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The Gate Keepers of Trucking Safety: Keeping Motor Carriers Accountable For Their Negligent Employment Actions

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ABSTRACT

In an America which has become more dependent than ever on the transportation industry, a common law rule known as the *McHaffie* rule barricades the tort system from its candid operation. Americans trust the tort system with assessing and distributing fault among numerous actors in complicated factual scenarios. For the system to do this, all the facts and all the parties must be permitted to traverse through the tort system. The *McHaffie* rule, however, allows motor carrier principals a rather peculiar luxury: the dismissal of all direct negligence claims against them when they admit vicarious liability for their driver agents. Under the *McHaffie* rule, the negligent management actions of a motor carrier in their hiring, training, and supervision practices of drivers never see judicial nor juror scrutiny. The *McHaffie* rule allows motor carriers to prioritize the satisfaction of consumers at home over the safety of travelers on the road. This Comment

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examines the context and arguments for and against the *McHaffie* rule and concludes that courts should eliminate or, at a minimum, narrow the rule to truly duplicative claims.

I. INTRODUCTION

America runs on trucks.[1] Following the COVID-19 pandemic, Americans have depended on the transportation industry more than ever, and "the trend is expected to continue increasing."[2] As transportation needs have increased, driver supply has not: one estimate has the industry short roughly 78,000 drivers.[3] In 2020, the transportation industry lost "more than 88,000 jobs and more than 3,000 trucking companies closed."[4]

Strained by high demand and decreasing labor, heavy truck accidents have increased disproportionately with the footprint of the industry. In 2021, 523,796 truck accidents occurred in the U.S.[5] This included a 17% increase in fatalities from 2020 and a historic high for the industry with 9% of the accidents resulting in a fatality.[6] Between the increased demand and waning supply of truckers, has the industry prioritized consumers at home over travelers on the road?

There may be a variety of explanations for the increase in accidents, and it is the job of courts and the tort system to determine accountability for these accidents. However, many courts have adopted what is known as the *McHaffie* rule, which keeps negligent motor carrier practices out of court while endangering the motoring public.[7] Motor carriers, as the hiring,

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1 In this paper, the term "trucks" refers to semi-trucks, also called tractor-trailers.

2 Alexander Dovgal, *Trucking in a Post-COVID World*, COM. CARRIER J. (May 9, 2023) https://www.ccjdigital.com/business/article/15447267/trucking-in-a-postcovid-world [https://perma.cc/95ST-LJGV] (stating that in 2020, U.S. e-commerce sales grew by 32.4%).

3 Jason Cannon, *Driver Shortage Number Drops, Still Near Record High*, COM. CARRIER J. (Oct. 26, 2022), https://www.ccjdigital.com/workforce/article/15302122/truck-driver-shortage-improves-still-near-record-high [https://perma.cc/WX6T-XSKR].

4 Alexander Dovgal, *supra* note 2.

5 NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS: 2021 DATA 2 (2021), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813452.pdf.

6 *Id.*

7 *See e.g.*, Adele v. Dunn, 2:12-CV-00597-LDG, 2013 WL 1314944 (D. Nev. Mar. 27, 2013); Avery v. Roadrunner Transp. Servs., Inc., CIV-11-1203-D, 2012 WL 6016899 (W.D. Okla. Dec. 3, 2012); Finkle v. Regency CSP Ventures Ltd. P'ship, 27 F. Supp. 3d 996 (D.S.D. 2014); Tischauser v. Donnelly Transp. Inc., 20-C-1291, 2022 WL 623994 (E.D. Wis. Mar. 3, 2022); Dye v. Cooney's Farm Serv., Ltd., 09-CV-32-J, 2010 WL 11564947 (D. Wyo. Sept. 28, 2010) (predicting Wyoming to follow the rule); Ferrer v.

supervising, and training force of America's truck drivers, are the gatekeepers of safe trucking practices. At a minimum, jurisdictions should loosen the rule by following Wyoming's treatment of the *McHaffie* rule through adopting the separate and independent standard, acknowledging a punitive damages exception, and focusing the intent of the rule on truly duplicative claims.[8] In Part II, this Comment examines the history and context of motor carrier liability.[9] Part III looks at the modern origins of the *McHaffie* rule and the historical rationales for and against it.[10] in Part IV, the Comment examines how the *McHaffie* rule has been loosened in Wyoming.[11] This Comment concludes that the *McHaffie* rule is a blunt procedural instrument that comes at the cost of transparency to the public and accountability of motor carriers.[12] Courts that have adopted the *McHaffie* rule should abandon or at least loosen it and follow Wyoming's treatment of the rule to encompass cases with specificity and sophistication.

II. LIABILITY IN THE TRUCKER/MOTOR CARRIER EMPLOYMENT RELATIONSHIP

The trucker/motor carrier employment relationship has significant implications ranging from tax and workers compensation to liability for negligence.[13] Generally, as will be shown below, it is difficult for motor carriers to escape vicarious liability for the negligence of their drivers.[14]

Under the common law, employees, such as truck drivers, may be independent contractors or employees. Some courts view the employment relationship as an agency relationship and even "equate the term 'employee' with 'agent.'"[15] As one court has explained, "[t]he relation of principal and agent and that of master and servant are essentially similar, and the terms are sometimes used interchangeably. The difference is one

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Okbamicael, 2017 CO 14M, *as modified on denial of reh'g* (Mar. 27, 2017) (quoting the article at length); Diaz v. Carcamo, 253 P.3d 535 (Cal. 2011); Quynn v. Hulsey, 850 S.E.2d 725 (Ga. 2020); Wilson v. Image Flooring, LLC, 400 S.W.3d 386 (Mo. Ct. App. 2013); Jones v. Windham, W2015-00973-COA-R10-CV, 2016 WL 943722 (Tenn. Ct. App. Mar. 11, 2016), *appeal granted, judgment vacated* (Aug. 19, 2016).

8 JTL Grp., Inc. v. Gray-Dockham, 2022 WY 67, 510 P.3d 1060 (Wyo. 2022).

9 *See infra* Part II.

10 *See infra* Part III.

11 *See infra* Part IV.

12 *See infra* Part V.

13 *See* Patton v. Worthington Assocs., Inc., 89 A.3d 643, 645 (Pa. 2014) (analyzing employment status in a workers compensation context); *see also* Ratcliff v. TranStewart Trucking Inc., 1:22-CV-00623-TWP-KMB, 2023 WL 4866326, at *5 (S.D. Ind. July 31, 2023) (analyzing employment status in a negligence context).

14 *See infra* Part I.A; *see also e.g.*, *Ratcliff*, 2023 WL 4866326, at *5.

15 27 AM. JUR. 2D *Employment Relationship* § 3.

of degree only. Both render service, but the 'servant' does not 'represent' the employer."[16] Thus, an agency relationship contains an agent (the representor) and a principal (the represented).[17]

In determining whether an employee is an agent, many courts look to the Restatement (Second) of Agency which defines an agency relationship as a fiduciary relationship arising when a person (a principal) assents to another person (an agent) to act on their behalf.[18] Ultimately this test determines "[a]ctual agency" is comprised of "a principal/agent, master/servant, or employer/employee relationship, and the principal's control or right to control the conduct of the agent, servant, or employee."[19]

A majority of courts draw from the ten factors listed in the Restatement (Second) of Agency to determine the legal status of an agent.[20] Seven of these factors have emerged as the most common practice:

> (1) The degree of control exercised by the principal over the details of the work;
> (2) which party invests in the facilities used in the work;
> (3) the opportunity of the individual for profit or loss;
> (4) whether or not the principal has the right to discharge the individual;

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16 See Winkelstein v. Solitare, 27 A.2d 868, 869 (N.J. Sup. Ct. 1942), *aff'd*, 31 A.2d 843 (N.J. 1943); *accord* Wardley Better Homes & Gardens v. Cannon, 61 P.3d 1009, 1015 (Utah 2002) (applying agency principals of imputation of knowledge to an employee employer relationship); Viado v. Domino's Pizza, LLC, 217 P.3d 199, 208 (Or. Ct. App. 2009).

