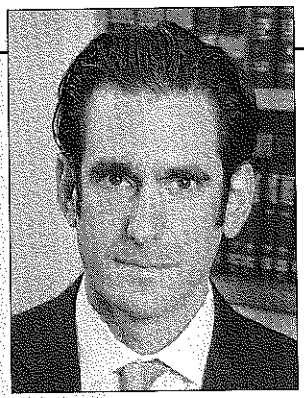
Case Note: Vicarious Liability and Negligence Law



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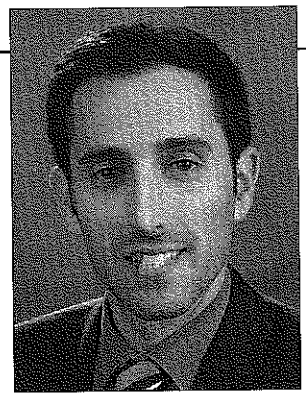

A Colorado Supreme Court ruling on February 27, 2017 has changed the landscape of negligence and vicarious liability in the context of trucking litigation in Colorado. In *Ferrer v. Okbamicael*, 390 P.3d 836 (2017), the Colorado Supreme Court held that where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred. Accordingly, where an employer acknowledges that an employee was acting in the course and scope of his or her employment when an accident occurs, direct negligence claims against the employer are barred.[1] In *Ferrer*, a plaintiff's claims against an employer for direct negligence, including claims for negligence as a common carrier and negligent entrustment, hiring, supervision, and training were barred in accordance with the Court's adoption of the holding in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995).

The following article will discuss the Colorado Supreme Court's decision in *Ferrer v. Okbamicael*, 390 P.3d 836 (2017), otherwise referred to as the "preemption rule" or the "majority rule."[2] The article will then provide a nationwide analysis of the "preemption rule." Finally, the article will address the application of the "preemption rule" in appropriate litigation.

I. *Ferrer v. Okbamicael*, 390 P.3d 836 (2017)

In *Ferrer*, a pedestrian brought a negligence action against a taxi driver and the driver's employer for injuries received when the driver struck the pedestrian as she crossed a street. The pedestrian sued the driver alleging negligence and the driver's employer for negligence under the doctrine of respondeat superior. The pedestrian also directly filed suit against the employer asserting claims of negligence as a common carrier and for negligent entrustment, hiring, supervision, and training.[3] In an amended answer to the complaint, the employer admitted that its driver was an employee acting within the course and scope of his employment at the time of the accident.[4] The employer then moved for partial judgment on the pleadings, seeking to dismiss the direct negligence claims against the employer. The trial court dismissed these direct negligence claims.[5] The pedestrian then moved to amend the complaint to add exemplary damages against both the driver and the employer.[6] The trial court denied the motion for exemplary damages because the pedestrian failed to allege evidence of willful and wanton conduct by either the driver or the employer. The pedestrian then petitioned the Colorado Supreme Court requesting that the Court vacate the trial court's ruling.[7]

In upholding the trial court's ruling dismissing direct negligence claims against the employer, the Colorado Supreme Court adopted the rule in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995). *McHaffie* held that "where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred."[8] The Court agreed with those courts that preclude direct negligence claims against employers who acknowledge vicarious liability. The Court found that because a plaintiff first must prevail on negligence claims against an alleged employee tortfeasor, "a plaintiff has no cause of action against [an] employer for [direct negligence] ... unless and until the employee's own negligence causes an accident."[9] An employer's vicarious liability and direct negligence claims "are tethered to the employee's tortious acts."[10]

The pedestrian also appealed the trial court's ruling denying the motion to add exemplary damages against the driver and employer. The Colorado Supreme Court acknowledged that certain courts have recognized an exception for direct negligence claims against an employer where a plaintiff seeks exemplary damages.[11] The Colorado Supreme Court rejected such an exception and found that "an exception is not logically consistent

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with the rule."[12] The Court also held that Colorado's exemplary damages statute, C.R.S. § 13-21-102, "does not create an independent cause of action, but merely authorizes increased damages ancillary to an independent claim for actual damages."[13]

