DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRENT JOHN BARTELL, through his Court-appointed guardian and conservator, KIM HOESEL,	)	1 CA-CV 08-0024
	)	DEPARTMENT A
Plaintiff/Appellee, v.	)	**AMENDED MEMORANDUM DECISION**
MESA SOCCER CLUB, INC., an Arizona corporation,	)	Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2004-009728

The Honorable Edward O. Burke, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 On May 17, 2003, appellee Brent Bartell suffered catastrophic injuries when the motorcycle he was operating collided with a sport utility vehicle ("SUV") operated by Re-Ann Fuzy. A jury awarded Bartell a $7 million verdict and found that Fuzy had been acting as an agent for appellant Mesa Soccer Club, Inc. ("MSC") at the time of the accident and that MSC was vicariously liable for Fuzy's actions. On appeal, MSC contends the trial court erred by denying its motion for directed verdict and motion for judgment notwithstanding the verdict ("JNOV") on the issue of its vicarious liability. MSC also raises several other issues on appeal that it contends require reversal of the judgment and a new trial. For the following reasons, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 MSC is a non-profit organization that is dedicated to the sport of soccer. It sponsors a youth soccer league that has several divisions structured around the age and ability of the players, and it hires coaches for each of the teams. At the time of the incident, Fuzy was a sixteen-year-old player on one of MSC's youth soccer teams. The team was coached by Aaron Muth.

¶3 Prior to the May 17, 2003 incident, Muth scheduled a training session for his team on that day at North Mountain Park in Phoenix. Muth instructed the team to meet at the Cornerstone Mall in Tempe, and from there they would carpool together approximately twenty miles to North Mountain Park. Muth wanted the players to carpool both to save them money and so they would arrive at North Mountain Park together.

¶4 Fuzy drove herself to the mall in her mother's SUV. From there she drove herself and four other players to North Mountain Park. At trial, it was disputed whether she had volunteered to drive herself and the other players or whether Muth had asked her to drive. Muth and two or three of the other teenaged players drove the rest of the team to the practice site. It was also disputed during the trial whether Muth had instructed Fuzy to follow him in his vehicle from the mall to North Mountain Park.

¶5 The team trained at North Mountain Park for about two hours. Afterwards, they met near the base of the mountain and Muth gave them directions on how to drive back to the mall. A "No Left Turn" sign was posted at the intersection of the North Mountain Park parking lot and Seventh Street. Because left-hand turns from the parking lot were prohibited, Muth instructed the drivers to make a right-hand turn out of the parking lot -- into the southbound lane on Seventh Street -- and then to make a U-turn to go northbound.

¶6 Muth exited the parking lot first, turning right and then quickly executing a U-turn to head north. He waited in the median facing northbound across from the parking lot so the team could follow him back to the mall. The next driver made a right-hand turn out of the parking lot and continued driving south, apparently because the players in that vehicle lived in the opposite direction and were planning to drive directly home rather than return to the mall.

¶7 Fuzy, who was driving several of the girls back to the mall, was next to leave the parking lot. She saw Bartell approaching on his motorcycle from her left in the southbound lane but believed she had enough time to cross the southbound lane before Bartell arrived. She pulled into the intersection and began an illegal left-hand turn. As she crossed into Bartell's path of travel, Bartell's motorcycle struck the rear

driver's side of her vehicle. Bartell, who was not wearing a helmet at the time, suffered severe and permanent brain injuries as a result of the accident.

¶8 In January 2006, Bartell's court-appointed guardian and conservator filed a first amended complaint on Bartell's behalf against MSC, Fuzy, and Muth. He alleged the defendants had been negligent and that MSC was vicariously liable for Fuzy's negligence because she was acting as MSC's agent at the time of the incident. Prior to trial, the court granted Bartell's motion for partial summary judgment precluding MSC from presenting evidence that Bartell was not wearing a helmet at the time of the accident. After Bartell had presented his evidence to the jury, MSC moved for a directed verdict on the issues of its vicarious and direct liability. The court denied the motions.

