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' RESPONSE TO AMICUS CURIAE BRIEF OF ARIZONA ASSOCIATION FOR JUSTICE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

I. ARGUMENT

Amicus Curiae Arizona Association for Justice ("AAJ"), in answer to this Court's question presented regarding prejudicial error, answers, instead, that no error occurred at all. The arguments presented are incorrect and often involve irrelevant misdirection. First, AAJ argues that *McHaffie* and the rule set forth therein cannot exist because *McHaffie* refers to negligent hiring as an imputed liability claim whereas other authorities refer to it as a direct liability claim. The argument misstates Missouri jurisprudence and fails on its face. More importantly, it does not even attempt to address the question before this Court. Second, AAJ argues that the *McHaffie* rule cannot apply here because Appellants moved *in limine* at the trial court to preclude Francisco Ortiz's driving record. This argument ignores Appellants' directed verdict motion on the negligent hiring issue and that the *McHaffie* rule exists, in part, out of concern for evidentiary considerations. Third, AAJ proffers a red herring in the form of a protracted discussion of irrelevant criminal law. Finally, AAJ argues that the *McHaffie* rule somehow immunizes employers from liability. In substance, AAJ's final argument reveals that the absence of the *McHaffie* rule invites juries to inflict improper punitive damages on employers.

A. The *McHaffie* rule is not barred by Arizona jurisprudence or the Restatement (Second) of Agency.

AAJ attempts, and fails, to create a bright line prohibition on adopting the *McHaffie* rule by conflating and misconstruing a multitude of concepts across states and cases. But the premise of the entire argument is wrong, as can be seen from the case it is based on, *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184 (Mo. 2014). In *Coomer*, the Missouri Supreme Court, quoting *McHaffie*, explained that "'once an employer has admitted *respondeat superior* liability . . . it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability.'" 437 S.W.3d at 205–06 (quoting *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995)). The Missouri Supreme Court went on to explain that this is so because "all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose." *McHaffie*, 91 S.W.2d at 826.

Of course, the *Coomer* court went on to explain that "even though claims of negligent training or supervision may not strictly be theories of imputed liability . . . [the plaintiff] still must show [the individual defendant]

was negligent before the jury can award him any of his damages under these theories." *Coomer*, 437 S.W.3d at 206. As in *Coomer*, for any liability to attach to Medstar, Roaf had to show that Ortiz, the driver, was negligent. Moreover, as thoroughly briefed elsewhere, Medstar and Ortiz's liability became co-extensive when Medstar admitted *respondeat superior* liability. The false dichotomy between 'direct' and 'imputed' liability does not undermine the *McHaffie* rule, as the Missouri Supreme Court points out in *Coomer*.

Ultimately, there is a split between the states as to whether the *McHaffie* rule should be adopted. Some states, as has been repeatedly acknowledged, disapprove of the rule for a variety of reasons. Others have adopted the rule or some version of it. All of those states are, presumably, aware of the Restatement (Second) of Agency and of the distinctions between *respondeat superior*, negligent hiring, negligent supervision, and negligent entrustment. As recognized by this Court in *Lewis v. Southern Pacific Co.*, "the failure of an employer to hire only competent and experienced employees does not of itself constitute an independent ground of actionable negligence." 102 Ariz. 108, 110 (1967). This is not a controversial statement and is not inconsistent with *McHaffie*. It remains up to this Court

to adopt or reject the rule proposed by Medstar, as thoroughly briefed elsewhere.

B. Appellants' motion *in limine* does not eliminate the *McHaffie* rule or have any bearing on its viability in Arizona.