II. Nationwide Analysis

There appears to be a "fairly even split among jurisdictions in adopting the conflicting [majority and minority rules.]"[14]

As such, certain opinions have referred to the conflicting rules as the "preemption rule" and the "non-preemption rule."[15] Additionally, in McHaffie, the Missouri Supreme Court recognized that there may be an exception to the majority rule when an employer is liable for punitive damages.[16] This exception remains applicable nationwide even though it was rejected in *Ferrer*.[17]

a. Majority Rule or Preemption Rule

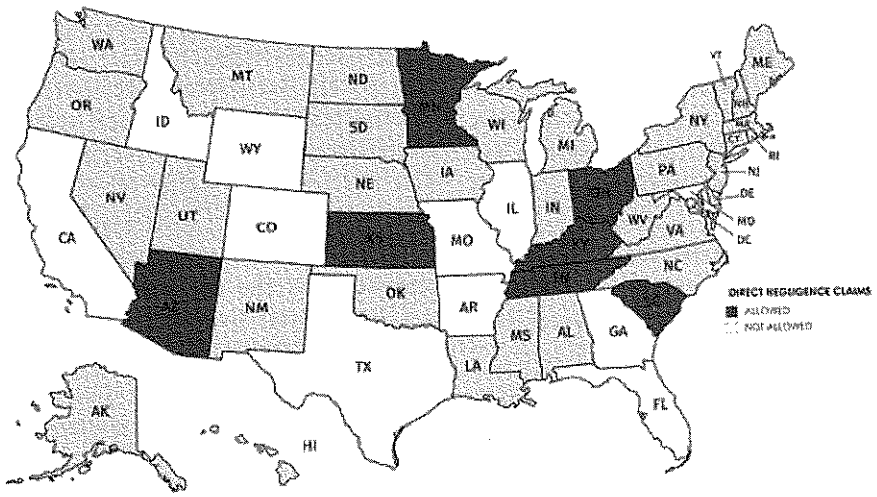
Various state courts follow the majority rule cited in *McHaffie*. The Court of Appeals of Maryland (commonly called the Supreme Court) found in *Houlihan v. McCall*, 78 A.2d 661 (Md. 1951) that "when agency has been admitted it [is] quite unnecessary to pursue the alternative theory in order to hold the corporate defendant [liable]. It [is] only necessary to prove negligence on the part of the driver."[18] The Supreme Court of Arkansas in *Elrod v. G & R Const. Co.*, 628 S.W.2d 17 (Ark. 1982) upholds the majority rule.[19] In Idaho, the Supreme Court agreed with decisions from Arkansas, Florida, Georgia and Maryland in affirming the trial court's dismissal of direct negligence claims after an employer admitted responsibility for an employee's negligence.[20] Furthermore, in California, the majority rule does not undermine the applicability of a comparative fault based system for allocating tort liability.[21]

In addition to state courts, various federal district courts have upheld the majority rule.[22]

b. Minority View or Non-Preemption Rule

Jurisdictions that have rejected the majority view and disagree with the holding in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995) "rest on the proposition that negligent entrustment and negligent hiring, retention, or supervision are torts distinct from respondeat superior and that liability is not imputed but instead runs directly from the employer to the person injured."[23] These jurisdictions often recognize the torts of negligent hiring, retention, and supervision as separate torts from an employee's negligence, and do not therefore preclude actions for respondeat superior and negligent entrustment or negligent hiring, retention, or supervision.[24] Some federal jurisdictions deciding whether or not to dismiss a plaintiff's direct negligence claims against an employer, pursuant to state law that has not addressed the issue, have found that direct employer negligence claims are warranted even when the employer admits vicarious liability.[25] For instance, in *Kozlov v. Associated Wholesale Grocers, Inc.*, 2014 WL 1572440 (D.Neb. 2014) the United States District Court for the District of Nebraska found "[b]ecause this Court is not persuaded that the Nebraska

