IN THE SUPREME COURT FOR THE STATE OF ARIZONA

JOSHUA and CLAYTON WING Plaintiffs/Appellees, v. U-HAUL INTERNATIONAL, INC. And U-HAUL CO. OF OREGON, Defendants/Appellants	)	Arizona Supreme Court No. CV-20-0081-PR Arizona Court of Appeals (Div. One) No. 1 CA-CV 18-0765 Maricopa County Superior Court No. CV2016-050917

AMICUS BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND ARIZONA CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF DEFENDANTS/APPELLANTS

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INTERESTS AND IDENTITY OF THE *AMICUS CURIAE*[1]

The International Association of Defense Counsel ("IADC") is an invitation-only association of approximately 2,500 of the world's leading corporate and insurance lawyers and insurance executives. Its members come from diverse backgrounds, ranging from partners in both large and small law firms, to senior counsel in corporate law departments, to corporate executives. The IADC is committed to ensuring fair and efficient administration of the civil justice system. To further this goal, the IADC supports and advocates for a justice system that fairly compensates plaintiffs for genuine injuries and holds responsible defendants liable for appropriate damages, while also ensuring that non-responsible defendants are exonerated without unreasonable costs.

The Arizona Chamber of Commerce & Industry ("the Chamber") is a membership organization whose organizational goal is to serve as the collective voice for Arizona business at the state Legislature. The Chamber exists to represent the interests of commerce and industry in a way that enhances the state economy. In the civil justice space, the Chamber is guided by the principle that Arizona's legal system for settling disputes should be fair and responsive to the needs of civil

[1] This *amicus curiae* brief is filed with U-Haul's consent. Plaintiff's counsel do not consent to the filing of this *amicus curiae* brief. No counsel to any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief.

litigants. The Chamber has consistently supported reforms to civil procedure rules and/or legislation to provide a legal system that promotes prompt resolution of disputes, fairness and certainty, curbs civil lawsuit abuse, reduces the costs of litigation, and protects due process rights.

SUMMARY OF THE FACTS AND PROCEEDINGS BELOW

This case arises from an accident involving a rented U-Haul single-axle tow dolly. *Wing v. U-Haul Int'l, Inc.*, No. 1 CA-CV 18-0765, 2020 WL 773474, at *1 (Ariz. Ct. App. Feb. 18, 2020). The dolly itself was rented in Oregon, but the accident occurred on an Arizona interstate while en route to the driver's final destination, Texas. *Id.* The driver, Matthew Delcollo, lost control of his vehicle. *Id.* As a result, both his vehicle and the tow dolly, as well as the vehicle the dolly transported, left the interstate and repeatedly rolled. *Id.* Joshua Wing was a passenger in Delcollo's truck, and suffered serious injuries due to the accident. *Id.* Joshua Wing and his son, Clayton Wing, sued U-Haul, alleging that the tow dolly's lack of brakes "substantially contributed to the accident." *Id.*

In Oregon, where Delcollo rented the tow dolly, there is no requirement for tow dollies to be equipped with brakes. Or. Rev. Stat. § 801.529. Arizona law, however, requires trailers over a certain weight to be "equipped with brakes that are adequate to control the movement of and to stop and to hold the vehicle[.]"A.R.S § 28-952(A)(3). Nevertheless, this requirement had never been extended to single

axle dollies such as the dolly at issue. *See also* U-Haul's Petition for Review at 8. Nonetheless, at the summary judgment phase, the trial court found that A.R.S. § 28-952(A)(3) *did* apply, and that U-Haul's dolly violated the statute because it did not have brakes. *Id.* at *5; *see also* U-Haul's Petition for Review at 8.

