LANE CHANGE: THE NEED TO CLARIFY *MCHAFFIE* AND ACCEPT A PUNITIVE DAMAGES EXCEPTION

INTRODUCTION

Traffic litigation, while not the most "noble"[1] field of law, can constitute a large portion of a plaintiff's attorney's work and income.[2] Simple automobile negligence claims, assuming the driver is solvent, provide quick settlements without the need for overly complex discovery.[3] These cases become more attractive to plaintiff's attorneys if the defendant driver was operating the vehicle in the course and scope of his or her employment—providing a link to an employer with deep pockets via the theory of respondeat superior.[4] One of the more common vehicles in a traffic accident is a tractor-trailer, which is conveniently almost always operated by an employee acting in the course and scope of employment for a motor carrier company. Proceeding against the motor carrier company, however, becomes precarious in Missouri due to "the *McHaffie* rule."[5]

The *McHaffie* rule is simple: once a defendant motor carrier admits respondeat superior liability, the plaintiff is barred from proceeding on any additional theories of imputed liability against the employer, such as negligent

1. Traffic litigation attorneys are often negatively associated with aggressive and unscrupulous "ambulance chasers" in popular culture and even by state legislatures. Michigan has passed two house bills that would make it more difficult to obtain personal information about drivers in traffic accidents. H.R. 4770, 97th Leg., Reg. Sess. (Mi. 2013); H.R. 4771, 97th Leg., Reg. Sess. (Mi. 2013); *see also* Steven M. Gursten, *Stopping 'Ambulance-Chasing' Lawyers Is an Issue that Everyone Should Support*, MICH. AUTO LAW (Jul. 8, 2013), http://www.michiganautolaw.com/news/lawyer-steven-gursten-editorial-stopping-ambulance-chasing-lawyers/ (praising the introduction of H.R. 4770 and H.R. 4771 and arguing for stronger reforms to protect accident victims and their families from excessive solicitation).

2. In 2005, automobile accidents represented fifty-two percent of all personal injury lawsuits. Staci A. Terry, *Personal Injury Lawsuits in the U.S.: A Brief Look*, LEGAL FIN. J. (Aug. 26, 2011), http://legalfinancejournal.com/personal-injury-lawsuits-in-the-u-s-a-brief-look/.

3. Such a case represents a quick turnaround for plaintiff's lawyers working on contingency agreements without draining too much of the attorney's valuable time. Indeed, automobile litigation also carries a high success rate at trial, winning sixty-one percent of the time in 2005. *Id.*

4. An employer is liable for "the misconduct of an employee or agent acting within the course and scope of the employment or agency." McHaffie *ex rel.* McHaffie v. Bunch (*McHaffie II*), 891 S.W.2d 822, 825 (Mo. 1995) (en banc).

5. *See* Wright v. Watkins & Shepard Trucking, Inc., 972 F. Supp. 2d 1218, 1220 (D. Nev. 2013).

median area between the eastbound and westbound lanes of Interstate 44.[21] The loss of control caused Bunch to overcorrect and jerk her car back to the right side of the highway, where it eventually collided with the guardrail.[22] After hitting the guardrail, Bunch again overcorrected and pulled back to the median area, causing the car to complete a full spin while crossing over the median and into the westbound lane.[23] The car then hit the opposite westbound guardrail and was subsequently struck by a tractor-trailer driven by Defendant Farmer.[24]

The collision left McHaffie with permanent mental and physical disabilities.[25] Rita McHaffie, the guardian and conservator of Laura McHaffie's estate, brought suit against Bunch and Farmer to recover for Laura's injuries.[26] McHaffie also sued Bruce Transport and Leasing ("Bruce Transport") and Rumble Transport, the employers of truck driver Farmer.[27] Bruce Transport was the owner-lessor of the tractor-trailer and Rumble Transport was the operator-lessee of the tractor-trailer.[28]

B. Liability Under Respondeat Superior and Negligent Hiring or Entrustment?

McHaffie claimed basic negligence against Defendant Bunch for failing to

Transport and was acting within the course and scope of his employment.[31] These claims were founded on the familiar agency theory of respondeat superior.[32] In addition to the respondeat superior claim, McHaffie claimed that both Bruce Transport and Rumble Transport negligently hired, entrusted, and supervised Farmer.[33]