DIRECT NEGLIGENCE CLAIMS BY STATE



ALLOWED
Arizona - *Quinonez for and on Behalf of Quinonez v. Andersen*, 696 P.2d 1342 (Ariz. Ct. App. 1984)
Kansas - *Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213 (Kan. 1998)
Kentucky - *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324 (Ky. 2014)
Tennessee - *Jones v. Windham*, 2016 WL 943722 (Tenn. Ct. App. 2016)
South Carolina - *James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008)
Minnesota - *Lim v. Interstate System Steel Div., Inc.*, 435 N.W.2d 830 (Minn. Ct. App. 1989)
Ohio - *Clark v. Stewart*, 185 N.E. 71 (Ohio 1933)

NOT ALLOWED
Arkansas - *Elrod v. G & R Const. Co.*, 628 S.W.2d 17 (1982)
California - *Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954)
Colorado - *Ferrer v. Okbamicael*, 390 P.3d 836 (2017)
Florida - *Clooney v. Geeting*, 352 So.2d 1216 (Fla. Dist. Ct. App. 1977)
Georgia - *Bartja v. Nat'l Union Fire Ins. Co.*, 463 S.E.2d 358 (Ga. Ct. App. 1995)
Idaho - *Wise v. Fiberglass Sys., Inc.*, 718 P.2d 1178 Idaho 1986)
Illinois - *Gant v. L.U. Transp., Inc.*, 770 N.E.2d 1155, 1160 (Ill. App. Ct. 2002)
Missouri - *McHaffie By and Through McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995)
Maryland - *Houlihan v. McCall*, 78 A.2d 661 (Md. 1951)
Texas - *Rodgers v. McFarland*, 402 S.W.2d 208 (Tex. App. 1966)
Wyoming - *Beavis v. Campbell Cty. Mem'l Hosp.*, 20 P.3d 508 (Wyo. 2001)

Supreme Court would prohibit a plaintiff from pursuing independent claims for negligent hiring, training, supervision, or entrustment, once a defendant has admitted responsibility under respondeat superior … this Court will decline the parties' joint suggestion that the Court expand law in Nebraska by applying precedents from other jurisdictions…."

In *Wright v. Watkins and Shepard Trucking, Inc.*, 972 F.Supp.2d 1218 (D.Nev. 2013), a defendant driving a semi-truck hit a plaintiff with his side mirror causing severe injuries. The plaintiff sued the defendant driver for negligence and the defendant driver's employer for negligent hiring and supervision.[26] Defendants argued that the plaintiff could not recover pursuant to both a theory of respondeat superior and direct liability. However, the United States District Court for the District of Nevada did not adopt the majority view.[27] Instead, the Court found that the theories of respondeat superior and direct negligence addressed similar but not identical conduct. "[T]he doctrine of vicarious liability and the tort of negligent hiring and supervision address different conduct."[28] As a result, "the cause of action against the employer is no longer simply derivative of, or dependent upon, the negligence of the employee."[29]

Parrick v. FedEx Grounds Package System, Inc., 2010 WL 1981451 (D. Mont. 2010) involved a plaintiff who was killed when his vehicle was struck by a tractor trailer driven by the defendant. The plaintiff alleged that FedEx was liable for the negligent hiring and retention of the defendant driver. FedEx moved for partial summary judgment asserting that the plaintiff could not proceed against FedEx under a theory of negligent hiring and retention because Fed Ex admitted respondeat superior liability. The United States District Court for the District of Montana, finding that the Montana Supreme Court had not yet determined the issue, ruled that "[b]ecause [Plaintiff] has … asserted a valid claim for punitive damages based on FedEx's alleged conduct in hiring and retaining [Defendant], it cannot be said as a matter of law that [Plaintiff's] negligent hiring and retention claim is entirely duplicative of his respondeat superior claims."[30] Indeed, while this is an important holding that must be considered, the court's ruling is in the context of a claim for punitive damages. It appears that a defendant in the United States District Court for the District of Montana would still have a valid argument that when punitive damages do not apply, a claim for negligent hiring and retention should be dismissed where a defendant employer has admitted respondeat superior.