¶9 The jury awarded Bartell a $7 million verdict and found Fuzy 82% liable, Bartell 16% liable, MSC 1% liable, and Muth 1% liable. The jury also found Fuzy was acting as MSC's agent at the time of the incident. After the court entered judgment, MSC moved for a JNOV on the issues of its vicarious and direct liability. The trial court denied the motion.

¶10 MSC now appeals from the trial court's denial of its motions for directed verdict and for JNOV on the issues of its vicarious and direct liability, as well as the trial court's

granting of Bartell's motion for partial summary judgment on the issue of MSC's motorcycle helmet defense. MSC also contends the trial court made several erroneous evidentiary rulings and failed to properly instruct the jury on the issue of agency. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

AGENCY AND VICARIOUS LIABILITY

¶11 MSC first contends the trial court erred by denying its motions for judgment of acquittal and JNOV on the issue of its vicarious liability for Fuzy's actions. When reviewing the denial of both motions, we view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997). Both motions should be granted "only if the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant." *Id*.

¶12 The terms "master" and "servant" have been defined in the common law as follows:

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of

> the service is controlled or is subject to the right to control by the master.

Restatement (Second) Agency § 2; *see Wiggs v. City of Phoenix*, 198 Ariz. 367, 370, ¶ 10, 10 P.3d 625, 628 (2000) (using definitions from Section 2); *Solar-West, Inc. v. Falk*, 141 Ariz. 414, 418, 687 P.2d 939, 943 (App. 1984) (same). An agency relationship arises when there is a "manifestation of consent by the alleged principal to the alleged agent that the agent shall act on his behalf and subject to his control and consent by the agent to act on behalf of the principal and subject to his control." *Dawson v. Withycombe*, 216 Ariz. 84, 100, ¶ 43, 163 P.3d 1034, 1050 (App. 2007); *see also* Restatement (Second) Agency § 1.

¶13 The doctrine of respondeat superior imposes liability upon a master for the torts of his or her servants committed while acting in the scope of their employment. *See Hansen v. Oakley*, 76 Ariz. 307, 312, 263 P.2d 807, 810 (1953); *see also* Restatement (Second) Agency § 219. It is also established in Arizona law that "[o]ne who volunteers services without an agreement for or expectation of reward, may be a servant of the one accepting such services." *Scottsdale Jaycees v. Superior Court*, 17 Ariz.App. 571, 574, 499 P.2d 185, 188 (1972) (quoting Restatement (Second) Agency § 225); *see also Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 14, 536 P.2d 697, 702 (1975);

Duncan v. State, 157 Ariz. 56, 60, 754 P.2d 1160, 1164 (App. 1988); *Maxwell v. Bell*, 121 Ariz. 475, 477, 591 P.2d 567, 569 (App. 1979).

¶14 Generally, agency is a question of fact to be determined by the jury. *See Schenks v. Earnhardt Ford Sales Co.*, 9 Ariz.App. 555, 557, 454 P.2d 873, 875 (1969). If the facts are not in dispute, however, or if the facts viewed most favorably to the non-moving party are insufficient to establish agency, it is a question of law for the court. *See id*.

¶15 MSC contends there was insufficient evidence that Fuzy was MSC's agent and that MSC controlled or had the right to control her driving. It also argues that strong public policy should compel rejection of vicarious liability under the facts of this case and that, even if Fuzy was its agent, imposition of vicarious liability is improper under the "going and coming rule" and because Fuzy's driving was not within the scope of her employment.

Agency Relationship

¶16 It is undisputed that Fuzy had no expectation of being compensated for driving herself and others to the practice site on the day of the incident. In determining whether a gratuitous undertaking is part of a master-servant relationship, the two key elements "are whether the actor has submitted [her]self to the directions and control of the one for whom the service is

done and whether the primary purpose underlying the act was to serve another." *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 14, 536 P.2d 697, 702 (1975). We conclude there was sufficient evidence for the jury to find that Fuzy subjected herself to MSC's control on the day of the incident and that the primary purpose underlying her actions was to serve MSC.