In a pretrial order, the trial court held that both employer defendants, Bruce Transport and Rumble Transport, "judicially admitted" Farmer was "their agent and working within the scope and course of his employment at the time of the accident."[34] Based on its determination, the trial court made clear that "agency w[ould] not be an issue in this case."[35] At the same time, Rumble Transport submitted a motion to dismiss the pending independent negligent hiring, supervision, and entrustment claims.[36] Strangely, the trial court never ruled on the motion and the case proceeded to trial with both respondeat superior and the independent negligent hiring, entrustment, and supervision claims submitted to the jury.[37] Curiously, McHaffie only submitted the negligent hiring, entrustment, and supervision claims against Rumble Transport, but not Bruce Transport.[38]

McHaffie presented evidence to the jury that Bunch negligently failed to keep her vehicle on the correct side of the road and drove into oncoming traffic.[39] With regards to the crash itself, McHaffie submitted evidence demonstrating Farmer failed to keep a careful look out and failed to appreciate and apprehend the danger of Bunch's oncoming car.[40] In support of this theory, an expert testified that Farmer could have stopped in time to avoid the collision

31. *McHaffie II*, 891 S.W.2d at 824.

32. *Id.* at 825.

33. *Id.* at 824.

34. *McHaffie I*, 1994 WL 72430, at *6.

35. *Id.*

36. *Id.* It is not clear from the Southern District's appellate record if Rumble's motion asserted a theory based on an insufficiency of evidence or on the legal argument that once the agency relationship was established that the negligent hiring claim must be dismissed. Presumably the motion was based on the sufficiency of the evidence since it was pending at the time the trial court entered the order taking judicial notice of the agency element. An argument based on the sufficiency of the evidence also comports with the fact that the trial court never ruled on Rumble's motion to dismiss. If the motion to dismiss rested on the legal theory that respondeat superior liability and negligent hiring were mutually exclusive, then the trial court would have likely ruled on the merits of the issue right after taking judicial notice of the existence of agency.

37. *Id.*

38. *McHaffie II*, 891 S.W.2d at 824. Not submitting against both employers is odd since Farmer is the admitted employer of both entities and therefore both had the duty to not entrust the tractor-trailer to an incompetent driver or hire an employee with a dangerous proclivity. *Id.* at 824–26.

39. *McHaffie I*, 1994 WL 72430, at *1.

40. *Id.* at *4.

had he been "properly observant."[41] Obviously, since Bruce Transport and Rumble Transport admitted Farmer was an employee acting within the course and scope of his employment, all evidence proving Farmer's negligence also proved the negligence of Bruce Transport and Rumble Transport.[42]

The basic legal theory behind assigning liability to the employer based on the negligence of its employee is that the business enterprise can best absorb the loss as a "cost of doing business" via pricing or purchasing liability insurance.[43] Indeed, the Federal Motor Carrier Safety Administration requires motor carrier companies like Bruce Transport and Rumble to carry at least $300,000 in liability insurance due to the great potential for severe harm from tractor-trailer accidents.[44] The legal theory considers employers as being best able to reduce the tortious conduct of individual employees by monitoring and structuring their enterprise.[45]

To support the independent negligent hiring, supervision, and entrustment claims, McHaffie introduced evidence demonstrating Rumble Transport's general failure to properly evaluate Farmer before hiring him and to ensure compliance with all relevant motor carrier regulations.[46] First, McHaffie showed that Rumble Transport hired Farmer without requiring that he have adequate experience, testing, or training or that he undergo a required medical examination before driving their trucks.[47] Rumble Transport also failed to enforce Department of Transport regulations and its own internal policies to ensure Farmer accurately maintained logbooks of all of his trips.[48] Finally, at the time of the accident, Farmer had driven more hours than permitted by the Department of Transportation.[49]

41. *McHaffie II*, 891 S.W.2d at 828. The expert's opinion was based on accident reconstruction of the incident in question. *Id*. at 832.

42. *Id.* at 824–25.

43. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500 (5th ed. 1984).

44. 49 C.F.R. § 387.303 (2011). The insurance requirements increase as the potential for more disastrous consequences increases. For instance, motor carriers with trucks weighing more than 10,001 pounds and carrying hazardous substances, such as insecticides, must carry a minimum of $5,000,000 in rov49). 492 1 Tf9H7 TD-.720 g0Id.