The Tennessee Court of Appeals considered the "preemption rule," otherwise known as the majority view cited above, and the "non-preemption rule" and held that the majority view was not in accord with the Tennessee system of comparative fault.[31] Consequently, in Tennessee, a plaintiff's claims for direct negligence against an employer who has admitted vicarious liability are not barred.[32] The Tennessee Court of Appeals held that "a plaintiff's ability to recover for his or her injuries [in a comparative fault system] is certainly impacted by removing an alleged tortfeasor from the allocation of fault."[33] Interestingly, the Colorado Supreme Court in *Ferrer* analyzed the same comparative fault argument, regarding the same system of comparative fault, and found that "the *McHaffie* rule is compatible with Colorado's comparative negligence regime … [w]here an employer has accepted respondeat superior liability for any negligence of its employee, the employer is strictly liable for the employee's negligence regardless of the percentage of fault as between the party whose negligence directly caused the injury and the one whose liability for negligence is derivative."[34]

III. Practical Application

In those jurisdictions that follow the majority rule, counsel must proactively seek to dismiss claims for direct negligence against an employer where it is admitted that an employee was acting in the course and scope of his or her employment. This is essential in order for counsel to have grounds to object to certain discovery requests and/or deposition testimony. To prove claims of negligence against an employer, plaintiffs often seek to obtain discovery regarding an employee drivers' background, training and job performance. With the ruling in *Ferrer*, defense counsel can argue such requests are now irrelevant, beyond the scope of discovery, and are inadmissible at trial.[35] Additionally, counsel may argue that such requests are not proportional to the needs of the case, when considering the importance of the discovery in resolving case issues.[36] Overall, the *Ferrer* decision has great implications for trucking defense litigation and should significantly limit the scope of permissible corporate discovery. Counsel should use this ruling to hinder a plaintiff's ability to obtain evidence which is irrelevant and beyond the scope of discovery rules. While there are no published cases in Colorado yet applying *Ferrer* to permissible discovery, the author of this article recently argued to a Court that the Rule 30(b)(6) deposition of the corporate representative of the motor carrier should not be allowed in light of the *Ferrer* decision as the motor carrier has admitted that the driver was operating in the course and scope of his employment when the accident occurred. The Court agreed and declined to allow a Rule 30(b)(6) deposition.

In Colorado, punitive damages cannot be alleged in an initial complaint. Instead, punitive damages can only be asserted by filing a motion and an amended complaint.[37] According to C.R.S. § 13-21-102(1.5)(a), "[a] claim for [punitive damages] … may not be included in any initial claim for relief. A claim for [punitive damages] … may be allowed by amendment to the pleadings only after the exchange of initial disclosures … and [when] the plaintiff establishes prima facie proof of a triable issue." Punitive damages may only be awarded when the injury complained

of is as the result of fraud, malic, or willful and wanton conduct.[38] Plaintiffs often utilize the motor carrier's driver's qualification file, personnel file and/or training file as grounds for punitive damages. The *Ferrer* case provides a basis to resist production of these files which can possibly avoid grounds for punitive damages.