The parties therefore did not dispute whether U-Haul violated the statute at trial. Instead, U-Haul argued "the statutory requirement for brakes was enacted to ensure that vehicles meet a certain 'stopping distance standard,' and because the tow dolly design met that standard, brakes were unnecessary." *Wing*, 2020 WL 773474, at *2. It also "presented the jury with U-Haul's understanding that A.R.S. § 28-952 does not apply to tow dollies." *Id.* Both parties submitted competing expert testimony as to the "primary issue – whether the absence of tow dolly brakes caused and/or contributed to the accident." *Id.* U-Haul also introduced evidence reflecting that prior efforts to install brakes in tow dollies *created* safety problems, and that its tow dollies complied with the statutory performance requirement, as outlined in A.R.S. § 28-952(B). *See* U-Haul's Petition for Review at 2.

The jury, after considering all of the above, entered a general verdict for the defense at the conclusion of the 14-day trial. *See Wing*, 2020 WL 773474, at *2. In turn, the Plaintiffs, without moving for a motion for a new trial, then appealed on the basis that the trial court provided the jury with flawed instructions. *Id.* Specifically, the Plaintiffs argued that while the trial court appropriately provided negligence per

se instructions, the language of the instruction itself was flawed due to the inclusion of so-called "excuse language." *See id.* at *4-5. The "excuse language" permitted the jury to excuse U-Haul's failure to abide by A.R.S. § 28-952 if it found that U-Haul's violation of the statute was not U-Haul's fault. *Id.* The court of appeals ultimately found that the inclusion of the "excuse language" was in error, and remanded for a new trial. *See id.* at *6-7.

ARGUMENT

This Court should exercise its discretion pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure, and grant U-Haul's petition for three reasons:

First, the lower court improperly permitted the Plaintiffs to obtain appellate review for a jury instruction despite their failure to move for a new trial. This is in tension with this Court's longstanding edict that an appellate court may not review an instructional error that "requires an examination to determine if there is sufficient evidence to support [a legal] theory," and thus this Court should grant the petition. *Lewis v. S. Pac. Co.*, 105 Ariz. 582, 583 (1970); *see* Ariz. R. Civ. App. P. 23(d)(3) (review of an appellate decision is warranted where it reflects that "a decision of the Supreme Court should be overruled or qualified").

Second, the opinion below improperly expanded the application of the negligence per se doctrine, a prevalent theory of tort law. The misapplication of this theory distorts this Court's prior rulings, and implicates an "important issue[ ] of

law" that has been "incorrectly decided." *See* Ariz. R. Civ. App. P. 23(d)(3). Review is necessary to promote the rule of law and prevent further distortions of the doctrine.

Third, remand was not warranted. The jury returned a general verdict for the defense, and thus the appellate court should have let the jury's verdict stand because there was an independent, untainted basis to uphold the jury's verdict. *See Thornburg v. Elgas*, 71 Ariz. 400, 403 (1951) (a general verdict should stand if "there is any theory which is supported by substantial evidence, the judgment of the lower court will not be disturbed on appeal."). Despite this, the lower court remanded the case for a new trial. The lower court's flawed reasoning challenges the standard of review Arizona applies to general verdicts. Given the prevalence of general verdicts throughout Arizona, this error implicates an important issue of law, and thus review by this Court is necessary. *See* Ariz. R. Civ. App. P. 23(d)(3) (review of an appellate decision is warranted where it reflects that "a decision of the Supreme Court should be overruled or qualified").

Each of the reasons articulated above provides an independent basis for this Court to accept U-Haul's petition.

I. The Lower Court's Decision to Address the Plaintiffs' Jury Instruction Argument is in Tension with Past Precedent

In 1970, the Arizona Supreme Court established that an appellant must generally raise its objection to a jury instruction in its motion for a new trial to preserve the issue for appellate review. *See Lewis v. S. Pac. Co.*, 105 Ariz. 582, 583

(1970); *see also* A.R.S. § 12-2102(c) ("On an appeal from a final judgment the supreme court shall not consider the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made"). At the same time, the Arizona Supreme Court carved out a narrow exception, wherein it stated that a motion for a new trial would not be necessary *if* the appellant "desired a review of the legality of the instructions" alone. *Lewis,* 105 Ariz. at 583. By contrast, if an appellant's review of a jury instruction requires the court to "determine if there is sufficient evidence to support that theory," then the appellant must move for a new trial to preserve the issue. *Id.*

