Covered Events

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Colorado Joins Trend Rejecting the Claims of Direct Liability Against the Employer Where Vicarious Liability of the Employee Is Admitted

by Michael C. Mills

Two pedestrians, crossing the street in Denver, Colorado, are hit and injured by a taxi. They sue the taxi driver, alleging that he is liable for their injuries and that the cab company is vicariously liable for the taxi driver's negligence. The pedestrians also claim that the cab company is independently liable for negligent entrustment, hiring, training or supervision of the driver.

Initially, the cab company says that the taxi driver is an independent operator. But later, it changes its mind. Via an Amended Answer, the cab company admits that the driver was its employee and that he was acting in the course and scope of his employment.

The cab company follows up its Amended Answer with a Motion for Partial Summary Judgment, asking the court to dismiss the pedestrian's claims of direct negligence against Yellow Cab. The basis of Yellow Cab's argument is the decision of McHaffie v. Bunch, 891 S.W.2d 822 (Mo 1995).

The pedestrians counter with a motion of their own, to Amend the Complaint to add a claim of punitive damages against the cab company. However, the trial court grants the cab company's Motion for Partial Summary Judgment and rejects the pedestrian's Motion to Amend to add punitive damages. The pedestrians appeal directly to the Colorado Supreme Court asking the court to overturn the trial court's decision by granting its Motion to add punitive damages and restoring their claims of negligent entrustment, hiring, training and supervision.

In the case of Ferrer v. Okbamicael, 390 P.3d 836 (Colo. 2017), the Colorado Supreme Court then faced the question of whether it would adopt the McHaffie Rule.

The Ferrer decision considers the development of the McHaffie rule. It points to earlier cases in which various courts declared that claims of negligent hiring and supervision were just alternative theories to the primary negligence claim. Once vicarious liability was admitted, these secondary claims of negligence, be they of entrustment, hiring or supervision were superfluous. Houlihan v. McCall, 197 Md. 130, 78 A.2d 661 (1951) and Armenta v. Churchill, 42 Cal. 2d 448, 267 P.2d 303 (1954).

The Ferrer court then outlines the McHaffie decision. McHaffie was a passenger in a car that crossed the median and hit an oncoming commercial truck. She sued not only the driver of her car but also the truck driver, stating claims of vicarious liability against the trucking company, but also direct claims of negligence for the company's failures to train, test and evaluate its drivers. Even though the trucking company admitted that it was responsible for the negligence, if any, of its driver, the court allowed both the negligence of the driver and the direct negligence of the company to go to the jury. On appeal, the Missouri Supreme Court said that the court had made a mistake. The court said that the negligent driving claim and the direct negligence claim were alternative theories of imputed liability.

The Ferrer court then points to two secondary reasons the McHaffie court reached the decision that it did. Namely, efficiency in the use of judicial resources

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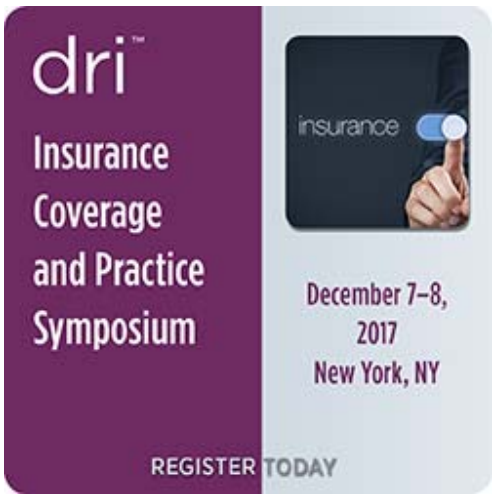

and the avoidance of potentially inflammatory but irrelevant evidence. The McHaffie court said it this way:

> If 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. The energy and time of courts and litigants is unnecessarily expended. In addition, potentially inflammatory evidence comes into the record which is irrelevant to any contested issue in the case.
>
> McHaffie, 891 S.W.2d at 826.