¶17 We first note that MSC did not normally control transportation of the players to and from practices and games. MSC's operating guidelines provide that "[p]arents must provide transportation to and from all events." Testimony at trial established that the players or their parents in fact routinely provided their own transportation to and from MSC events.

¶18 On the day of the incident, however, Muth directed the players to meet at the mall rather than the usual practice site and to carpool to North Mountain Park. And although the evidence was conflicting, there was evidence that Muth asked Fuzy to drive herself and several of her teammates from the mall to the practice site and back again. During her deposition, Fuzy was asked: "What happened at [the mall] to change your mind and allow you to drive?" She responded: "I had one of the bigger vehicles and [Muth] asked me to drive [to the practice site]." Similarly, Fuzy's mother was asked during her deposition: "What is your understanding of why [Fuzy] drove that day to North Mountain Park?" She responded: "Because

[Muth] had asked her to drive. . . . She said [Muth] asked her if she had driven [“]the beast[”] that day, referring to the [SUV]. She said yes. And he said, “well, would you – would you drive?”

¶19 Reasonable persons could find that Fuzy had performed this task primarily for MSC’s benefit. Under MSC’s guidelines, Fuzy had a general obligation to transport herself to and from practice, but she had no obligation to transport several of her teammates, as Muth requested that she do. Fuzy’s mother stated in her deposition that she had not wanted Fuzy to drive from the mall to the practice site on that day because Fuzy was a newly licensed driver who had never before driven to North Mountain Park, she believed it was too far for Fuzy to drive, and she thought it would be unsafe. And while Fuzy may have benefitted from transporting herself to practice, reasonable jurors could find that it was for MSC’s benefit that she was asked to transport her teammates on the day in question.

¶20 There was also evidence MSC exercised control over Fuzy’s driving to and from the practice site. Fuzy testified that, as the team was preparing to leave the practice site, Muth had given her directions back to the mall and had expressly directed her to follow him in his vehicle. Fuzy stated: “[Muth] told me to follow him because of all the detours. I didn’t know where to go, plus I had never been to Phoenix and I

said okay. . . . I remember him saying something about just follow me and I'll take you back that way." After Muth pulled his vehicle onto Seventh Street, he waited in the median so Fuzy could follow him back to the mall. Reasonable jurors could find Muth exercised sufficient control over Fuzy's driving to establish a master-servant relationship.[1]

¶21 MSC next argues there was no agency relationship because Fuzy and MSC never reached a formal agreement that Fuzy would act as MSC's agent.[2] The relationship of agency, however, "does not depend upon the intent of the parties to create it, nor their belief that they have done so." Restatement (Second) Agency § 1, cmt. b. Thus, the parties' understanding of the nature of their relationship is not determinative, *see Phoenix Western Holding Corp. v. Gleeson*, 18 Ariz.App. 60, 66, 500 P.2d 320, 326 (1972), and the fact that neither Fuzy nor MSC believed they were creating an agency relationship is not dispositive of the issue. *See* Restatement (Second) Agency § 1, cmt. b (explaining possibility that "neither [party] may have any realization that they are creating an agency relation or be aware of the legal obligations which would result from

[1] We also note that testimony during trial established that MSC's coaches generally had the authority to control their players on and off the field for soccer-related activities.

[2] During trial, Fuzy testified she had not entered into an agreement to be an agent of MSC. And an officer of MSC stated that MSC had never entered into an agency agreement with Fuzy.

performance of the service.").

¶22 The facts construed most favorably to Bartell, as they must be, show the arrangement between MSC and Fuzy and MSC's control over Fuzy's actions was only informal and temporary. Illustration one from Restatement (Second) of Agency § 225, however, supports the conclusion that such an arrangement may lead to a principal's vicarious liability:

> A, a social guest at P's house, not skilled in repairing, volunteers to assist P in the repair of P's house. During the execution of such repair, A negligently drops a board upon a person passing upon the street. A may be found to be a servant of P.