17 *See Winkelstein*, 27 A.2d at 869.

18 RESTATEMENT (SECOND) OF AGENCY § 1(1) (AM. L. INST. 1958).

19 McGrath v. Addy & McGrath Fireworks, Inc., 216 N.E.3d 1060, 1071 (Ill. App. Ct. 2022) (quoting Jacobs v. Yellow Cab Affiliation, Inc., 2017 IL App (1st) 151107, ¶ 64, 73 N.E.3d 1220, 1244; *cf.* United States v. SSM Properties, LLC, 598 F. Supp. 3d 478, 483–84 (S.D. Miss. 2022) (holding that the right to control and not formal employment status is determinative of finding an agency relationship).

20 RESTATEMENT (SECOND) OF AGENCY § 220(2) (listing 10 factors); *see, e.g.*, Weber v. Comm'r, 60 F.3d 1104, 1110 (4th Cir. 1995); Pro. & Exec. Leasing v. Comm'r, 89 T.C. 225, 232 (1987) (listing the same seven factors as Weber); Avis Rent a Car Sys., Inc. v. United States, 503 F.2d 423, 428 (2d Cir. 1974) (listing the same seven factors); Peno Trucking, Inc. v. Comm'r of Internal Revenue, 296 Fed. App'x 449, 456 (6th Cir. 2008); United States v. Silk, 331 U.S. 704, 716 (1947). *But see* Doty v. Elias, 733 F.2d 720, 723 (10th Cir. 1984) ("In applying this test, the courts generally focus on five factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work."); Flores v. FS Blinds, L.L.C., 73 F.4th 356, 365 (5th Cir. 2023) (applying a five factor test); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979) (using an eleven factor test).

> (5) whether the work is part of the principal's regular business;
> (6) the permanency of the relationship; and
> (7) the relationship the parties believe they are creating.[21]

As acknowledged by courts discussing agency, the essential difference between an employee/agent and an independent contractor is that for independent contractors, employers have "no right of control over the manner in which the work is to be done."[22]

Within employment relationships, employers are liable for the negligent actions of their employees under the doctrine of *respondeat superior*, however, courts do not extend employer liability to the negligence of their independent contractors.[23] Under *respondeat superior,* employers are held responsible for the wrongdoing of their employee, "not because the party did anything wrong but rather because of the party's relationship to the wrongdoer," that is, because of their agency.[24] Thus, when a truck driver drives negligently, the employing motor carrier is liable for any damages.[25] *Respondeat superior* is a theory of vicarious liability.[26] Where an employer admits vicarious liability for their employee, they are accepting all liability for any negligence committed by the employee.[27]

However, courts do not extend employer liability to the negligence of their independent contractors.[28] "An employer is not responsible for torts committed by an independent contractor or employees of such independent contractor"[29] because employers generally do not supervise the actions of independent contractors in the same way they supervise their

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21 *Peno Trucking, Inc.*, 296 Fed. Appx. 449, 456 (6th Cir. 2008) (quoting *Weber,* 60 F.3d at 1110).

22 Puckrein v. ATI Transp., Inc., 897 A.2d 1034, 1041 (N.J. 2006) (quoting Baldasarre v. Butler, 625 A.2d 458 (N.J. 1993)); *accord McGrath*, 216 N.E.3d at 1071 (quoting *Jacobs*, 2017 IL App (1st) 151107, ¶ 64, 73 N.E.3d at 1244–45).

23 *E.g.*, Cap. Constr. Servs., Inc. v. Gray, 959 N.E.2d 294, 298 (Ind. Ct. App. 2011).

24 Ratcliff v. TranStewart Trucking Inc., 1:22-CV-00623-TWP-KMB, 2023 WL 4866326, at *14 (S.D. Ind. July 31, 2023) (citing Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 147 (Ind. 1999)).

25 *Id.* at *6.

26 Garrison v. Sagepoint Fin., Inc., 345 P.3d 792, 810 (Wash. Ct. App. 2015).

27 *Ratcliff*, 2023 WL 4866326, at *5.

28 *E.g.*, *Cap. Constr. Servs., Inc.*, 959 N.E.2d at 298 ("[A]n employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence of the independent contractor."); Piggly Wiggly S., Inc. v. Hercules, Inc., 259 S.E.2d 219, 221 (Ga. Ct. App. 1979); Bagley v. Insight Comms. Co., 658 N.E.2d 584, 586 (Ind. 1995) ("[T]he long-standing general rule has been that a principal is not liable for the negligence of an independent contractor."); Embler v. Gloucester Lumber Co., 83 S.E. 740, 742 (N.C. 1914).

29 *Piggly Wiggly S., Inc.*, 259 S.E.2d at 221.

employees.[30] Independent contractors' specialized skills and equipment often develop a sense of risks particular to their profession which are not germane to the general public and, therefore, "a person will not be vicariously liable for the actions of the contractor."[31]

However, courts have generally acknowledged five exceptions to the independent contractor liability rule:

> (1) where the contract requires the performance of intrinsically dangerous work;
> (2) where one party is by law or contract charged with performing the specific duty;
> (3) where the performance of the contracted act will create a nuisance;
> (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and
> (5) where the act to be performed is illegal.[32]

Courts have applied these exceptions to truckers with inconsistent conclusions.[33]

A. Statutory Employment Under the Federal Motor Carrier Safety Regulations

One obvious way for motor carriers to evade liability for the accidents of their truck drivers is to limit the employment relationship with their truck drivers. As of 2023, the average verdict from a trucking accident was $31.8 million.[34] For motor carriers, avoiding that liability is frugal if not economically wise.

However, in 2000, the Federal Motor Carrier Safety Administration (the Administration) was established.[35] The stated purpose of the Administration is to "reduce crashes, injuries and fatalities involving large

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30 *But see* Insco v. Aetna Health & Life Ins. Co., 673 F. Supp. 2d 1180, 1190–91 (D. Nev. 2009) (citing Hanneman v. Downer*,* 871 P.2d 279, 284 (Nev. 1994)).

31 *Id.* (citing Sierra Pac. Power Co. v. Rinehart, 665 P.2d 270, 274 (Nev. 1983)).

32 *Cap. Constr. Servs.,* 959 N.E.2d at 298. Another exception has been recognized for performance of nondelegable duties. Rockwell v. Sun Harbor Budget Suites, 925 P.2d 1175, 1179 (Nev. 1996).

33 *E.g.*, Ill. Bulk Carrier, Inc. v. Jackson, 908 N.E.2d 248 (Ind. Ct. App. 2009) (denying application of the second and fourth exceptions.); Graham v. Amoco Oil Co., 21 F.3d 643, 645 (5th Cir. 1994) (applying the first exception).