Endnotes

1 *Ferrer v. Okbamicael*, 390 P.3d 836, 848-49 (2017).
2 *Marquis v. State Farm Fire and Cas. Co.*, 961 P.2d 1213, 1224 (Kan. 1998); *see also Jones v. Windham*, 2016 WL 943722, *3-4 (Tenn. Ct. App. 2016) ("[W]e will follow the lead of the Kentucky Supreme Court's recent decision in *MV Transportation, Inc. v. Allgeier*, 433 S.W.3d 324 (Ky. 2014), and refer to the conflicting rules as the 'preemption rule' and the 'non-preemption rule.'").
3 390 P.3d at 839.
4 *Id.*
5 *Id.*
6 *Id.* at 840.
7 *Id.*
8 *Id.* at 841-42.
9 *Id.* at 844.
10 *Id.* at 845.
11 *Id.* at 847.
12 *Id.* at 848.
13 *Id.*(citing *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 214 (Colo. 1984)).
14 *MV Transportation, Inc. v. Allgeier*, 433 S.W.3d 324, n.8 (Ky. 2014).
15 *Id.*
16 *State ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995).
17 *See e.g., Plummer v. Henry*, 171 S.E.2d 330 (1969); *Parrick v. FedEx Grounds Package System, Inc.*, 2010 WL 1981451 (D. Mont. 2010).
18 *McCall*, 78 A.2d at 664-65.
19 628 S.W.2d at 19 ("[W]e are inclined to follow the majority view which allows plaintiff to proceed on only one theory of recovery in cases where liability has been admitted as to one theory of recovery.").
20 *Wise v. Fiberglass Sys., Inc.*, 718 P.2d 1178, 1181–82 (Idaho 1986).
21 *Diaz v. Carcamo*, 253 P.3d 535, 544 (Cal. 2011) (reaffirming ruling in *Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954).
22 *See e.g., O'Donnell v. Sullivan*, 2010 WL 2585286, *1–2 (D. Colo. 2010) (granting defendant's motion to dismiss claims of negligent entrustment, hiring, training, supervision, and retention); *Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 5459136, *1–2 (E.D. Ky., 2008) (dismissing claims for negligent hiring, training, retention, supervision, and entrustment); *Connelly v. H.O. Wolding, Inc.*, 2007 WL 679885, *2–3 (W.D. Mo. 2007) (dismissing claims for negligent entrustment, hiring, and training); *Lee v. J.B. Hunt Transp., Inc.*, 308 F.Supp.2d 310, 315 (S.D.N.Y. 2004) (dismissing claim for negligent hiring)); *Hackett v. Wash. Metro. Area Transit Auth.*, 736 F.Supp. 8, 10–11 (D.D.C. 1990) (dismissing claims for negligent supervision, hiring, and retention).
23 *Marquis v. State Farm Fire and Cas. Co.*, 961 P.2d 1213, 1224 (Kan. 1998). *But see McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995) ("The 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.").
24 *Marquis*, 961 P.2d at 1224. Various courts disagree with the majority rule and have held that it is not proper to dismiss other theories of negligence when the employer has admitted responsibility under respondeat superior, because claims based on direct and indirect negligence theories are entirely separate causes of action. *See e.g., James v. Kelly Trucking Co.*, 661 S.E.2d 329, 331–32, 33 (S.C. 2008); *Fairshter v. American Nat. Red Cross*, 322 F.Supp.2d 646, 654 (E.D.Va. 2004).
25 *See Kozlov v, Associated Wholesale Grocers, Inc.*, 2014 WL 1572440 (D.Neb. 2014); *see also Finkle v. Regency CSP Ventures Ltd. Partnership*, 27 F.Supp.3d 996, 1000 (D.S.D. 2014) ("This Court finds the minority rule to be better reasoned … This Court holds that it is probable that the South Dakota Supreme Court would hold that 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 training or supervision.").
26 *Wright v. Watkins and Shepard Trucking, Inc.*, 972 F.Supp.2d 1218, 1219 (D.Nev. 2013).
27 *Id.* at 1221.
28 *Id.* at 1220.
29 *Id.* at 1221. *See also Finkle*, 27 F.Supp.3d at 1000.
30 *See also Harris v. Decker Truck Line, Inc.*, 2013 WL 1769095 (E.D.Mo 2013) (plaintiff alleges punitive damages and court denies defendant's motion to dismiss direct negligence claims against employer as premature); *Kwiatkowski v. Teton Transp., Inc.*, 2012 WL 1413154 (W.D.Mo 2012) ("If the Missouri Supreme Court was presented with the issue, the Court believes it would recognize a punitive-damage exception to the rule stated in *McHaffie*.").
31 *Jones v. Windham*, 2016 WL 943722 (Tenn. Ct. App. 2016)
32 *Id.* at *5.
33 *Id.* at *6.
34 *Ferrer*, 390 P.3d at 846.
35 *See Scroggins v. Yellow Freight Sys., Inc.*, 98 F.Supp.2d 928, 931–32 (E.D. Tenn. 2000) (granting motion to exclude evidence of employee's previous accident history); *Elrod v. G & R Const. Co.*, 628 S.W.2d 17 (Ark. 1982) (affirming trial court ruling disallowing evidence of employee prior driving record at trial).
36 See Colo. R. Civ. P. 26(b)(1).
37 C.R.S § 13-21-102(1.5)(a).
38 C.R.S § 13-21-102(1)(a).