In *Nguyen v. Nguyen*, 155 Ariz. 290, 291, 746 P.2d 31, 32 (App. 1987), this court applied this principle and held that, where a homeowner asked her sister to wax the kitchen floor, and plaintiff slipped and was injured on the newly waxed floor, the sister was a servant of the homeowner, who could be held vicariously liable for the sister's negligence.

¶23 We note that other jurisdictions have also found that a non-profit organization may be vicariously liable for the negligence of a one-time or occasional volunteer who injures a third-party while using his or her personal vehicle to transport goods or persons for that organization, so long as the organization exercised sufficient control over the volunteer's actions. For example, in *Daniels v. Reel*, 515 S.E.2d 22, 25

(N.C. Ct. App. 1999), a baseball coach instructed his team to meet at the high school before a game. At the school, he asked for volunteers to drive to the game and Reel, a sixteen-year-old player, volunteered to drive himself and several players in his father's SUV. *Id*. While returning from the game Reel was involved in an accident that injured two players in his vehicle and killed another. *Id*. On those facts, the court found it was for the jury to determine whether Reel was an agent of the American Legion post that sponsored the baseball team and whether that American Legion post was vicariously liable for Reel's negligence under the doctrine of respondeat superior. *Id*. at 30. The relevant facts in our case are similar to those in *Daniels*.

¶24 In *Trinity Lutheran Church, Inc. v. Miller*, 451 N.E.2d 1099, 1101 (Ind. Ct. App. 1983), Goodman volunteered to deliver cookies to sick and infirm members of the church's congregation as part of the church's Christmas program. *Id*. While making deliveries, he turned his vehicle into Miller's motorcycle, which resulted in Miller's left leg being amputated. *Id*. The court found there was sufficient evidence for the jury to conclude Goodman was an agent of the church and subject to its control. *Id*. at 1102-03. The court noted that Goodman drove at the invitation of a church member, he had participated as a driver on previous Christmases, and the church had picked the

delivery date, provided the cookies, organized the list of shut-in members who were to receive cookies, and had chosen the people to whom Goodman was to deliver cookies. *Id*.

¶25 Although we believe the agency question here to be a close one, we conclude that there was sufficient evidence for the jury to find that Fuzy was an agent of MSC and had subjected herself to its control at the time of the incident. Accordingly, we discern no error in the court's denial of MSC's motions for judgment of acquittal and JNOV.

Public Policy

¶26 MSC claims that "strong public policy concerns should compel rejection of vicarious liability under the facts of this case" and that imposing vicarious liability would subject numerous charitable and youth organizations to liability because their participants are often required to travel to and from sponsored events. MSC argues that: "All that would be needed to saddle one of these organizations with the potential for multi-million [dollar] liability would be a claim that a request was made by the organization."

¶27 To the extent MSC is suggesting that charitable organizations should not be saddled with respondeat superior liability, we first note that the doctrine of charitable immunity has long been abolished in Arizona. *See Ray v. Tucson Medical Center*, 72 Ariz. 22, 36, 230 P.2d 220, 229-30 (1951).

Additionally, MSC has misstated the basis for a finding of vicarious liability. To establish the existence of an agency relationship, a plaintiff must prove not only that "a request was made by the organization," but that each party assented to the alleged agent acting on behalf of the alleged principal and that the agent's conduct was controlled by the principal – these are the elements necessary to find a principal vicariously liable for the negligence of its agent. *See Dawson*, 216 Ariz. at 100, ¶ 43, 163 P.3d at 1050. When a party presents reasonable evidence of these elements, our law permits the jury to determine whether an agency relationship existed.

Going and Coming Rule

¶28 Finally, MSC asserts that even if an agency relationship existed, the imposition of vicarious liability is improper under the "going and coming rule." Under that rule, an employer is generally not liable for the tortious acts of his employee while the employee is going to or returning from his place of employment. *See State v. Superior Court*, 111 Ariz. 130, 132, 524 P.2d 951, 953 (1974); *Bishop v. State Dep't of Corrections*, 172 Ariz. 472, 475, 837 P.2d 1207, 1210 (App. 1992). That rule is inapplicable here because Fuzy's driving to and from this particular practice location -- North Mountain Park -- formed the very basis of the agency relationship. *See Smith v. American Exp. Travel Related Services Co.*, 179 Ariz.