34 Fred Fakkema, *A Practical Approach to Avoid Nuclear Verdicts*, COM. CARRIER J. (Dec. 7, 2023) https://www.ccjdigital.com/business/article/15659467/a-practical-approach-to-avoid-nuclear-verdicts [https://perma.cc/XY5J-KVRC].

35 *About Us,* FED. MOTOR CARRIER SAFETY ADMIN. (Dec. 13, 2013), https://www.fmcsa.dot.gov/mission/about-us [https://perma.cc/MZU3-JXA8].

trucks and buses."[36] To prevent motor carriers from evading safety responsibility, the Administration passed several regulatory measures known as the Federal Motor Carrier Safety Regulations (FMCSRs). The FMCSRs apply to all "employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce."[37] A motor carrier is one such employer who is either "engaged in the transportation of goods or passengers for compensation" or "a person who provides transportation of property or passengers, by commercial motor vehicle, and is not a for-hire motor carrier."[38] In a negligence context, the FMCSRs describe duties owed to the motoring public.[39]

Transporters of goods and people for compensation need drivers, and drivers, and not office managers, are the ones who get in accidents.[40] Under the common law principles outlined thus far, it would make sense for motor carriers to consciously define the employment relationships with their drivers to ensure they are independent contractors and, thus, escape liability for any collisions.[41] However, it was this very rationale which—in part—prompted the adoption of the FMCSRs.[42] As one court explains,

> carriers took care to constitute the lessors as independent contractors which enabled them to avoid the commission's safety, financial, and insurance regulations that had been prescribed for equipment and drivers to protect the public. Many of the owner-operators without authority were itinerant truckers known as "gypsies," fly-by-night truckers with poor, unsafe equipment who had little financial ability. They may or may not have had adequate insurance. The hard core of the problem was the trip lease and its attendant evils *which permitted an indifferent carrier to evade its safety and financial responsibility*. . . . Thousands of unregulated trucks were on the road.[43]

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36 *Our Mission*, FED. MOTOR CARRIER SAFETY ADMIN. (Dec. 13, 2023) https://www.fmcsa.dot.gov/mission [https://perma.cc/62MS-D4S7].

37 49 C.F.R. § 390.3(a).

38 *Id.* § 390.5. (defining "for-hire motor carriers" and "private motor carriers").

39 Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006, 1011 (Ind. Ct. App. 1986).

40 Ferrer v. Okbamicael, 2017 CO 14M, ¶ 28, *as modified on denial of reh'g* (Mar. 27, 2017).

41 *See supra* notes 13–33 and accompanying text.

42 *Rediehs Express, Inc.*, 491 N.E.2d at 1010.

43 *Id.* (emphasis added) (citations omitted).

The FMCSRs were adopted to pressure indifferent motor carriers to train and supervise their drivers responsibly and be responsible for the transit of their freight.[44]

First and foremost, these regulations attempted to inhibit motor carriers from evading liability "simply by labeling a driver as an independent contractor."[45] The FMCSRs define an employee to include independent contractors.[46] This is often referred to as "statutory employment" under the FMCSRs,[47] which aims to keep motor carriers from evading accountability under common law doctrines "by means of a contractual device."[48]

A motor carrier's vicarious liability only requires that the "motor carrier must have been in control or possession of the motor vehicle at issue."[49] Motor carriers are allowed to use trucks they do not own to transport their goods as long as there is a lease agreement.[50] The lease must grant the equipment "with or without a driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation."[51] Critically, the lease must also provide that "the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease."[52] Putting these regulations together, it is difficult for a motor carrier to escape liability for their truck drivers' collisions.[53] For plaintiffs, vicarious liability is, thus, relatively easy to establish under the FMCSRs regardless of the common law employment status of the driver.[54]

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44 *Id.*

45 Ill. Bulk Carrier v. Jackson, 908 N.E.2d 248, 255 (Ind. Ct. App. 2009) (citing Brown v. Truck Connections Int'l, Inc., 526 F. Supp. 2d 920, 924 (E.D. Ark. 2007)); Ratcliff v. TranStewart Trucking Inc., 1:22-CV-00623-TWP-KMB, 2023 WL 4866326, at *15 (S.D. Ind. July 31, 2023).

46 49 C.F.R. § 390.5 ("Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (*including an independent contractor* while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler." (emphasis added)).

47 *E.g.*, *Ill. Bulk Carrier*, 908 N.E.2d at 256.

48 *Id.* at 255.

49 *Ratcliff*, 2023 WL 4866326, at *15.

50 49 C.F.R. § 376.11.

51 *Id.* § 376.2(e).

52 *Id.* § 376.12(c)(1).

53 *See supra notes* 23–27, 45–52 and accompanying text.

54 *Id.*

B. Direct Negligence Claims

The FMCSRs not only require *that* motor carriers are responsible for truck driver safety (or lack thereof), it regulates *how* motor carriers must be responsible.[55] The FMCSRs require all "employer[s]" to be "knowledgeable" and "comply with all regulations."[56] This duty imposed on motor carriers includes: maintaining a driver qualification file for all drivers,[57] ensuring new hires possess the necessary qualifications to operate a commercial motor vehicle,[58] receiving and keeping a driver's application of employment,[59] performing an annual review of driving records and job statuses,[60] completing pre-hiring background and character investigation of the driver,[61] and training all employees in their duties under the FMCSRs.[62]

These responsibilities for motor carriers are distinct from the duties of drivers and lead to damages distinct from those resulting from driver negligence.[63] A motor carrier's violation of its duties under the FMCSRs endanger the public.[64] On a case-by-case analysis, whether the negligent actor was a driver, the hirer, or both, there will be a damaged plaintiff and, under statutory employment, the motor carrier will likely be liable.[65] The difference is in accountability. Generally, a jury will find a motor carrier's failure to ensure safe fleet operation more outrageous than the driver's simple driving error. Everyone is charged with operating their vehicle on the road in a safe manner.[66] Motor carriers, however, profit from having their trucks on the road and assume responsibility for ensuring their profiting does not endanger others.

Where a motor carrier negligently hires an unsafe driver, an aggrieved plaintiff may pursue direct negligence claims against the motor carrier themself "so long as a good-faith factual basis exists for a plaintiff's claim of direct negligence against an employer, the plaintiff should be allowed to pursue such a claim in addition to a claim of vicarious liability."[67] Other

55 *See infra notes* 56–62 and accompanying text.
56 49 C.F.R. § 390.3(e)(1).
57 *Id.* § 391.51(a).
58 *See id.* § 391.11.
59 *See id.* § 391.21.
60 *Id.* § 391.25.
61 *See id.* § 391.23.
62 *Id.* § 390.3(e)(3).
63 *See* Werner Enters. v. Blake, 672 S.W.3d 554, 628–29 (Tex. App. 2023).
64 James v. Kelly Trucking Co., 661 S.E.2d 329, 330 (S.C. 2008).
65 *See supra notes* 23–27, 45–52 and accompanying text.
66 Smith v. Allen, 2 N.Y.S.3d 647, 649 (N.Y. App. Div. 2015) (quoting Singh v. Avis Rent A Car Sys., Inc., 989 N.Y.S.2d 302 (N.Y. App. Div. 2014)).
67 McQueen v. Green, 2022 IL 126666, ¶ 43, 202 N.E.3d 268, 279.

examples of direct negligence theories are negligent hiring, negligent training, negligent supervision, and negligent entrustment[68] "[i]n circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public."[69]Simply put, "the employer may be liable both on the ground that he was personally negligent and on the ground that the conduct was within the scope of employment" allowing plaintiffs ample opportunity to try their cases with specificity and hold the truly responsible parties accountable as the Administration intends.[70]

III. *MCHAFFIE V. BUNCH*

Regrettably, the development of motor carrier liability is not over. In 1995, the Missouri Supreme Court decided *McHaffie v. Bunch*.[71] *McHaffie*, and the rule from it, has hindered the ability of plaintiffs to plead and prove their cases with specificity.[72]

In 1989, Laura L. McHaffie was a passenger in a vehicle driven by Cindy D. Bunch.[73] Bunch was intoxicated.[74] Due to her intoxication, Bunch's vehicle drifted across the median and into the oncoming traffic

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68 Brown v. Long Romero, 2021 CO 67, ¶¶ 22–24.

