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DISTRICT COURT

CLARK COUNTY, NEVADA

DOBRIN KUTEV DOBREV, M.D.,

Plaintiff,

vs.

LEUL KAHSAY, individually; NEVADA STAR CAB CORPORATION, dba STAR CAB COMPANY a Domestic Limited Liability Corporation; ; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive;

Defendants.

Case No.: A-16-733037-C
Dept. No.: I

Date of Hearing: September 12, 2017
Time of Hearing: 9:00 am.

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S SECOND CAUSE OF ACTION OF NEGLIGENT ENTRUSTMENT AND FOURTH CAUSE OF ACTION OF NEGLIGENT HIRING, SUPERVISION AND RETENTION

This matter having come regularly on calendar for hearing on September 12, 2017, RICHARD A. ENGLEMANN, ESQ., appeared on behalf of Plaintiff, DOBRIN KUTEV DOBREV, M.D., and TAMER B. BOTROS, ESQ., appeared on behalf of Defendants, LEUL KAHSAY and NEVADA STAR CAB CORPORATION. This Court having reviewed the Motion and the Limited Opposition and the citing of the "McHaffie Rule" which states, when an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct claims against the employer are barred. This Court hereby **GRANTS** Defendants' Motion for Partial Summary Judgment based on

the "McHaffie Rule."

I.

FINDINGS OF FACT

1. On May 3, 2014, LEUL KAHSAY (hereinafter "KAHSAY") was driving a taxicab owned by Defendant, NEVADA STAR CAB CORPORATION (hereinafter "STAR CAB") while in the course and scope of his employment with STAR CAB.
2. Plaintiff, DOBRIN KUTEV DOBREV, M.D., was traveling in front of KAHSAY when a minor rear end impact occurred between the two (2) vehicles.
3. In STAR CAB's Responses to DOBREV's Requests for Admissions, it admitted that its driver KAHSAY, was in the course and scope of his employment with STAR CAB when the subject accident occurred and that it owned the taxicab involved.
4. Defendant KAHSAY was an employee of Defendant STAR CAB.
5. Defendant KAHSAY's actions occurred within the scope and course of his employment with Defendant STAR CAB.
6. STAR CAB is vicariously liable to Plaintiff DOBREV.

II.

CONCLUSIONS OF LAW

A. Claims of Negligent Hiring, Training, Supervision and Retention Are Barred In this Matter

Plaintiff has alleged Negligent Entrustment, Negligent Hiring, Supervision and Retention. These claims are barred when a defendant admits an employee was acting within the course and scope of employment. The majority of courts including the United States District Court of Nevada have consistently ruled that a negligent hiring, training, supervision, and retention cause of action is unnecessary when a defendant admits that the driver was within the course and scope of employment when the subject accident occurred. Wright v. Watkins and Shepard Trucking, Inc., 2013 U.S. Dist. Lexis 146762, 2013 WL 5585005 (D. Nev. Oct 10, 2013); Cruz v. Durbin, 2011 U.S. Dist. Lexis 51057, 2011 WL 1792765 (D. Nev. 2011); Adele v. Dunn, 2013 U.S. Dist. Lexis 44602,

2013 WL 1314944 (D. Nev. Mar. 27, 2013). The majority of jurisdictions have adopted the "McHaffie Rule" which reasons that negligent entrustment and negligent hiring, training, supervision, and retention claims cannot exist against an employer when the employer had admitted that the employee was within the course and scope of employment:

> Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, **no claim may proceed against the employer for negligent hiring or retention**. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay for the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training. Lee ex rel. Estate of Lee v. J.B. Hunt Transp., Inc., 308 F. Supp. 2d 310, 312 (S.D.N.Y. 2004) (quoting Karoon v. N.Y.C. Transit Auth., 659 N.Y.S.2d 27, 29 (App. Div. 1997)); accord Kelley v. Blue Line Carriers, LLC, 685 S.E. 2d 479, 483 (Ga. Ct. App. 2009); Grant, L.U. Transp., Inc., 770 N.E.2d 1155, 1159 (Ill. App. Ct. 2002); McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995). Contra James v. Kelley Trucking Co., 661 S.E.2d 329, 332 (S.C. 2008); Marquis v. State Farm Fire & Cas. Co., 961 P.2d 1213, 1225 (Kan. 1998).