131, 136, 876 P.2d 1166, 1171 (App. 1994) (employer liable for torts of employee if employee performing service in furtherance of employer's business).

Agency Instruction

¶29 MSC next contends the court abused its discretion when it refused to include the factors listed in *Santiago v. Phoenix Newspapers*, 164 Ariz. 505, 794 P.2d 138 (1990), in its agency instruction to the jury. In *Santiago*, our supreme court stated:

> In determining whether an employer-employee relationship exists, the fact finder must evaluate a number of criteria. They include:
>
> 1. The extent of control exercised by the master over details of the work and the degree of supervision;
>
> 2. The distinct nature of the worker's business;
>
> 3. Specialization or skilled occupation;
>
> 4. Materials and place of work;
>
> 5. Duration of employment;
>
> 6. Method of payment;
>
> 7. Relationship of work done to the regular business of the employer;
>
> 8. Belief of the parties.

Id. at 509, 794 P.2d at 142.

¶30 We find no abuse of discretion in the court's refusal to include these factors. *See Smyser v. City of Peoria*, 215 Ariz. 428, 439, ¶ 33, 160 P.3d 1186, 1197 (App. 2007) ("trial

court has substantial discretion in determining how to instruct the jury"). The factors in *Santiago*, which are taken from Restatement (Second) Agency § 220, are used to determine whether an acknowledged agent is an employee or independent contractor. Here, the question is more fundamental: Was Fuzy acting as a gratuitous agent of MSC? The trial court did not abuse its discretion in declining to instruct on the *Santiago* factors.[3]

¶31 The court here instructed the jury as follows:

> Agency is the relationship that arises when one person, a principal, manifests assent to another person, an agent, that the agent shall act on the principal's behalf subject to the principal's control or right to control and the agent manifests assent or otherwise consents to so act.
>
> . . .
>
> The two key elements for the determination of whether a person who volunteers his or her services as an agent of the person or entity for whom the services are volunteered are whether the volunteer has submitted

[3] Bartell suggests in his answering brief that it would have in fact been improper for the court to list the *Santiago* factors in its instruction because they are relevant to whether a person is an employee or independent contractor, not whether the person is an agent. A servant is a type of agent and an independent contractor may also be an agent. *See* Restatement (Second) Agency § 2 cmt. b. The issue in the case was whether Fuzy was a gratuitous servant of MSC. The *Santiago* factors, however, might conceivably have assisted a jury in determining whether Fuzy was a gratuitous independent contractor of MSC, but MSC was not contending that Fuzy was a gratuitous independent contractor. *See generally Boissonnault v. Bristol Federated Church*, 642 A.2d 328, 328-29 (N.H. 1994) (applying factors in Restatement (Second) Agency § 220 to determine if volunteer for church should be considered servant or independent contractor).

> himself or herself to the directions and control of the one for whom the service is performed and whether the primary purpose of the act was to serve another.

These instructions mirror the law as stated in the Restatement (Second) of Agency § 1 and *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 14, 536 P.2d 697, 702 (1975). We find the instruction given was an adequate and accurate statement of the law. Although a trial court must fully and accurately state the law that a jury is to apply, it need not instruct on every refinement of law that is suggested by the parties. *See State Farm Fire & Cas. Ins. Co. v. Grabowski*, 214 Ariz. 188, 195, ¶ 23, 150 P.3d 275, 282 (App. 2007). Again, we see no abuse of the court's discretion in refusing to give the proffered instruction.

DIRECT LIABILITY

¶32 MSC claims the trial court erred by denying its motions for directed verdict and JNOV on the issue of its 1% independent liability. It argues that it should not be held directly liable to Bartell because, as a matter of law, it did not owe Bartell a duty of care. We disagree.