69 *James*, 661 S.E.2d at 330 (emphasis added).

70 MV Transp., Inc. v. Allgeier, 433 S.W.3d 324, 336 (Ky. 2014) (noting the McHaffie rule is inconsistent with the Restatements of Agency) (quoting RESTATEMENT (SECOND) OF AGENCY § 213 cmt. h (AM. L. INST. 1958); *accord James*, 661 S.E.2d at 330.

71 891 S.W.2d 822, 824 (Mo. 1995). *McHaffie* is the modern seminal case. *See* Ferrer v. Okbamicael, 2017 CO 14M, ¶ 23, *as modified on denial of reh'g* (Mar. 27, 2017). Indeed, the earliest state supreme court case to acknowledge a procedure for direct negligent claims where vicarious liability has been admitted was not a trucking case at all. In *Prosser v. Richman*, a six year old boy on December 18, 1941 was walking home from school when he was pushed behind a backing out vehicle. 50 A.2d 85, 85 (Conn. 1946). The vehicle, operated by a 15 year old, Harold Richman, backed over his left knee. *Id.* The boy required two surgeries and nearly four years of supervised care to repair the wound ultimately ending up with "a pretty good leg." *Id.* The boy filed suit against Harold alleging negligence and against Harold's parents, Emanual and Rose Richman, for "allowing an unlicensed and incompetent person to drive the car." *Id.* at 87. The Richmans admitted their liability if Harold was found negligent. *Id.* The Supreme Court of Connecticut ordered a new trial and that "[Harold's] negligence must be proven *before* [the parents] can be held liable." *Id.* I note the formula of this rule: agent's negligence must be proven before principal can be held liable. *Id.* Importantly, the cases cited by the Court in *Prosser* stand for the proposition that "[i]f the employee has not been negligent the employer is not liable." Thus, the *Prosser* proposition is an innovation on case law itself. *See* Carlson v. Conn. Co., 108 A. 531 (Conn. 1919); *see also* Haliburton v. Gen. Hosp. Soc'y, 48 A.2d 261 (Conn. 1946).

72 *See supra Part III.A.2.*

73 *McHaffie*, 891 S.W.2d at 824.

74 *Id.*

lane.[75] The Bunch/McHaffie vehicle then hit a guard rail and was hit by a truck driven by Donald R. Farmer.[76]

Farmer was employed as an independent contractor for Rumble Transport, and Rumble Transport received their truck fleet by a lease agreement from Bruce Transport.[77] Thus, the Farmer/Rumble/Bruce relationship reflected a prototypical motor carrier arrangement: Bruce leased trucks to Rumble and Rumble hired drivers.[78]

In her pleadings, McHaffie alleged that Bunch failed to drive on the correct side of the road, that Farmer failed to keep a safe look out, and that Farmer was an employee of Bruce and Rumble.[79] Further, McHaffie plead that Rumble negligently hired and supervised Farmer.[80] While this claim was not brought against Bruce—the lessor of the trucks—both Bruce and Rumble admitted Farmer was their employee acting within the scope and course of his employment.[81]

At trial, McHaffie presented evidence that Rumble "did not require Farmer to have adequate experience, testing, training, and medical evaluations before driving their trucks" and "did not adequately enforce regulations requiring Farmer to maintain log books" as the FMCSRs require.[82] Following deliberation, the jury awarded $5,258,000 in damages and allocated "70% to Bunch, 10% to Farmer, Bruce and Rumble based on Farmer's negligence and Bruce and Rumble's vicarious liability, 10% to

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75 *Id.*

76 *Id.*

77 *Id.* There is not the space in this Comment to explore the significance of the *McHaffie* rule for corporate employees. For more on employer status in corporate employment relationships see *Brown v. Truck Connections International, Inc.*, 526 F. Supp. 2d 920, 925 (E.D. Ark. 2007) ("By using a different term to define employer, the language of the regulation itself indicates that in this instance, 'individual' and 'person' are not synonymous, which further indicates that here, 'individual' does refer to human beings and not to corporations or other legal persons."). *See also* Ill. Bulk Carrier, Inc. v. Jackson, 908 N.E.2d 248, 255 (Ind. Ct. App. 2009) (finding that corporations cannot be employees for purposes of statutory employment.).

78 *See* Mustang Transp. Co. v. Ryder Truck Lines, Inc., 523 F. Supp. 1097, 1100–03 (E.D. Pa. 1981).

79 *Id.*

80 *Id.*

81 *Id.* Based on the preceding liability discussion, it should be noted that Farmer would have been a statutory employee of Rumble. As such, Rumble's admission is somewhat vapid. The reason Bruce—who was *not* a statutory employer of Farmer—would admit Famer as an employee is the reason for this paper.

82 *Id.*

Rumble based on negligent hiring, and 10% to [McHaffie] based on riding with an intoxicated person."[83]

The defendants Bruce and Rumble appealed, arguing that it was improper for the court to allow the plaintiff to prove both vicarious and direct negligence claims against them at trial.[84] The Supreme Court of Missouri agreed, stating, "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."[85]

On its face, the *McHaffie* rule seems rather benign. Regardless of the theory of liability, the employer still foots the bill and compensates the plaintiff.[86] However, the *McHaffie* rule deviates from the intent and history of the FMCSRs—to hold motor carriers accountable for their safety responsibilities—by keeping motor carrier negligence out of court.[87] Thus, the *McHaffie* rule, while not shielding motor carriers from monetary obligations, protects motor carriers from the public scrutiny associated with their own negligence.[88] Under the *McHaffie* rule, motor carriers, regardless of negligence, walk away with a clean face leaving their driver on the hook for the scrutiny.[89] In this sense, the *McHaffie* rule is most unfair to drivers.[90] Moreover, under the FMCSRs' statutory employment scheme, a motor carrier's admission of liability is a rather vacuous *quid* for a disproportionately large *quo*: a token admission for exoneration of scrutiny.[91]

Plaintiffs often plead that an employee's negligence occurred within the context of an employer's negligent training, supervision, or a company culture which values productivity over safety.[92] Under the *McHaffie* rule,

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83 McHaffie v. Bunch, 891 S.W.2d 822, 825 (Mo. 1995).

84 *Id.*

85 *Id.* at 826.

86 *See id.*

87 *Compare* Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006, 1010 (Ind. Ct. App. 1986) (explaining the purpose of the FMCSRs), *with McHaffie*, 891 S.W.2d at 826 (preventing direct negligence claims against motor carriers).