The *McHaffie* rule limits redundant and prejudicial evidence when that evidence serves no purpose. Naturally, then, a key purpose is to prevent the introduction of prejudicial evidence to the jury when that evidence serves no legal purpose. To use the facts of the case at bar, had Ortiz been involved in a motor vehicle with his personal vehicle on his own time, his driving record would have been inadmissible. *See*, *e.g.*, *Quinonez ex rel. Quinonez v. Andersen*, 144 Ariz. 193, 197 (App. 1984). But an employee's driving record may be admissible when the plaintiff asserts a claim of negligent hiring. *Id.* However, even the *Quinonez* court recognized "that the evidence which would support a theory of direct liability against [the defendant employer] . . . is only material on the issue of aggravating circumstances affecting punitive damages." *Id.* at 198. Thus, *Quinonez* recognizes that redundant claims may involve evidentiary considerations *and* that an employee's driving record in the face of an admission of *respondeat superior* liability "is only material on the issue of aggravating circumstances affecting punitive

damages." Given that there was no claim for punitive damages before the jury, the evidence supporting the negligent hiring claim was immaterial under *Quinonez* and under the version of the *McHaffie* rule Medstar advocates for.

C. Criminal cases about evidence of prior criminal convictions have no relationship to this case and the issue this Court has asked the parties and amicus curiae to address.

Relying on *Galati* and a wholly unrelated legislatively enacted criminal statute, AAJ argues that an admission cannot render evidence immaterial. In *Galati*, a criminal defendant was charged with violations of A.R.S. § 28-1383(A)(1) and (A)(2), a statute whose elements include certain prior acts or convictions. *State ex rel. Romley v. Galati ex rel. County of Maricopa*, 195 Ariz. 9, 10 ¶ 2 (1999). The *Galati* court ultimately concluded "that because the prior convictions to which the defendants agreed to stipulate constitute elements of the charged offense, they were not entitled to a bifurcated trial." *Id.* at 12 ¶ 16. *Galati* is distinguishable on a multitude of points. First, *Galati* is a criminal case involving the violation of a criminal statute which specifically requires proof of certain prior conduct. Whereas in the case at bar, none of those things are true. Second, the defendants in *Galati* wanted their stipulation kept from the jury unlike the stipulation in this matter. *Id.* at ¶ 15.

Finally, the situation in *Galati*, and the other cases relied on by AAJ, is one in which the defendant is subject to greater punishment as a result of previous behavior. That cannot be the case in civil negligence actions where punitive damages are not at issue.

D. Neither the *McHaffie* rule, nor any of Medstar's arguments, immunize employers from civil liability.

Finally, AAJ argues that *respondeat superior* liability for an employee's misconduct allows an employer to "hide their misconduct." AAJ Amicus Brief at 14. AAJ continues that employers "will have no incentive to act responsibly" and will not have "any accountability for their actions." According to this argument by AAJ, *respondeat superior* liability either doesn't exist or is of no consequence. This is completely untrue. Consequently, AAJ's argument is completely unsupported and should be ignored outright.

AAJ's remaining suggestions that a rule that specifically provides an exception for cases where punitive damages are available is similarly meritless. The rule specifically does not apply in cases of punitive damages. Whether or not a plaintiff's allegation that punitive damages are appropriate may be addressed by motion for summary judgment under the standards

set forth by this Court in *Swift Transportation Co.* and, should the *McHaffie* rule be adopted, such a motion could similarly address any negligent hiring or supervision claims. Nothing Medstar has argued precludes punitive damages. Indeed, Medstar's concern is the imposition of pseudo-punitive damages by introducing evidence and arguments to the jury that supports punitive damages when no such damages are legally available. Also, in any case where punitive damages are sought, the jury is instructed on what those damages mean, and when they can be applied. Here, that instruction was not given because no punitive damages allegations were made.

II. CONCLUSION

AAJ's amicus brief does not answer the question before this Court and should be disregarded in its entirety. To the extent AAJ challenges the rule proposed by Medstar, none of those challenges have merit. At bottom, many states have adopted the *McHaffie* rule or a version of it that provides an exception in cases involving punitive damages. Arizona's statutes and case law support adopting such a rule despite AAJ's arguments. This Court should disregard AAJ's brief and rule on the question before it.

RESPECTFULLY SUBMITTED this 6th day March, 2024.

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