¶33 Generally, whether a duty exists is a question of law for the court. *See Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 437, ¶ 10, 153 P.3d 1064, 1066 (App. 2007). According to section 213 of the Restatement (Second) of Agency:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

As discussed above, there was evidence from which jurors could find that Fuzy had been acting as an agent of MSC at the time of the incident. Under this section, MSC, as principal, owed a duty to Bartell to ensure that Fuzy was a proper person for MSC to employ to transport herself and other players to and from the practice site and to ensure that Fuzy received proper instructions on how to complete the task. Apart from respondeat superior liability, the jury could find MSC was directly negligent by permitting or directing young drivers such as Fuzy to transport themselves and other players to a distant practice site.

¶34 MSC contends it owed no duty to Bartell because Fuzy was a licensed driver and because there was no evidence she posed a driving risk. Whether Fuzy was a licensed and

responsible driver, however, is relevant to the issue of whether MSC breached its duty, a question of fact that is for the jury. *See Fehribach v. Smith*, 200 Ariz. 69, 73, ¶ 16, 22 P.3d 508, 512 (App. 2001). And, in any event, there was evidence presented at trial that Fuzy was an inexperienced driver, who had not previously driven to Phoenix at the time of the incident.

¶35 MSC asserts in its opening brief that the "absence of a known driving risk factored heavily in this Court's recent determination in a closely analogous case that no duty existed." In *Collette v. Tolleson Unified School Dist.*, 203 Ariz. 359, 54 P.3d 828 (App. 2002), the case to which MSC refers, this court found a school district owed no duty to the driver of a vehicle that had been struck by a student who had left the school without a pass on lunch break. That case is inapplicable here, however, because no agency relationship was involved and the duties that a principal owes to third parties were not present, and also because the school district had not arguably assumed control of the transportation of the students, as here.

HELMET DEFENSE

¶36 Bartell was not wearing a helmet at the time of the accident. Prior to trial MSC retained an expert witness, Dan Wall, who opined that "[u]nhelmeted riders are 29 percent less likely to survive a crash and 40 percent more likely to die from head injury, according to the National Highway Traffic

Administration (NHTSA)." He further stated:

> The helmet reduces the inertial loading on the brain and reduces the load distribution on the skull. Helmets are effective in reducing rotational acceleration injuries to the brain. The helmet cushions the blow to the head and spreads the blow over a larger area. . . . Modern full face helmets with the newest safety design help mitigate or prevent injuries to the brain, face and chin in head frontal impacts. The face shield and chin bar also help to prevent these injuries.

At his deposition Wall was asked if Bartell would be able to walk today if he had been wearing a helmet. He responded: "It's certainly highly probable that he would be able to do that, yes."

¶37 Prior to trial, Bartell moved for partial summary judgment on the issue of MSC's "motorcycle helmet defense," seeking to preclude MSC from presenting evidence that he was not wearing a helmet at the time of the accident. He argued MSC had not presented competent evidence to quantify the degree that his injuries were enhanced by his failure to wear a helmet, as required by *Warfel v. Cheney*, 157 Ariz. 424, 758 P.2d 1326 (App. 1988). MSC now challenges the trial court's grant of that motion, a decision we review *de novo*. *See Western Corrections Group, Inc. v. Tierney*, 208 Ariz. 583, 586, ¶ 11, 96 P.3d 1070, 1073 (App. 2004).

¶38 Generally, evidence that an injured plaintiff was not

wearing a helmet at the time of the incident is admissible and relevant to the issue of damages. *Warfel*, 157 Ariz. at 430, 758 P.2d at 1332. To present such evidence, however, "defendants must also produce evidence showing what portion of the injuries sustained by plaintiff [were] attributable to helmet nonuse." *Id*. Testimony that helmet use generally results in less severe injuries after a motorcycle accident is insufficient because it gives the jury "no guidance in apportioning damages," and any reduction in damages would be "purely speculative." *Id*. at 430, 758 P.2d at 1332.