The policy behind requiring a motion for a new trial prior to obtaining appellate review is simple: "trial court[s] must be given the opportunity to correct any errors at the trial court level before an appeal is taken." *Gabriel v. Murphy*, 4 Ariz. App. 440, 442 (Ct. App.1966). Failure to comply with this procedural rule bars appellate review of an issue, regardless of how important it may be to the appellant, as civil appeals are "a statutory privilege rather than a right and strict compliance with statutory and rule requirements is mandatory." *Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 601 (Ct. App. 1984); *see also Arizona Dep't of Econ. Sec. v. Don*, 165 Ariz. 407, 408 (Ct. App. 1990) ("Because the right of appeal in civil matters is statutory in nature, appeals can only be taken at a time and in a manner provided by express grant of statutory provision."). Arizona courts have

repeatedly reaffirmed their stance that "[t]he scope of the appeal may not be enlarged beyond the matters assigned as error in the motion for new trial." *Van Dusen v. Registrar of Contractors*, 12 Ariz. App. 518, 520 (Ct. App. 1970); *Matcha v. Winn*, 131 Ariz. 115, 116 (Ct. App. 1981) ("[I]n reviewing the denial of a motion for new trial, this court may not go beyond the matters assigned as error in the motion"); *Sun Lodge, Inc. v. Ramada Dev. Co.*, 124 Ariz. 540, 543 (Ct. App. 1979) ("The scope of appeal from an order denying a motion for new trial may not be enlarged beyond the matters assigned as errors in the motion").

The lower court's decision to ignore this long-standing rule, and permit the Wings to improperly expand the scope of the appellate review in this case has far-reaching implications. It calls into question whether procedural rules are as mandatory and inflexible as prior decisions state, and risks encouraging parties to raise any creative argument they can come up with at the appellate stage, regardless of whether it was properly raised below. Such a result would gut the trial court's opportunity to correct any perceived errors at the trial court level, and is directly contrary to Arizona's stated policy. *See Gabriel*, 4 Ariz. App. at 442.

This Court therefore should grant review of the lower court's decision. Despite citing the opinion in *Lewis*, the decision below improperly analyzed whether the evidence presented at the trial court supported the instruction presented to the jury. *See Wing*, 2020 WL 773474, at *5 ("U-Haul failed to present any evidence that

it attempted to comply with A.R.S. § 28-952 . . .”). The lower court never should have undertaken this “qualitative evidentiary inquiry” due to the Plaintiffs’ failure to move for a new trial. *See Atkins v. Snell & Wilmer LLP*, No. 1 CA-CV 17-0519, 2018 WL 5019615, at *7 (Ariz. Ct. App. Oct. 16, 2018) (“Because the superior court had to have engaged in a qualitative evidentiary inquiry into the parties’ relevant contacts, . . . its conclusion that Arizona law governs is not a purely legal conclusion”). This Court should grant U-Haul’s petition for review to reinforce and protect its past precedent and policy goals. *See* Ariz. R. Civ. App. P. 23(d)(3); *see also City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378 (Ct. App. 1993) (the court of appeals is “bound by decisions of the Arizona Supreme Court and [has] no authority to overrule, modify, or disregard them.”).

II. The Lower Court’s Expansion of the Negligence Per Se Doctrine in Arizona Implicates an Important Question of Law

The lower court’s decision to impose a rigid interpretation of the negligence per se doctrine in this case resulted in an unfair – and incorrect – result for U-Haul and sets a dangerous precedent. This Court should grant review and reverse the findings of the lower court before it results in similarly unjust results for other defendants throughout Arizona. *See* Ariz. R. Civ. App. P. 23(d)(3) (review is appropriate where a decision presents an “important issue[] of law” that has been “incorrectly decided.”).