The jury returned a verdict in favor of McHaffie, assessing 70% of the fault to Cindy Bunch for negligently driving into oncoming traffic.[50] The jury assigned 10% of the liability to Farmer for failing to keep a careful lookout—this liability was shared by his employers, Bruce Transport and Rumble Transport, via respondeat superior.[51] Another 10% was assigned to Rumble Transport for negligently hiring Farmer.[52] The final 10% was given to McHaffie herself for knowingly riding with an intoxicated driver.[53] Damages were assessed to total $5,258,000.[54]

C. The Missouri Court of Appeals, Southern District

Among other issues,[55] all four defendants appealed the submission of the negligent hiring claim and the admission of evidence concerning Rumble Transport's failure to comply with Department of Transportation regulations, to enforce logbook entries, and to properly evaluate Farmer's experience before entrusting him with a truck.[56] The Missouri Court of Appeals for the Southern District ("Southern District") agreed with the defendants' argument that a claim of negligent hiring or entrustment could not be submitted after the employer admits agency to a claim of respondeat superior.[57]

The Southern District, noting the first impression nature of the issue, looked to basic principles of respondeat superior, to other jurisdictions addressing the issue, and to the potential for prejudice in holding that the negligent hiring claim was improperly submitted.[58] The court cited to a majority view, which would later be known as "the *McHaffie* rule":

to Reduce Truck Driver Fatigue Begin Today, FED. MOTOR CARRIER SAFETY ADMIN. (July 1, 2013), http://www.fmcsa.dot.gov/newsroom/new-hours-service-safety-regulations-reduce-truck-driver-fatigue-begin-today.

50. *McHaffie II*, 891 S.W.2d at 825.

51. *Id.*

52. *Id.*

53. *Id.* This case appears to be the poster child for tort reform advocates, as McHaffie obtained a seven-figure verdict after knowingly riding with a drunk driver and recovered from a truck driver and his employers, for failing to avoid a car speeding into oncoming traffic.

54. *Id.*

55. Farmer, Bruce Transport, and Rumble Transport also argued there was insufficient evidence to support the claim that Farmer failed to keep a careful look out and failed to avoid the collision. McHaffie *ex rel.* McHaffie v. Bunch (*McHaffie I*), Nos. 18097, 18107, 18116, 18187, 1994 WL 72430, at *3–6 (Mo. Ct. App. Mar. 10, 1994). The Southern District disagreed and affirmed the decision of the trial court to submit both issues to the jury. *Id.* at *4–6. The Supreme Court of Missouri would similarly hold that sufficient evidence existed to submit a claim of negligence against Farmer. *McHaffie II*, 891 S.W.2d at 825.

56. *McHaffie I*, 1994 WL 72430, at *6–7.

57. *Id.* at *12.

58. *Id.* at *8–12.

> [I]f the [employer] has already admitted liability under the doctrine of *respondeat superior*, it is improper to also allow a plaintiff to proceed against the [employer] of a vehicle on the independent negligence theories of negligent entrustment and negligent hiring or training.[59]

The court briefly recited the rule for respondeat superior and recognized that the element of agency was uncontested by both Bruce Transport and Rumble Transport.[75] The court next reviewed the negligent entrustment claim against Rumble Transport and noted the verdict director failed to instruct on one of the required elements, namely "that Farmer was incompetent or unqualified to drive commercial vehicles."[76]

In its review of negligent hiring, the third and final theory of imputed liability, the court stated that Missouri case law requires intentional misconduct or criminal behavior on behalf of the employee or the existence of a "special relationship" between the employer and the injured party to prove negligent hiring.[77] The court expressed doubts as to whether McHaffie had pled or submitted any facts to satisfy this element of negligent hiring and reasoned that the pleadings, evidence, and jury instructions all seemed to "more closely track" with negligent entrustment.[78] Despite pointing out evidentiary, pleading, and jury instruction issues with the negligent entrustment and negligent hiring claims, the court assumed the facts to be sufficient for a negligent hiring cause of action.[79]

After determining that a claim for respondeat superior and negligent hiring existed, the court addressed whether both could be submitted to a jury. The court began by describing the "majority view" adopted by the Southern District and deemed it "the better reasoned view."[80]reseerJkn-24.20.957TD.002-TDunigrteee eee miscondehiretw (L

the court reasoned that if a plaintiff were allowed to proceed on all possible theories[82] to impute liability after the imputation was freely admitted, the additional evidence for each additional theory "serves no real purpose."[83] This lack of purpose results in a waste of resources for both courts and litigants by requiring the "laborious[]" admission of evidence on an uncontested issue.

Missouri, any evidence proving such a claim becomes completely unnecessary if agency is admitted due to the strict liability nature of *respondeat superior*.[93]

McHaffie relied on case law from the minority of jurisdictions and *Prosser and Keeton on the Law of Torts* to justify dual submission of claims, even when agency was admitted.[94] The court gave little consideration to the

The ultimate holding of the Supreme Court of Missouri, and the new "*McHaffie* rule," was that once an employer admits agency in a respondeat superior claim, there could not be a submission of an independent imputed liability claim against the employer.[101]

1. Exceptions to the Rule

After rejecting the dual submission of claims, the court discussed possible exceptions to the *McHaffie* rule.[102] It is not clear why the court decided to tackle purely hypothetical exceptions, especially after noting, "none of those circumstances exist here."[103]

issue on the sufficiency of the evidence for punitive damages and made an explicit exception to the general rule of barring additional claims of imputed liability when agency has been conceded.