In addition to the courts of Maryland, California and Missouri, the Ferrer court cites other state Supreme courts that follow the McHaffie precedent including Arkansas, Elrod v. G & R Constr. Co., 275 Ark. 151, 628 S.W.2d 17 (1982); Idaho, Wise v. Fiberglass Sys., 110 Idaho 740, 718 P.2d 1178 (1986); Georgia, Willis v. Hill, 116 Ga. App. 848, 159 S.E.2d 145 (1967) and Wyoming, Beavis v. Campbell Cty. Mem'l Hosp., 2001 WY 32, 20 P.3d 508 (2001).

The Ferrer court cites to state appellate courts and federal courts that have applied the McHaffie rule as well. See, e.g., Cole v. Alton, 567 F. Supp.1084 (N.D. Miss. 1983); Lee v. J.B. Hunt Transport Inc., 308 F. Supp. 2d 310 (S.D. New York 2004); Clooney v. Geeting, 352 So. 2d 1216 (Fla. Dist. Ct. App. 1977) and Gant v. L.U. Transp., 331 Ill. App. 3d 924, 264 Ill. Dec. 459, 770 N.E.2d 1155 (2002).

The Ferrer court makes two important points as to why McHaffie is the better position. The court says that evidence to prove direct negligence claims against the employer is likely to be unfairly prejudicial to the employee. Second, the court says that if evidence of both the driver's negligence and the employer's negligence is presented, the jury might award liability twice and duplicate the Plaintiff's damages.

But the pedestrians are not going down without a fight. They come back with the argument that the McHaffie rule is inconsistent with the state's Comparative Fault law. They argue that since a plaintiff can be deprived of a recovery if her negligence is too large in comparison to that of defendants, a jury should be allowed to consider the negligence of all defendants. See Lorio v. Cartwright, 768 F. Supp. 658, 660-61 (N.D. Ill. 1991) and J.J. Burns, Note, Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims, 109 Mich. L. Rev. 657, 664 (2011).

The Colorado Supreme Court responds that the McHaffie rule is not inconsistent with state's Comparative Fault regime. The court explains that once vicarious liability is admitted, the employer is "responsible for all the fault attributed to the negligent employee, but only the fault attributed to the negligent employee as compared to the other parties to the accident." Gant, 770 N.E.2d at 1159.

Finally, the pedestrians argue that the court should give them their claim for punitive damages and adopt the exception to the McHaffie rule for cases where punitive damages are asserted. First, the court sustains the trial court's decision that the pedestrians' claims for punitive damages are not supported. But even if they had been, the Ferrer court explains it would not be adopting the punitive damages exception that has been accepted by other courts. E.g., Plummer v. Henry, 7 N.C. App. 84, 171 S.E.2d 330 (N.C. Ct. App. 1969). The court's rational is that Colorado's punitive damages scheme is not an independent cause of action, but it is an auxiliary to an underlying claim for actual damages. The court explains: "Because any direct negligence claims against the employer are barred, there can be no freestanding claim against the employer on which to base exemplary damages. A plaintiff cannot simply resurrect direct negligence claims against the employer by asserting a claim for exemplary damages against the employer." Ferrer v. Okbamicael, 2017 CO 14, ¶ 45, 390 P.3d 836, 848.

The dissent cites the argument made in the case of James v. Kelly Trucking Co., 377 S.C. 628, 661 S.E.2d 329, 332 (S.C. 2008):

> In our view, the argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial, and to the jury's ability to follow the trial court's instructions.

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Id. at 331.

The McHaffie issue is yet to be decided in many jurisdictions. Take my home state of Nevada for example. The dissent in Ferrer cites Wright v. Watkins & Shepard Trucking, Inc., 972 F.Supp.2d 1218 (D. Nev., 2013). However, it fails to acknowledge numerous other decisions from the very same federal district which contradict the Wright decision. Gonzalez v. Kirk, No. 2:14-CV-39 JCM (VCF), 2014 U.S. Dist. LEXIS 66928 (D. Nev. May 14, 2014); Adele v. Dunn, 2013 WL 1314944, 2013 U.S. Dist. LEXIS 44602 (D.Nev. 2013); Cuadras-Barraza v. Stringer, Case No. 2:13-cv-01627-GMN-VCF (D. Nev. Nov. 15, 2013).

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