¶39 Here, the trial court ruled that Wall was "not medically qualified to testify that Mr. Bartell 'probably would have been able to walk today if he had been wearing a motorcycle helmet.'" Wall did not consult any medical doctors in reaching this conclusion and does not have degrees in biomechanical engineering or medicine. Whether an expert witness is competent to testify on a given subject rests in the sound discretion of the trial court. *Carrel v. Lux*, 101 Ariz. 430, 441, 20 P.2d 564, 575 (1966). MSC challenges this ruling for the first time on appeal in its reply brief, and we generally do not address issues raised for the first in a reply brief. *See, e.g., A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, 534 n.23, ¶ 53, 217 P.3d 1220, 1239 n.23 (App. 2009). And even reaching the issue, we find no abuse of

discretion on this record.

¶40 We cannot say the court erred in finding the remainder of Wall's expert opinion failed to meet the requirements set forth in *Warfel*. Wall's expert report offered facts about the effectiveness of helmets generally in saving lives and preventing injuries. He did not offer an opinion, however, about the effect a helmet would have had on Bartell's injuries. Wall's testimony therefore would have provided little or no guidance to the jury in apportioning damages for Bartell's particular injuries. *See Warfel*, 157 Ariz. at 430, 758 P.2d at 1332 ("we start with the accepted premise that motorcycle helmets generally save lives and prevent enhancement of head injuries"). Accordingly, we find no abuse of discretion in the trial court's exclusion of MSC's helmet defense.

POSITIVE DRUG SCREEN TEST AND NEGLIGENCE PER SE

¶41 Following the accident, Bartell was taken to John C. Lincoln Hospital. There he was given a drugs-of-abuse urine screen test that showed positive for an "amphetamine-like" substance. Prior to trial, MSC requested that the trial court give a negligence per se instruction to the jury based on Bartell's alleged violation of A.R.S. § 28-1381(A)(3), which prohibits driving with, *inter alia*, amphetamine, meth-amphetamine, or their metabolites in the system. Bartell responded that a negligence per se instruction was improper

because both MSC's and Bartell's expert witnesses had concluded the immunoassays used in the screening test were non-specific and the screening test therefore did not show whether Bartell had been using methamphetamine or one of a wide variety of over-the-counter drugs, such as Nyquil or Sudafed. He then filed a motion in limine to preclude all argument or reference to methamphetamines during the trial, which the trial court granted.

¶42 MSC argues the trial court abused its discretion by excluding evidence of the positive drug test and by refusing to instruct the jury on negligence per se. We disagree.

¶43 The evidence below established that Bartell tested positive for an "amphetamine-like" substance, but it did not establish that Bartell had amphetamine, methamphetamine, or one of their metabolites in his system at the time of the incident. MSC's expert, Dr. John Sullivan, stated in his expert report:

> [Bartell] had a urine drugs-of-abuse screen that was positive for amphetamine-like substance on the day of admission. The drug screen results were qualitative and only presumptive for an amphetamine-like substance. Blood was not tested. The urine results were not confirmed by an alternative method and, therefore, the identity of this substance remains unknown.

Similarly, Dr. Norman Wade provided a declaration stating the "immunoassays involved in a urine drug screen for amphetamines are not specific" and that

> [o]f all immunoassays, amphetamine assays are highly subject to cross-reactivity with a wide variety of over-the-counter and non-illicit substances, such as Nyquil, Sudafed, Robitussin, Dexatrim, Accutrim, Vicks inhaler, asthma medication, Chinese herbal remedies, weight loss pills and dozens of prescription drugs. . . . Because the amphetamine immunoassay's chemical structure is similar to many over-the-counter and non-illicit drugs, the presence of any of these substances can cause a false positive result.

Norman concluded: "It is my opinion, to the highest degree of toxicological certainty, that the May 17, 2003 urine drug screen . . . does not show what substance, legal or illegal, and what amount of that substance, caused the positive amphetamine result." Moreover, the last page of the screen-test results states that "[t]he ingestion of natural herbal and plant products containing Ephedra/Ephedra metabolites can produce in urine one or more substances capable of cross-reacting with amphetamine/methamphetamine immunoassays. This test provides a preliminary result only."