In this case, STAR CAB, admitted in its responses to Plaintiff's requests for admissions that KAHSAY was an employee and was acting within the course and scope of his employment as a taxicab driver when the subject minor accident occurred. Therefore, no claim may proceed against STAR CAB for negligent entrustment, hiring, training, supervision and retention in this matter. Plaintiff has included causes of action against STAR CAB that are precluded in the majority of jurisdictions including the United States District Court of Nevada, California and most recently in Colorado when a defendant admits that the driver was within the course and scope of employment at the time of an accident. Even though the Nevada Supreme Court has not directly addressed this issue, the majority of jurisdictions including California have held that such claims, when based on the negligent conduct of the employee, are barred once the employer has admitted the employee was employed by that particular employer and was within the course and scope of employment. Furthermore, by alleging the claims of negligent entrustment, hiring, training, supervision and retention, it is highly likely to cause unnecessary litigation expenses in defending causes of action that have been consistently barred and judicial resources in hearing arguments on an issue of law that in the majority of jurisdictions has been ruled upon including the United States District Court of Nevada. In *Cruz*, the United States District Court of Nevada indicated the reasoning on why such causes of

action for negligent hiring, training, supervision and retention are redundant and would cause unnecessary litigation:

> Most of the courts to address the question have noted that the bar to a negligent hiring or training action after an employer admits the employee was acting within the scope of employment ("the *McHaffie* rule") **is the majority rule**. See, e.g., Marquis, 961 P.2d at 1224. *Id* at page 4.
>
> The purpose of the McHaffie rule is **to prevent unnecessary litigation** over claims that have become redundant due to a factual admission by one party and to avoid the admission of irrelevant, prejudicial material. See *McHaffie*, 891 S.W.2d at 826. *Id* at page 5

Although the Nevada Supreme Court has not addressed this issue, in Alvares v. McMullin, Case No.: 2:13-cv-02256-GMN-CWH (D. Nev. June 3, 2015), a United States District Court of Nevada case, Judge Gloria M. Navarro ruled that **"the Court predicts that Nevada would adopt the majority rule in situations like the present one, where the direct claims of negligence against the employer rest entirely upon the alleged negligence of the employee and are therefore superfluous with the claim for respondeat superior liability."** The rationale for this rule is that the employer is only liable for the employee's negligence, the plaintiff cannot recover any more in damages than he would recover under a theory of respondeat superior, and the collateral evidence of the other claims would likely be **irrelevant and inflammatory**. See Jeld-Wen, Inc. v. Superior Court, 32 Cal. Rptr. 3D 351, 356 (Cal. Ct. App. 2005). STAR CAB has admitted vicarious liability for the conduct of KAHSAY. This means that if KAHSAY is found by the jury to be liable for this minor rear-end accident, STAR CAB will be held 100% liable for his conduct. Therefore, claims of negligent entrustment, hiring, training, supervision and retention have no legal basis to be asserted by Plaintiff in this matter and are irrelevant and would result in unnecessary and expensive litigation.

B. Colorado Supreme Court Adopted The "McHaffie Rule"

Recently, the Colorado Supreme Court ruled on this specific issue for the first time since it presented an issue of significant public importance that it felt compelled to address. The Colorado Supreme Court adopted the "McHaffie Rule" which states, when an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct claims against the employer are barred. Ferrer v. Okbamicael, 390 P.3d 836 (2017). In *Ferrer*, the plaintiff was injured when a

taxicab struck her as she crossed a street in Denver. The cab driver worked for a cab company that owned the cab. The plaintiff filed suit against both the cab driver and the cab company and alleged that the driver was negligent and the company was vicariously liable under the doctrine of respondeat superior. The plaintiff also alleged that the cab company was liable for negligent entrustment, negligent hiring, negligent supervision and negligent training. The cab company admitted that the cab driver was an employee acting within the course and scope of his employment with Yellow Cab at the time of the accident. The Colorado Supreme Court relied on McHaffie v. Bunch, 891 S.W.2d 822 (Mo. 1995) and indicated that it was adopting this majority view and the McHaffie Court's reasoning, which held that "to allow multiple theories for attaching liability to a single party for the negligence of another 'serves no real purpose,' unnecessarily expends the 'energy and time of courts and litigants,' and risk the introduction of potentially inflammatory, irrelevant evidence into the record." *Id.* at 826. The Colorado Supreme Court stated:

> The pursuit of both vicarious liability and direct negligence claims against an employer after it has conceded respondeat superior liability for any of its employee's negligence is also superfluous to the plaintiff's recovery; the direct negligence claims **will not increase the plaintiff's damages**. Id. at paragraph 31 page 16.