The court in *Clooney* affirmatively created a punitive damages exception to the general rule, even though the plaintiff failed to allege sufficient facts for punitive damages. While the Supreme Court of Missouri looked to *Clooney* as a source for the exception in *McHaffie*, the court hesitated on whether the exception existed under Missouri law as it did under Florida law. The hesitation created an uncertainty in Missouri law and a missed opportunity to permit McHaffie to amend her pleadings to include a claim for punitive damages.

II. POST-MCHAFFIE PROBLEMS

A. Legacy of the McHaffie *Rule*

The court in *McHaffie* offered a possible punitive damages exception, but failed to state if it existed or how it would be applied. The lack of clarity creates problems for plaintiff's attorneys that typically assert a claim for punitive damages in all pleadings. The court also failed to indicate *when* the additional claims of negligence against the employer should be dismissed once agency is admitted.[119] This issue is particularly relevant when a motor carrier tries to limit discovery only to the incident in question to avoid revealing evidence capable of supporting a claim for punitive damages.

The missed opportunity for clarification is particularly glaring considering Plaintiff McHaffie probably had enough evidence to submit a claim for punitive damages. Most significantly, evidence of Rumble Transport's disregard of regulation and failure to oversee Farmer would typically warrant a jury instruction on punitive damages.[120] Indeed, Missouri law generally holds that evidence of such industry violations is sufficient for punitive damages.[121]

119. See *infra* Part III.B for further discussion concerning the debate of when the *McHaffie* rule applies and whether this should have any effect on the limits of discovery.

120. See *infra* Part III.A.2 for a more in-depth discussion of why this set of facts warrants punitive damages.

121. Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 160 (Mo. 2000) (en banc) (holding a "knowing[] violat[ion] [of] a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred" is a key factor in determining whether to submit a claim for punitive damages to the jury); Garrett v. Albright, Nos. 06-CV-4137-NKL, 06-CV-0785, 06-CV-4139, 06-CV-4209, 06-CV-4237, 2008 WL 795613, at *2, *6 (W.D. Mo. Mar. 21, 2008) (holding the plaintiff had sufficient evidence to submit a claim for punitive damages based on violations of Federal Motor Carrier Safety Regulations regarding a driver's medical history and maximum amount of hours that a driver is permitted to drive); Coon v. Am. Compressed Steel, Inc., 207 S.W.3d 629, 638–39 (Mo. Ct. App. 2006) (holding permissible an award for punitive

Ultimately, the court seemed willing to recognize a punitive damages exception by going out of its way to put forth the idea in dicta but failed to connect the dots when providing instructions for retrial.[122]

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trial courts differ on whether the punitive damages exception exists and when the *McHaffie* rule applies.[133]

Given the early dismissal of additional theories of imputed negligence and the general lack of reporting Missouri trial court decisions, it is difficult to fully appreciate how many negligent hiring or entrustment claims get barred at

little discussion of the dicta in *McHaffie* or any possible exception to its general rule. This makes sense because outside of a claim for punitive damages, there are few fact patterns that could potentially invoke one of the other two potential exceptions discussed by the Supreme Court of Missouri in *McHaffie*.[136] Ultimately, the most common way to make the federal district court consider any possible exception to the *McHaffie* rule is by alleging a claim for punitive damages along with a negligent entrustment or hiring claim based on the violation of federal motor carrier regulations.[137]

The federal district courts in Missouri have surprisingly vacillated on the existence of any exception to the *McHaffie* rule. A trio of decisions from the United States District Court for the Eastern and Western Districts of Missouri categorically decided that no punitive damages exception exists.[138] The primary reason given for rejecting the exception was due to the lack of clarity from the Missouri courts after *McHaffie*.[139] Chief Judge Fernando Gaitan, Jr., writing for the United States District Court for the Western District of Missouri in *Connelly v. H.O. Wolding Inc.*, was unmoved by the dicta in *McHaffie* and reasoned that "it is clear that the [punitive damages exception] language was not a part of the Court's holding in *McHaffie*."[140] The court in *Connelly* thus rejected adopting the punitive damages exception as "Missouri has yet to recognize such an exception."[141]

Judge Dean Whipple, also writing for the United States District Court for the Western District of Missouri in *Allstate Ins. Co. v. Hasty*, pointed to the lack of any formal adoption of the punitive damages exception and held "the Missouri Supreme Court did not create any exceptions to the rule, and in fact, it explicitly declined to create these exceptions."[142] Judge Whipple's characterization of the decision as "explicit" is arguably misleading as the court in *McHaffie* went out of its way to suggest exceptions when it felt that the facts were not before the court.[143] An explicit approach would have been to deny any exception or simply not discuss an exception altogether.