¶44 Based on this evidence, we cannot say the court abused its discretion by excluding evidence of the urine screen test results. The test did not show what amphetamine-like substance, licit or illicit, was in Bartell's system. There was evidence that any number of legal substances could have caused the positive result, including herbs and over the counter medications. The court did not err by finding the probative

value of this evidence was substantially outweighed by the danger of unfair prejudice. *See* Ariz. R. Evid. 403.

¶45 We also cannot say the court erred by refusing to give a negligence per se instruction based on Bartell's possible violation of A.R.S. § 28-1381(A)(3). That statute provides: "It is unlawful for a person to drive or be in actual physical control of a vehicle . . . [w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body." "Methamphetamine" and "amphetamine" are substances listed in § 13-3401. *See* A.R.S. § 13-3401(6)(b)(i), (xiii). While we agree with MSC that a violation of A.R.S. § 28-1381 does not require evidence that Bartell was *impaired* by methamphetamine or amphetamine at the time of the accident, the evidence did not establish that Bartell had amphetamine, methamphetamine, or any other substance listed in § 13-3401 in his system at the time of the incident. There was no evidence that the over-the-counter medications or herbs that may have caused the positive test result contain a substance listed in § 13-3401. The court did not abuse its discretion by refusing to give the requested instruction.

History of Methamphetamine Use

¶46 In 2000, Bartell was indicted for driving a motor vehicle with amphetamine, methamphetamine, or its metabolite in his body in violation of § 28-1381(A)(3). In 2001, he was

arrested for possession of methamphetamine. Bartell's fiancée stated in her deposition that she had seen Bartell take methamphetamine approximately ten times, including once in the month prior to the accident.

¶47 MSC now argues the trial court erred by excluding evidence of Bartell's history of methamphetamine use. He claims the evidence "was relevant to corroborate his impairment on the date of the accident" and to put into context Bartell's positive drug screen test. We disagree. As discussed above, the trial court did not abuse its discretion by precluding evidence of the positive drug screen test from trial, and evidence of Bartell's prior methamphetamine use would have been used to show conduct in conformity with his prior bad acts, an improper use of that evidence here. *See* Ariz. R. Evid. 404(b); *see also Ornelas v. Fry*, 151 Ariz. 324, 328-29, 727 P.2d 819, 823-24 (App. 1986) (requiring plaintiff in medical malpractice case to prove doctor was impaired by alcohol on day of surgery before admitting evidence of doctor's alcoholism).

Erratic Driving

¶48 Last, MSC claims the trial court erred by precluding evidence that Bartell was driving erratically prior to the accident. In a police interview conducted after the accident, an officer wrote in his report: "Justin Lombard didn't see the collision but described the driving of the motorcycle in the

area of 7[th] Street and Thunderbird as a high rate of speed and cutting in and out of traffic. The motorcycle varied its speed due to traffic conditions and by the time Justin crested the hill, the collision had already occurred."

¶49 Bartell filed a motion in limine to prevent Lombard from testifying and to exclude his statements as recorded in the police report. He claimed the statements in the police report were inadmissible hearsay and that Lombard's testimony would be irrelevant because he had last seen Bartell driving more than a mile away from where the crash occurred. The trial court granted the motion without comment.

¶50 MSC claims this evidence was relevant to proving Bartell's comparative fault and to corroborating other evidence of Bartell's impairment. Generally, testimony regarding the speed of a driver some distance prior to the accident is not admissible to show the speed of the driver at the site of the accident. *See Morris v. Aero Mayflower Transit Co.*, 73 Ariz. 390, 395, 242 P.2d 279, 282 (1952) (evidence of speed of vehicle four or five blocks from accident site incompetent to show speed at accident site). Because Lombard last saw Bartell driving more than a mile from the accident scene, on this record we do not find that the court abused its discretion by excluding this testimony.

DISPOSITION

¶51 For the foregoing reasons, we affirm the judgment.

___/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
SHELDON H. WEISBERG, Presiding Judge

____/s/_____
DANIEL A. BARKER, Judge