88 *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, 233 (2010) (arguing that the *McHaffie* rule does not alter a plaintiff's rightful recovery).

89 *See McHaffie*, 891 S.W.2d at 826.

90 *See id.*

91 *See id.*

92 *See, e.g.*, *id.* at 824; James v. Kelly Trucking Co., 661 S.E.2d 329 (S.C. 2008); Werner Enters. v. Blake, 672 S.W.3d 554 (Tex. App. 2023); Ferrer v. Okbamicael, 2017 CO 14M, *as modified on denial of reh'g* (Mar. 27, 2017); Ramon v. Nebo Sch. Dist., 2021 UT 30, 493 P.3d 613.

adopted now in several jurisdictions, courts dismiss any and all direct negligence claims against the employer.[93]

The court's initial recitation of the rule begs the question, how is maintaining a direct and a vicarious claim improper? Historically, courts that adopted the *McHaffie* rule have articulated two major justifications for it: (1) procedural efficiency and (2) elimination of prejudicial evidence.[94] Thus, courts view the *McHaffie* rule as both an evidentiary rule and a redundant claims rule.[95]

A. Prejudice and Procedure

First, proponents of the *McHaffie* rule argue it seeks to bar prejudicial evidence from trial court proceedings—the original rationale of the rule.[96] A breach by a negligent motor carrier, as a profiting entity and an authority on their safe operation, is more distasteful than merely a negligent driver.[97] However, the Federal Rules of Evidence only bar *unfairly* prejudicial evidence; in a trial setting, all evidence is prejudicial to one side or the other.[98] For example, in a trial where the plaintiff seeks to recover under a theory of negligent hiring against a motor carrier (much like in *McHaffie*), evidence that the motor carrier knew of the driver's prior accidents and unfitness to drive is relevant and necessary to establish the motor carrier negligently hired a risky driver.[99] Where these issues are tried alongside a negligence claim against the driver for whom the motor carrier is vicariously liable, however, allowing the same evidence of negligent hiring

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93 *E.g.*, Sanchez v. Home Depot, Inc., No. 1:13-CV-00117-ABJ, 2014 WL 2986672, at *3 (D. Wyo. July 2, 2014); Wise v. Fiberglass Sys., Inc., 718 P.2d 1178, 1181-82 (Idaho 1986); Houlihan v. McCall, 78 A.2d 661, 665 (Md. 1951); Roaf v. Stephen S. Rebuck Consulting, LLC, No. 1 CA-CV 22-0620, 2023 WL 5036929, at *2 (Ariz. Ct. App. Aug. 8, 2023), *vacated on other grounds by* 550 P.3d 173 (Ariz. 2024). "Arizona has neither adopted nor rejected the *McHaffie* rule." *Roaf*, 2023 WL 5036929, at *2.

94 J.J. Burns, *Respondeat Superior As an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 MICH. L. REV. 657, 671–72 (2011).

95 *Id.* at 671.

96 *E.g.*, *id.*; *James*, 661 S.E.2d at 331 ("The argument goes that the admission of evidence which must be offered to prove a negligent hiring, training, supervision, or entrustment claim—evidence such as a prior driving record, an arrest record, or other records of past mishaps or misbehavior by the employee—will be highly prejudicial if combined with a stipulation by the employer that it will ultimately be vicariously liable for the employee's negligent acts."); *see also* Fuentes v. Tucker, 187 P.2d 752, 755 (Cal. 1947).

97 *See supra* notes 55–66 and accompanying text; *see also* Smith v. Allen, 2 N.Y.S.3d 647, 649 (N.Y. App. Div. 2015) (quoting Singh v. Avis Rent A Car Sys., Inc., 989 N.Y.S.2d 302 (N.Y. App. Div. 2014)).

98 People v. Acosta, 2014 COA 82, ¶ 57 ("All effective evidence is prejudicial in the sense that it is damaging to the party against whom it is being offered.").

99 *James*, 661 S.E.2d at 331–32.

may confuse or enflame the jury when determining whether the driver was negligent.[100]

Second, courts following the *McHaffie* rule believe that allowing a plaintiff to proceed on both a direct and vicarious cause of action, where the principal has admitted vicarious liability, is redundant,[101] and laborious to court efficiency.[102] Proponents of the *McHaffie* rule view direct and vicarious negligence claims as attempts to get at the principal's pocket, so to speak.[103] Thus, courts have reasoned that in such situations, plaintiffs "merely allege a concurrent theory of recovery."[104] An admission of vicarious liability 'cuts the corner' on access to the employer's purse, making the direct claim redundant.[105]

Proponents further argue that the *McHaffie* rule protects defendants from paying a double apportionment of fault.[106] Traditionally, the employee's fault apportionment fixes the fault of the employer under a vicarious liability claim.[107] Thus, the plaintiff's fault apportionment should be no different between a direct or a vicarious claim, meaning the *McHaffie* rule prevents any confusion by the jury in assessing fault twice leading to a "plainly illogical result."[108]

Putting these rationales together, proponents of the rule argue that "[s]ince the direct negligence of the master is derivative of the negligence of the servant, the direct negligence claims serve no real purpose, unless the purpose is to inject prejudice into the proceedings and invite error."[109] Thus, proponents see the *McHaffie* rule as a procedural safeguard from both prejudicial evidence and inefficient use of court time.[110]

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100 Houlihan v. McCall, 78 A.2d 661, 665 (Md. 1951).

101 Ferrer v. Okbamicael, 2017 CO 14M, ¶ 28, *as modified on denial of reh'g* (Mar. 27, 2017).

102 McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995).

103 *See e.g.*, Werner Enters. v. Blake, 672 S.W.3d 554, 628 (Tex. App. 2023) ("[Direct] theories only operate to make the employer liable for an employee's negligence . . . ."); Davlin v. Sioux Cty. Truck Sales, CI 19-2195, 2020 Neb. Trial Order LEXIS 4731, *4 ("If the Plaintiff wants to have Sioux City Truck solely responsible for this matter, then she can dismiss the driver and then proceed against Sioux City Truck for any negligence it may have as to its hiring and training of the driver.").

104 Clooney v. Geeting, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977).

105 Mincer, *supra* note 88, at 233.

106 *Ferrer*, 2017 CO 14M, ¶ 33.

107 *Id.*

108 *Id.* (quoting McHaffie v. Bunch, 891 S.W.2d 822, 827 (Mo. 1995).

109 Mincer, *supra* note 88, at 233 (citing Beavis v. Campbell Cnty. Mem'l Hosp., 20 P.3d 508 (Wyo. 2001)).

110 *Id.* at 240–41.

B. The Anti-McHaffie Rule Rationale

To defendants and courts, the rule is a win-win: dismissal of the direct negligence claims save motor carriers from exposure to their own negligent conduct and lightens the already busy court docket. It is likely no surprise that the strongest adversaries of the rule have been plaintiffs.[111] Plaintiffs and courts adverse to the *McHaffie* rule have articulated at least three arguments against the rule. First, there are more sophisticated ways to get around *McHaffie* rule concerns already available in the American procedural schema: a court can bifurcate the issues of direct and vicarious liability and give proper jury instructions or special interrogatories.[112]

Second, adversaries of the *McHaffie* rule argue it usurps the trial court's discretion to determine the admissibility of evidence and the jury's ability to make a proper assessment.[113] The rule, thus, prescribes a procedural heavy-handedness unjust to plaintiffs.[114] Obviously, not all cases will require introduction of prejudicial evidence, but some will.[115] To address the range of cases by entirely precluding a cause of action "to protect the jury from considering prejudicial evidence" allows "impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial."[116]

Third, adversaries to the *McHaffie* rule argue it is "a rather strange proposition" that a party's admission can cause dismissal of a claim.[117] This is because "[the] plaintiff is the master of his own complaint" and may plead as many theories as he believes his case requires.[118] In sum,

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111 *See* Burns, *supra* note 94, at 677.