The Colorado Supreme Court was persuaded by the overwhelming majority jurisdictions that have followed the "McHaffie Rule," and concluded that ultimately where an employer has conceded it is subject to respondeat superior liability for its employee's negligence, direct negligence claims against the employer become redundant and wasteful.

C. The "McHaffie Rule"

McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995) is a Missouri Supreme Court case that has often been cited and accepted as the majority view for the proposition that once an employer admits respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on other theories of imputed liability. *Id.* at 826. In *McHaffie*, plaintiff brought suit against a trucking company and its driver for injuries sustained in a motor vehicle accident and alleged claims against the trucking company for vicarious liability and negligent hiring. The Missouri Supreme Court held that because the agency relationship had been admitted, it was

error to permit a separate assessment of fault against the employer for negligent hiring. The court observed that direct negligence claims such as negligent entrustment and negligent hiring are forms of imputed liability, just as respondeat superior is a form of imputed liability, because the employer's duty is dependent on and derivative of the employee's conduct. The court reasoned that to allow multiple theories for attaching liability to a single party for the negligence of another **"serves no real purpose,"** unnecessarily expends the **"energy and time of courts and litigants,"** and risks the introduction of potentially inflammatory, irrelevant evidence into the record. *Id.* at 826. The court also explained that once an employer concedes it is vicariously liable for any negligence of its employee, the employer becomes strictly liable to the plaintiff for damages attributable to the employee's conduct, regardless of the percentage of fault as between the employer and the employee. Once an employer admits vicarious liability for its employee's negligence, if a jury determines that the employee is liable, the employer is 100% liable for that employee's negligence.

The evidence is overwhelming and persuasive that a majority of jurisdictions have adopted the "McHaffie Rule" because it makes legal sense and from a public policy standpoint, it limits unnecessary and expensive litigation, which will relieve the court system from the heavy burden of having to render rulings on issues that serve no real purpose and which a majority of jurisdictions have barred. Although the Nevada Supreme Court has not rendered a ruling on this issue, based on the ruling from the majority of jurisdictions including Judge Navarro from the U.S. District Court of Nevada and the recent Colorado Supreme Court decision, it is highly anticipated that Nevada will follow the "McHaffie Rule," when it is presented with this issue. The fact that a majority of jurisdictions have adopted the "McHaffie Rule" including the recent Colorado Supreme Court, serves as persuasive legal authority on this issue of law that claims of negligent entrustment, hiring, training, supervision, and retention are barred when there is an admission of vicarious liability and therefore partial summary judgment must be entered as a matter of law since there is no genuine issue of material fact.

Direct negligence claims provide an alternate means of recovery when vicarious liability is

unavailable against an employer because the tortfeasor employee was not acting within the scope of his employment at the time of his alleged negligence. See Richard A. Mincer, The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior, 10 Wyo. L. Rev. 229, 232-22 & n. 9 (2010)(citing Plains Res., Inc. v. Gable, 235 Kan. 580, 682 P.2d 653 (1984)("The application of the theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment.")).

In this case, it is abundantly clear that STAR CAB has admitted that KHASAY was acting within the course and scope of his employment as a taxicab driver when this minor rear-end accident occurred. Plaintiff has a clear and identifiable means of recovery against STAR CAB for the alleged actions of KHASAY because vicarious liability has been admitted and is available in this matter. To permit Plaintiff to pursue direct claims of negligent entrustment, negligent hiring, supervision and retention against STAR CAB when it has clearly and unambiguously admitted vicarious liability for the alleged negligence of its driver, KHASAY, is unnecessary, a waste of judicial resources and will lead to costly litigation expenses. Furthermore, it is likely to lead to double recovery for the Plaintiff if such claims are not barred. As the Colorado Supreme Court stated:

> In addition, there is a danger that a jury will assess **the employer's liability twice** and award duplicative damages to the plaintiff if it hears evidence of both a negligence claim against an employee and direct negligence claims against the employer. *Ferrer* at page 17.

Also, there is a real danger that evidence necessary to prove direct negligence claims against the employer is likely to be unfairly prejudicial to the employee. Houlihan v. McCall, 78 A.2d at 664-65 ("Where agency is admitted, [evidence of a driver's record] can serve no purpose except to inflame the jury."); Clooney v. Geeting, 352 So.2d 1216, 1220 (Fla. Dist. Ct. App. 1977) ("Since the [direct negligence] counts impose no additional liability but merely allege a concurrent theory of recovery, the desirability of allowing these theories is outweighed by the prejudice to the defendants."); Hackett v. Wash. Metro. Area Transit Auth., 736 F. Supp. 8 10 (D.D.C. 1990)(dismissing claims for negligent supervision, hiring, and retention as prejudicial and unnecessary). For instance, evidence of an

employee's prior convictions for traffic offenses, relevant to the issue of the employer's negligent hiring, may lead a jury to "draw the inadmissible inference that because the [driver] had been negligent on other occasions he was negligent at the time of the accident." Houlihan, 78 A.2d at 665. As stated in *Ferrer*, "where an employer acknowledges respondeat superior liability for any negligence of its employee, the McHaffie rule bars direct negligence claims against the employer. 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." at page 24.

