismissal of direct liability claims against city where city admitted vicarious liability and the evidence failed to establish the employee acted with reckless disregard in order to overcome the city’s immunity); *Williams v. McCollister*, 671 F. Supp. 2d 884, 888–89 (S.D. Tex. 2009) (collecting Texas court cases recognizing that “in matters involving only ordinary negligence [and where the employer stipulates to vicarious liability for its employee’s negligence], a direct liability claim (such as negligent hiring or entrustment) and a claim resulting in vicarious liability under *respondeat superior* could be mutually exclusive modes of recovery.”); *Hackett v. Washington Metro. Area Transit Auth.*, 736 F. Supp. 8, 11 (D.D.C. 1990) (where plaintiff alleged injuries arising out of employers’ direct and vicarious liability and facts did not support punitive damage award, court found direct negligence claim “does not impose any additional liability, would be prejudicial and unnecessary and should be dismissed”).

The cases cited in plaintiff’s supplemental brief fail to address the question as re-framed by this Court. Notably, most of the cases include claims in which punitive damages were sought or at issue, while other cases do not involve the admission of employer liability. (Roaf Supp. Br. 6-10.)

There are significant public policy implications in allowing the Decision to stand. Allowing introduction of evidence of employer liability despite stipulating to vicarious liability for an employee's negligence, will deter employers, and their insurers, from stipulating to liability if such evidence will nonetheless be introduced. This will promote full litigation of both liability and damage issues, increasing trial and defense costs and the burden on the court system and juries. In the case of public employers, this increased burden and costs will fall on the public.

Roaf contends the admission of evidence of an employer's direct negligence even when an employer admits the same and no punitive damages are sought is demanded by Arizona's UCATA solely to allocate fault irrespective of whether there is only one responsible party. UCATA does not completely extinguish joint and several liability. Under A.R.S. § 12-2506(D)(2), a party is responsible for the fault of another person, or for payment of the proportionate share of another person," when "[t]he other person was acting as an agent or servant of the party." UCATA also does not extinguish the Court's ability to apply equitable principles. Under A.R.S. § 12-2502(2), "If equity requires, the collective liability of some as a group constitutes a single share." Thus, under UCATA, an employer may be jointly and severally liable for a plaintiff's compensatory damages, obviating the need for any allocation of fault.

The Pool respectfully requests this Court find it is prejudicial error to allow a plaintiff to proceed on alternative theories of negligent hiring and vicarious liability where an employer stipulates to vicarious liability for its employee's negligence and punitive damages are not sought or are not available.

Respectfully submitted this 27th day of February 2024.

SIMS MACKIN, LTD.

/s/ Kristin Mackin _____

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