Arizona law instructs that the application of the negligence per se doctrine should not be "so rigid as to demand injustice." *Brannigan v. Raybuck*, 136 Ariz. 513, 517 (1983). To that end, the *Brannigan* Court explained that the "actual rule on the negligence per se doctrine is that unless the statute is construed to impose an absolute duty, its violation may be excused[.]" *Id.* It then went on to provide *examples* of instances where the violation of a statute should be excused, including where "the defendant was 'unable after reasonable diligence to comply.'" *Id.* (quoting Restatement (Second) of Torts § 288A (1965)). Notably, it did not provide an exhaustive list of what could constitute an excuse. Yet the lower court's opinion incorrectly interpreted *Brannigan* as establishing that there is only *one* permissible ground for excuse, namely, "when circumstances beyond a defendant's knowledge or control prevent compliance." *Wing v. U-Haul Int'l, Inc.*, No. 1 CA-CV 18-0765, 2020 WL 773474, at *4 (Ariz. Ct. App. Feb. 18, 2020).

This misinterpretation of Arizona law sets a dangerous precedent. As the Restatement (Third) of Torts explains:

> [F]or negligence per se to operate ***fairly the legal system must avoid confusion*** in its communication of the law's obligations. Accordingly, if a statute is ***so vague or ambiguous*** that even the person aware of the statute would need to ***guess as to its requirements***, the person who makes a reasonable guess is excused from negligence per se ***even if a later judicial resolution of the ambiguity reaches a different result***.

Restatement (Third) of Torts § 13 (1999) (emphasis added).

The Restatement's reasoning is consistent with the reasoning adopted by other courts throughout the country, who have also favored a flexible approach to the negligence per se doctrine. *See*, *e.g.*, *Gordon v. Hurtado*, 609 P.2d 327, 329 (Nev. 1980) (excuse instruction is appropriate whenever "the violation might reasonably have been expected from a person of ordinary prudence acting in similar circumstances." (internal citation omitted)); *Dance v. Town of Southampton*, 95 A.D.2d 442, 446 (N.Y. App. 1983) ("[T]he doctrine of negligence per se should be applied flexibly rather than rigidly, for rigid application may impose liability upon violators who are free from fault in any real sense . . . "); *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943, 948 (D.C. Cir. 1960) ("[T]he rather rigid doctrine of negligence per se has been tempered by important limitations. Our law is clearly moving in the direction of leaving more and more of the question of negligence as derived from statutory standards ***for the jury to consider***." (emphasis added)).

Taking an approach that is flexible to negligence per se is particularly important where, as here, the statute at issue was relatively novel, and was "so vague and indeterminate" that it was unclear whether it applied to tow dollies in the first instance. *Hosein v. Checker Taxi Co.*, 419 N.E.2d 568, 570 (Ill. App. Ct. 1981) (excusing a statutory violation because "persons of common intelligence must necessarily guess at [the statute's] meaning and differ as to this application."); *see also Dayton v. Palmer*, 1 Ariz. App. 184, 188 (Ct. App. 1965) ("I subscribe to the

doctrine of negligence per se . . . but before a person can be guilty of negligence ***he must have some knowledge of his failure to do something that the 'reasonable and prudent person' would do*** or not do under the circumstances.") (Krucker, C.J (concurring) (emphasis added)). Prior to the trial court's ruling, § 28-952 had *never* been applied to single-axle tow dollies. In essence, U-Haul faced liability for a statutory violation that did not exist prior to the trial court's interpretation of the statute. This, when coupled with the reality that Oregon, where the driver rented the equipment, did not require a tow dolly to have brakes, makes it apparent that the rigid application of negligence per se is fundamentally unfair. *See* Or. Rev. Stat. § 801.529. The jury's ultimate decision, after considering *all* of these facts, to excuse U-Haul's violation of the statute supports this conclusion. *See Gordon*, 609 P.2d at 329.