In this case, there is no legal basis for Plaintiff to pursue the direct negligence claims against STAR CAB since it will not result in any additional liability that Plaintiff can recover any additional money damages. STAR CAB has clearly admitted that KHASAY was within the course and scope of his employment when this minor accident occurred. It is abundantly clear that should the jury award damages to Plaintiff, STAR CAB will be the liable party having to pay that judgment. As stated in Ferrer:

> The fact that a plaintiff is the 'master of her complaint' and may assert multiple theories of attaching liability to an employer for the employee's conduct does not mean that a plaintiff should be permitted to introduce evidence supporting those multiple theories where such evidence would serve only to establish that which is already undisputed: that the employer is liable for the plaintiff's damages caused by the employee's negligent acts. *Id.* at paragraph 31, page 16.

D. California Follows the "McHaffie Rule"

Since 1954, the California Supreme Court has held that if the employer admits vicarious liability for any negligent driving by its employee, Plaintiff cannot still pursue claims for negligent entrustment. Armenta v. Churchill (1954) 42 Cal.2d 448. In *Armenta*, a roadside worker was killed when a dump truck backed over him. The decedent's family sued the truck driver for negligence and his employer for negligent entrustment. The employer admitted that the driver was acting in the course of his employment and acknowledged vicarious liability for all damages sustained by the plaintiffs in the event the driver was found negligent. The California Supreme Court affirmed the trial court's exclusion of evidence of the driver's driving history and reasoned that the allegations of direct negligence against the employer for negligent entrustment represented merely an alternative

theory under which plaintiffs sought to impose upon the employer the same liability as might be imposed upon the employee driver. The employer's admission of vicarious liability removed any issue of her liability for the alleged tort, and therefore there remained no material issue to which the evidence of the employee's driving history could be legitimately directed. In 2005, the California Court of Appeal applied the *Armenta* decision and directed a trial court to dismiss a negligent entrustment claim after the defendant employer's admission of vicarious liability for its employee's driving. Jeld-Wen, Inc. V. Superior Court (2005) 131 Cal.App.4th 853. The Court noted that "the employer's liability cannot exceed [that] of the employee." *Id* at page 871. If an employer admits vicarious liability for its employee's negligent driving in the scope of employment, "the damages attributable to both employer and employee will be coextensive." In 2011, the California Supreme Court had another opportunity to address this issue in Diaz v. Carcamo, (2011) 51 Cal.4th 1148, 126 Cal.Rptr.3d 443. The Court stated:

> If, as here, an employer offers to admit vicarious liability for its employee's negligent driving, then claims against the employer based on theories of negligent entrustment, hiring, or retention **become superfluous**. To allow such claims in that situation would subject the employer to a share of fault in addition to the share of fault assigned to the employee, for which the employer has already accepted liability. To assign to the employer a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an **inequitable apportionment of loss**. *Id*. at 1160.

The *Diaz* case, which followed the "McHaffie Rule" made it abundantly clear that, if the employer admits to being vicariously liable, then there is no claim to show the history of the driver prior to the subject accident. Any evidence of previous accidents or issues with the driver's employment are not relevant or admissible. The Court stated:

> Evidence of an employee's past accidents (admitted here to support the negligent hiring claim against employer, Sugar Transport) is highly prejudicial to the defense of a negligent driving claim against the employee. Such evidence **creates a prejudicial risk** that the jury will find that the employee drove negligently based not on evidence about the accident at issue, but instead on an inference, drawn from the employee's past accidents, that negligence is a trait of his character. *Id*. at 1162

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The *Diaz* case explained that when the employer admits vicarious liability, there is one defendant who can be held responsible and that is the employer. The Court stated:

> Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one-the employer for purposes of apportioning fault..." *Id.* at 1159.

ORDER

Based upon the foregoing, and good cause appearing,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Defendants' Motion for Partial Summary Judgment is hereby **GRANTED**.

DATED this 19 day of Oct, 2017.

DISTRICT COURT JUDGE

Submitted by:

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