112 *See* Beavis v. Campbell Cnty. Mem'l Hosp., 20 P.3d 508, 515–17 (Wyo. 2001) (bifurcating a direct negligent supervision claim against a hospital from a vicarious claim against a nurse); McQueen v. Green, 2022 IL 126666, ¶ 47, 202 N.E.3d 268, 280 (citing Babikian v. Mruz, 2011 IL App (1st) 102579, ¶ 20, 956 N.E.2d 959; Marxmiller v. Champaign-Urbana Mass Transit Dist., 2017 IL App (4th) 160741, ¶ 21, 90 N.E.3d 1064).

113 Ramon v. Nebo Sch. Dist., 2021 UT 30, ¶ 24, 493 P.3d 613, 620 ("Adopting the [*McHaffie*] rule would, in essence, take away a district court's discretion.").

114 *See id.*; *see also* MV Transp., Inc. v. Allgeier, 433 S.W.3d 324, 336 (Ky. 2014) (quoting Penco, Inc. v. Detrex Chemical Industries, Inc., 672 S.W.2d 948 (Ky. Ct. App. 1984) ("We have no particular concern about the likelihood of double recovery under the non-preemption rule because a properly constructed jury instruction easily eliminates that possibility.").

115 Wise v. Fiberglass Sys., Inc., 718 P.2d 1178, 1185 (Idaho 1986) (Bistling, J., dissenting).

116 *Ramon,* 2021 UT 30, ¶ 21, 493 P.3d at 620 (quoting James v. Kelly Trucking Co., 661 S.E.2d 329, 331 (S.C. 2008)). The court "agree[d] with the *James* court that in most instances the best course is to rely on our district courts' discretion to determine whether evidence should be admitted." *Id.* at ¶ 23, 493 P.3d at 620.

117 James v. Kelly Trucking Co., 661 S.E.2d 329, 332 (S.C. 2008).

118 *Ramon*, 2021 UT 30, ¶ 15, 493 P.3d at 618.

fundamental principles of civil procedure are thwarted by the *McHaffie* rule: "that the plaintiff must be able to demonstrate a prima facie case for each cause of action and that a plaintiff may ultimately recover only once for an injury."[119]

In the black and white, the *McHaffie* rule is a rather "blunt" approach.[120] Indeed, trial courts have multiple and more sophisticated means to prevent double assessment and the introduction of prejudicial evidence, such as, proper jury instructions and the use of special interrogatories.[121] Moreover, the fact dependent benefits of the rule risk hiding negligent motor carriers from public and judicial scrutiny.[122] The rule, as stated in *McHaffie*, is too broad to do justice to plaintiffs and keep the motoring public safe.[123]

IV. THE *MCHAFFIE* RULE IN WYOMING

The *McHaffie* rule first came to Wyoming not through a case but a law review article by Richard Mincer.[124] The Mincer article shaped the national conversation of the *McHaffie* Rule for nearly a decade in numerous jurisdictions.[125]

It was not until 2018 that the Supreme Court of Wyoming discussed and adopted the *McHaffie* rule in *Bogdanski v. Budzik*.[126] In February of 2011,

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119 *MV Transp., Inc.*, 433 S.W.3d at 335–36 (quoting *James*, 661 S.E.2d at 332).

120 McQueen v. Green, 2022 IL 126666, ¶ 47, 202 N.E.3d 268, 280 (quoting *Ramon*, 2021 UT 30, ¶ 21, 493 P.3d at 619).

121 *Id.* (citing Babikian v. Mruz, 2011 IL App (1st) 102579, ¶ 20, 956 N.E.2d 959; Marxmiller v. Champaign-Urbana Mass Transit Dist., 2017 IL App (4th) 160741, ¶ 21, 90 N.E.3d 1064)).

122 Burns, *supra* note 94, at 671.

123 *See supra* Part III.B and accompanying text.

124 Mincer, *supra* note 88.

125 *See e.g.*, Adele v. Dunn, 2:12-CV-00597-LDG, 2013 WL 1314944 at *2 (D. Nev. Mar. 27, 2013) (quoting and following Mincer, *supra* note 88); Avery v. Roadrunner Transp. Servs., Inc., CIV-11-1203-D, 2012 WL 6016899 at *3 (W.D. Okla. Dec. 3, 2012) (citing and following Mincer, *supra* note 88); Finkle v. Regency CSP Ventures Ltd. P'ship, 27 F. Supp. 3d 996, 1000 (D.S.D. 2014) (citing but not following Mincer, *supra* note 88); Tischauser v. Donnelly Transp. Inc., 20-C-1291, 2022 WL 623994, at *2 (E.D. Wis. Mar. 3, 2022) (citing and following Mincer, *supra* note 88); Dye v. Cooney's Farm Serv., Ltd., 09-CV-32-J, 2010 WL 11564947 (D. Wyo. Sept. 28, 2010) (citing Mincer, *supra* note 88, and predicting Wyoming to follow the rule); Ferrer v. Okbamicael, 2017 CO 14M, *as modified on denial of reh'g* (Mar. 27, 2017) (quoting Mincer, *supra* note 88, and following the rule); Diaz v. Carcamo, 253 P.3d 535, 544 (Cal. 2011) (citing Mincer, *supra* note 88, and following the rule); Wilson v. Image Flooring, LLC, 400 S.W.3d 386, 393–94 (Mo. Ct. App. 2013) (quoting and following Mincer, *supra* note 88); Jones v. Windham, W2015-00973-COA-R10-CV, 2016 WL 943722, at *4 (Tenn. Ct. App. Mar. 11, 2016), *appeal granted, judgment vacated* (Aug. 19, 2016) (quoting Mincer, *supra* note 88, but not following the rule).

126 2018 WY 7, ¶ 23, 408 P.3d 1156, 1163 (Wyo. 2018).