Interestingly, the court in *Connelly* permitted the claim for punitive damages but did not allow its attachment to other forms of imputed liability like negligent hiring or entrustment.[144] The plaintiff was only permitted to claim punitive damages as attached to the respondeat superior negligence claim.[145] This decision is counterintuitive as the most likely way punitive damages can be pled is by proof of bad business practices of the employer—evidence that is inadmissible without an independent claim of imputed liability against the employer. Also, the court in *McHaffie* was clear in stating that punitive damages would only be assessed to the employer in the form of a negligent entrustment or hiring claim, not to the employee and employer collectively.[146]

The fumbling of the exception in *Connelly* reveals another problem with regards to which cause of action the punitive damages claim attaches. One year after *Connelly*, the United States District Court for the Western District of Missouri made a similar mistake in *Southern Star Central Gas Pipeline, Inc. v. Collins & Hermann, Inc.* by dismissing all additional claims of imputed liability but permitting the plaintiff to add a claim for punitive damages.[147] Curiously, the court in *Southern Star* seemingly accepted the punitive damages exception and held the plaintiff may later be able to claim punitive damages against the employer that would not be assessed against the employee.[148]

142. *Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 144965, at *8.

143. McHaffie *ex rel.* McHaffie v. Bunch (*McHaffie II*), 891 S.W.2d 822, 826 (Mo. 1995) (the court introduced three potential exceptions to the general rule and noted those "issues await another day.")

144. *Connelly*, 2007 WL 679885, at *2–3.

145. *See id.* at *2 (concluding that plaintiff was foreclosed from conducting discovery to prove additional theories of imputed liability).

146. *See McHaffie II*, 891 S.W.2d at 826 (reasoning that it is possible for an employer to be held liable for punitive damages on a theory of negligence that does not derive from and is not dependent on the negligence of the employee).

147. S. Star Cent. Gas Pipeline, Inc. v. Collins & Hermann, Inc., No. 08-5048-CV-SW-WAK, 2008 WL 5423339, at *2 (W.D. Mo. Dec. 29, 2008).

148. *Id.* at *2. The court also noted that there may be another claim against the defendant that would not be "derived from, or dependent upon, the negligence of [its employee]." *Id.*

or defense of the party seeking discovery" and thus would not be within the scope of discovery.[173]

The highly regulated nature of the motor carrier industry and the great

purpose of preventing driver fatigue in

extent the employee was negligent, the extraneous evidence concerning Hasty

properly oversee their drivers. Such conduct goes beyond mere negligence and demonstrates a "conscious disregard" for the rights of other motorists.[193]

Mincer seems naïve in believing that a motor carrier would never intentionally violate regulations to make more money or unintentionally violate regulations due to a complete lack of oversight. Although a lack of oversight may be "mere negligence" in most cases, which would not warrant punitive damages, such failure specific to the motor carrier industry should be sufficient to warrant punitive damages. The federal government painstakingly imposes hundreds of regulations on motor carriers just to do business, and most of the regulations require strict oversight of drivers because of the great danger posed to motorists.

Mincer also argues that because motor carriers are so highly regulated, the Federal Motor Carrier Safety Administration will disqualify any unqualified driver, and thus no motor carrier could possibly operate in a manner to warrant punitive damages.[194] Again, Mincer's position is naïve. The Federal Motor Carrier Safety Administration is not an omnipresent entity, and unqualified, tired, and dangerous drivers will eventually get behind the wheel of massive tractor-trailers. The most obvious example comes from *McHaffie*, where

CONCLUSION

The court in *McHaffie* failed to give any clarity to the lower courts concerning the punitive damages exception. Uncertainty in the rule continues today, although most lower Missouri courts accept the punitive damages exception to the *McHaffie* rule. While the recent decision in *Image Flooring* moves in the right direction, the lack of an opinion by the highest Missouri Court leaves doubt in the law. In the meantime, plaintiffs should continue to seek punitive damages for negligent entrustment, supervision, and hiring claims based on violations of federal motor carrier regulations and press the trial courts into ruling on the exception. This will eventually bring the issue back to the attention of the Supreme Court of Missouri and at the very least keep motor carriers honest with regard to their business practices.

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