The lower court's holding will not just affect U-Haul: it will affect any other defendant facing a negligence per se claim based on a novel or ambiguous statute or regulation because the lower court's opinion is that of an intermediate appellate court. Review by this Court is critical to avoid misplaced reliance on the lower court's reasoning, which is contrary to this Court's established precedent and risks exposing other defendants to the same injustice imposed on U-Haul.

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III. The Lower Court's Decision to Remand is Contrary to this Court's Established Precedent Regarding General Verdicts

The jury submitted a general verdict in this case. Arizona courts follow the "general verdict rule," which is the "well known rule that if there is any theory which is supported by substantial evidence, the judgment of the lower court will not be disturbed on appeal." *Thornburg v. Elgas*, 71 Ariz. 400, 403 (1951); *see*, *e.g.*, *Garcia v. Cohen*, 225 A.3d 653, 11 (Conn. 2020) ("[I]n a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand"); *Skender v. Brunsonbuilt Const. & Dev. Co., LLC*, 148 P.3d 710, 716 (Nev. 2006) ("Under the general verdict rule, a court will sustain a general verdict where several counts are tried if any one count is supported by substantial evidence and is unaffected by error."). General verdicts do not include "interrogatories for the jury to answer," and thus it is impossible "to determine the manner in which the jury reasoned and arrived at its verdict." *Thornburg*, 71 Ariz. at 403. Arizona law, however, provides that a "general verdict implies a finding by the jury on every essential fact in favor of the prevailing party." *See Lohmeier v. Hammer*, 214 Ariz. 57, 62 (Ct. App. 2006).

The lower court's decision to remand this case for an additional jury trial ignores this longstanding rule. Even if U-Haul's violation of the applicable statute constituted negligence per se, the Plaintiffs still had to demonstrate that U-Haul's failure to comply with the statute was the "proximate cause" of the injury. *See*

Christy v. Baker, 7 Ariz. App. 354, 356 (Ct. App. 1968) (a negligence per se plaintiff must demonstrate that the "violation of the statute was the proximate cause of the injuries"). There are therefore two potential justifications for the jury's verdict: the first is that U-Haul's dolly's lack of brakes is not a design defect, and the second is that, regardless of whether there was a defect, it did not proximately cause the accident. The challenged jury instruction, however, only affected the issue regarding U-Haul's brakes. It had no impact on the question of proximate cause. Both parties introduced evidence regarding proximate cause at trial, and the jury entered a general verdict for U-Haul. *Wing*, 2020 WL 773474, at *2. As a result, there was an independent, untainted justification to uphold the jury's verdict. The jury's original verdict should have therefore remained unaffected. *See Lohmeier*, 214 Ariz. at 62.

The trial court's decision to remand for a retrial is an error that implicates an important question of law, and thus review is appropriate. *See* Ariz. R. Civ. App. P. 23(d)(3). The use of general verdict forms is widespread: general verdicts are "[t]he most common form of verdict employed" in Arizona. 2 Ariz. Prac., Civil Trial Practice § 34:3 (2d ed. 2019 Update). The lower court's error introduces confusion as to how to interpret these verdicts, and risks the remand of an untold number of jury verdicts for an unnecessary second trial. This senseless waste of judicial and parties' resources must be prevented. The cost of litigating a case already pressures many defendants to settle claims of dubious merit. *See also* Alan M. Trammell,

Isolating Litigants: A Response to Pamela Bookman, 68 Stan. L. Rev. Online 33, 37 (2015) (noting concerns "about burgeoning discovery costs and the resulting pressure to settle even meritless cases."). If permitted to stand, the lower court's decision will increase this pressure by adding uncertainty to the trial process. This Court should grant review to clarify that as long as there is an independent, untainted justification to uphold the jury's verdict, the jury's verdict should be upheld even if there is an error within the jury instructions. *See Lohmeier*, 214 Ariz. at 62.

CONCLUSION

For the foregoing reasons, as well as the reasons outlined in U-Haul's Petition, the IADC and the Chamber strongly urge this Court to grant review of U-Haul's petition, and reverse lower court's findings.

Dated this 15th day of June, 2020

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