Marius Bogdanski and Damian Budzik drove a tractor trailer for BZ Trucking across southern Wyoming.[127] Fed-Ex contracted BZ Trucking to haul trailers for Fed-Ex from Bedford, Illinois to Sacramento, California.[128] Pursuant to this contract, Bogdanski and Budzik were heading west on I-80 with two trailers destined for California.[129]

Bogdanski and Budzik worked in tandem, switching drivers after each eleven-hour shift.[130] At 2:00 a.m., a shift change occurred in Rawlins, Wyoming.[131] Budzik inspected the truck and began his shift in light snow while Bogdanski rested in the sleeper compartment of the cab.[132] As they traveled west of Rawlins, the snowfall increased.[133] Budzik encountered stopped traffic in both west bound lanes on I-80.[134] Budzik was stopped for about ten minutes.[135] Once the traffic began to move, Budzik realized that his truck was stuck.[136]

After unsuccessfully attempting to get his truck to move, Budzik woke his driving partner, Bogdanski.[137] Bogdanski exited the cab and inspected the truck.[138] Snow had begun to accumulate on the road, and Bogdanski determined he would need to put chains onto the truck's tires, which would require securing the truck's location using warning triangles.[139] The truck's tire chains and warning triangles were stored in the catwalk between the cab and the trailer.[140]

Bogdanski climbed onto the catwalk to retrieve the chains and warning triangles.[141] A semi-truck driven by Victor Marinov rear ended the stopped truck, throwing Bogdanski onto the emergency lane of the road.[142] Bogdanski was taken by ambulance to Evanston Hospital where he was treated and released.[143] Upon returning to Illinois, Bogdanski received

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127 *Id.* ¶ 3, 408 P.3d at 1157.
128 *Id.* ¶ 5, 408 P.3d at 1158.
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.* ¶¶ 5–6, 408 P.3d at 1158.
133 *Id.* ¶ 6, 408 P.3d at 1158.
134 *Id.*
135 *Id.* ¶ 7, 408 P.3d at 1158.
136 *Id.*
137 *Id.*
138 *Id.* ¶ 8, 408 P.3d at 1158.
139 *Id.* ¶¶ 6–8, 408 P.3d at 1158.
140 *Id.* ¶ 9, 408 P.3d at 1158.
141 *Id.*
142 *Id.* ¶ 9, 408 P.3d at 1159.
143 *Id.*

workers' compensation and medical and disability benefits for injuries to his back, hip, shoulder, and left arm.[144]

In 2015, Bogdanski filed a complaint in Uinta County, Wyoming and included Budzik and Fed-Ex in the pleadings.[145] Bogdanski's claims against Fed-Ex included direct claims for negligently training, hiring, and entrusting Budzik and vicarious liability for Budzik's negligence.[146] In a series of stipulations, Fed-Ex admitted vicarious liability for any negligence proved against Budzik.[147] Fed-Ex then moved for summary judgment on Bogdanski's negligent training claims against it.[148]

The District Court for the Third Judicial District granted the motion, predicting the Supreme Court of Wyoming would adopt the *McHaffie* rule.[149] As the District Court characterized the rule, "Bogdanski's claims for negligent hiring, training, and supervision cannot be maintained when vicarious liability has been accepted by FedEx."[150] Bogdanski appealed the order.[151] On review, the Supreme Court of Wyoming relied on a then-recent case from the Colorado Supreme Court for its recitation of the rule: "[O]nce 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."[152] Justice Davis then explained, "[a]n employer's negligent act in hiring, supervision and retention, or entrustment is not a wholly independent cause of the plaintiff's injuries, unconnected to the employee's negligence."[153] Under this recitation, there are no circumstances where an employer's own negligence can enter a courtroom. Therefore, the Supreme Court of Wyoming affirmed the trial court's grant of summary judgment for the direct negligence claims but allowed Bogdanski to "try his luck with a jury on his vicarious liability claim against FedEx."[154]

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144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.* ¶ 12, 408 P.3d at 1159.

148 *Id.* ¶ 14, 408 P.3d at 1160.

149 *Id.* ¶ 16, 408 P.3d at 1160.

150 Bogdanski v. Budzik, No. CV-15-30, 2016 WL 8715851, at *2 (Wyo. Dist. Ct. Dec. 01, 2016).

151 *Bogdanski*, 2018 WY 7, ¶ 26, 408 P. 3d at 1164.

152 *Id.* ¶ 19, 408 P.3d at 1161 (quoting Ferrer v. Okbamicael, 2017 CO 14M, ¶ 24).

153 *Id.* ¶ 22, 408 P.3d at 1163 (quoting Ferrer v. Okbamicael, 2017 CO 14M, ¶ 29).

154 *Id.* ¶ 37, 408 P.3d at 1166.

A. Wyoming Loosens the McHaffie Rule

Since the Mincer article in 2010—and at the time of *Bogdanski*'s publication—it was believed the *McHaffie* rule was the majority rule.[155] However, due to the diversity in tort systems across states and in application of the *McHaffie* rule, other articles have pointed out that it may have never been the majority rule in the usual sense of that phrase since tort systems, state to state, can differ so significantly, the operation of the rule itself is far from universal.[156]

Moreover, contemporary courts are not as certain of the *McHaffie* rule's status as the Mincer article was,[157] and courts are trending towards loosening or rejecting the rule.[158] Before the *Bogdanski* opinion, a number of courts rejected the *McHaffie* rule.[159] Since *Bogdanski*, the highest courts in Utah and Illinois have forcefully rejected the *McHaffie* rule.[160] In Colorado, the state Supreme Court adopted the rule in *Ferrer v. Okbamicael*[161] which was promptly reversed by the legislature.[162] In the interim, between publication and reversal, the *Ferrer* case provided the reasoning and recitation for the *McHaffie* rule in *Bogdanski*.[163]

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155 *E.g.*, Ferrer v. Okbamicael, 2017 CO 14M, ¶ 24.

156 Burns, *supra* note 94, at 660 (arguing that the rule is far from uniformly adopted and implemented among jurisdictions to call it a majority position).

157 *E.g.*, Ramon v. Nebo Sch. Dist., 2021 UT 30, ¶ 17, 493 P.3d 613, 618; McQueen v. Green, 2022 IL 126666, ¶¶ 38, 41, 202 N.E.3d 268, 279 ("Courts nationwide are split on whether an employer's acknowledgment of vicarious liability for its employee's conduct precludes a plaintiff from raising a cause of action for direct negligence against the employer."); Werner Enters., Inc. v. Blake, No. 14-18-00967-CV, 2023 WL 3513843, at *53 n.5 (Tex. App. May 18, 2023) ("In fairness, the cases are not unanimous. The highest courts in Illinois, Kansas, Kentucky, South Carolina, and Utah have not embraced the Admission Rule."); MV Transp., Inc. v. Allgeier, 433 S.W.3d 324, 335–36 (Ky. 2014); Marquis v. State Farm Fire & Cas. Co., 961 P.2d 1213, 1222 (Kan. 1998); Wright v. Watkins & Shepard Trucking, Inc., 972 F. Supp. 2d 1218, 1220–21 (D. Nev. 2013).

158 *Ramon*, 2021 UT 30, ¶¶ 17, 27, 493 P.3d at 618; *McQueen*, 2022 IL 126666, ¶ 41, 202 N.E.3d at 279.

159 *E.g.*, James v. Kelly Trucking Co., 661 S.E.2d 329, 332 (S.C. 2008); *MV Transp., Inc.*, 433 S.W.3d at 336.

160 *Ramon*, 2021 UT 30, ¶ 27, 493 P.3d at 620; *McQueen*, 2022 IL 126666, ¶ 41, 202 N.E.3d at 279.

161 Ferrer v. Okbamicael, 2017 CO 14M, ¶¶ 24–26.

162 Brown v. Long Romero, 2021 CO 67, ¶ 4 n.2 ("At the conclusion of the most recent legislative session, and shortly before oral arguments in this case, the General Assembly added language to section 13-21-111.5, C.R.S. (2020), to 'reverse the holding in *Ferrer v. Okbamicael*, 3920 P.3d 836 (Colo. 2017) that an employer's admission of vicarious liability for any negligence of its employees bars a plaintiff's direct negligence claims against the employer.'" (quoting COLO. REV. STAT. § 13-21-111.5 (2020)).

163 *See* Bogdanski v. Budzik, 2018 WY 7, ¶ 19, 408 P.3d 1156, 1161 (Wyo. 2018) (quoting Ferrer v. Okbamicael, 2017 CO 14M, ¶ 24).

The Supreme Court of Wyoming had an opportunity in 2022 to revisit the *McHaffie* rule in *JTL Group v. Gray-Dockham*.[164] In *JTL Group*, the court actively walks back the application of the McHaffie rule announced in *Bogdanski*, however, the *JTL Group* court does not describe what they are doing in this way.[165] Rather, the *JTL Group* opinion finds that the case is distinguishable from the *Bogdanski* facts in that Ms. Gray-Dockam's claims were sufficiently separate and independent to evade dismissal.[166] The *JTL Group* court speaks as if the rule has always been what they are announcing.[167] In effect, the evolution of the *McHaffie* rule present in *JTL Group* is not discernable from just looking at the text of the opinion, rather, only by a side-by-side analysis with *Bogdanski* is the evolution appreciable.[168] While it speaks as if the rule has always been the same, the *JTL Group* court changes the operation of the rule significantly.[169]

In *JTL Group,* the Wyoming Department of Transportation (WYDOT) contracted with Knife River, as a general contractor, to change a section of Yellowstone Highway near Casper.[170] Knife River subcontracted RoadWorx to pave the section.[171] Pursuant to their contract with WYDOT, Knife River was responsible for setting up temporary traffic control around the work zone and maintaining a traffic control supervisor onsite.[172] These supervisors were RoadWorx employee Consuela Garcia and Knife River's Dennis Hallford.[173] On September 12, 2017, WYDOT engineers assessed the construction and noticed "several deficiencies in the traffic control layout."[174] RoadWorx, it turned out, had removed all traffic control devices from the eastbound lane of the highway.[175]

The WYDOT engineers met with Knife River's Dennis Hallford to discuss the deficiencies.[176] Hallford then instructed RoadWorx on how

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164 2022 WY 67, 510 P.3d 1060 (Wyo. 2022).

165 *Id.* ¶ 24, 510 P.3d at 1066.

166 *See id.* ¶ 32, 510 P.3d at 1069.

167 *See supra* Part II.A.

168 *Compare Bogdanski*, 2018 WY 7, ¶ 37, 408 P.3d at 1166 (describing all direct negligence claims as duplicative), *with JTL Grp., Inc.*, 2022 WY 67, ¶ 24, 510 P.3d at 1066 (describing only direct negligence claims which are dependent on the agent's negligence as possibly duplicative).

169 *JTL Grp., Inc.*, 2022 WY 67, ¶ 24, 510 P.3d at 1066.

170 *Id.* ¶ 3, 510 P.3d at 1062.

171 *Id.*

172 *Id.* ¶ 4, 510 P.3d at 1062.

173 *Id.* ¶ 5, 510 P.3d at 1063.

174 *Id.* ¶ 7, 510 P.3d at 1063.

175 *Id.*

176 *Id.* ¶ 9, 510 P.3d at 1063.

WYDOT wanted the traffic control amended.[177] Further, Hallford signed the project mobility review verifying the changes were made.[178]

The same day, Lana Simmons drove through the portion of the highway under construction.[179] Due to confusing traffic control, Simmons collided with William Gray.[180] Gray died from his injuries resulting from the collision.[181] His estate filed suit alleging direct negligence against Knife River while also alleging vicarious liability for the RoadWorx employees.[182] The defendants moved for judgment as a matter of law to dismiss the direct negligence claims against Knife River, which the trial court denied.[183] The jury apportioned 30% fault to RoadWorx, 60% fault to Knife River, and 10% fault to Mrs. Simmons.[184] The defendants appealed.[185]

In reviewing the appeal, the Supreme Court of Wyoming invoked the *McHaffie* rule through *Bogdanski* with a more sophisticated recitation of the rule.[186] *JTL Group* changed the landscape of simultaneous direct and vicarious claims in three important ways: first, it brought the rule in conformity with Wyoming's comparative fault scheme;[187] second, it indicated a standard whereby direct and vicarious claims can both be maintained;[188] and third, it acknowledged exceptions to the *McHaffie* rule.[189]

1. Wyoming's Comparative Fault Statute

The Supreme Court of Wyoming brought the operative language of Wyoming's comparative fault statute into the *McHaffie* analysis.[190] In *Bogdanski,* Justice Davis's majority believed that a broad reading of the *McHaffie* rule, as adopted through *Ferrer v. Okbamicael* out of Colorado, was "consistent with [Wyoming's] comparative fault scheme."[191] To support

177 *Id.* ¶ 10, 510 P.3d at 1063–64.
178 *Id.*
179 *Id.* ¶ 12, 510 P.3d at 1064.
180 *Id.* ¶ 13, 510 P.3d at 1064.
181 *Id.*
182 *Id.* ¶ 15, 510 P.3d at 1064.
183 *Id.* ¶ 19, 510 P.3d at 1065–66.
184 *Id.*
185 *Id.,* ¶ 20, 510 P.3d at 1066.
186 *See supra* Part III.A.
187 *See supra* Part II.A.
188 *See supra* Part II.A.
189 *See supra* Part II.A.
190 *Id.* ¶ 28, 510 P.3d at 1068.
191 Bogdanski v. Budzik, 2018 WY 7, ¶ 23, 408 P.3d 1156, 1163 (Wyo. 2018).

this claim, Justice Davis cited two California cases, one of which was from the 1950s.[192]

The *JTL Group* court rightfully did not find this reasoning persuasive.[193] The appellant-defendants argued that "any direct negligence claim against [the employer] is barred because it concerns the same activity for which [the employer] already admitted vicarious liability," invoking the *Bogdanski/Ferrer* strict reading of the *McHaffie* rule where no direct claims can survive alongside vicarious liability.[194] In response, the Court said this argument "ignore[d] Wyoming's comparative fault scheme."[195]

To arrive at this conclusion, the *JTL Group* majority cited the Wyoming comparative fault statute and Wyoming caselaw.[196] What was lacking in the *Bogdanski* opinion was addressed in *JTL Group*, namely, to claim that the imported *McHaffie* rule comports with Wyoming law, one must analyze the rule against existing Wyoming law.[197]

In doing so, the court realized the *McHaffie* rule, under Wyoming law, cannot be broadly applied.[198] The court clarified that, under Wyoming's comparative fault statute, the verdict form must list "each actor," meaning anyone whose act or omission, caused the alleged injury.[199] The *JTL Group* opinion changed the operative terms in a *McHaffie* analysis from employer and employee to actor or non-actor in accordance with Wyoming's comparative fault scheme and, perhaps just as importantly, recognized that the administrative act of controlling and directing the traffic control was an action for purposes of Wyoming's comparative fault statute.[200]

B. The Separate and Independent Standard

Perhaps most significantly, *JTL Group* changed the *Bogdanski* rule itself.[201] The court changed the statement of the rule in two ways: (1) by

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192 *Id.* (citing Diaz v. Carcamo, 253 P.3d 535 (Cal. 2011); Armenta v. Churchill, 267 P.2d 303, 309 (Cal. 1954)).

193 *JTL Grp., Inc.*, 2022 WY 67, ¶ 28, 510 P.3d at 1068.

194 *Id.* ¶ 27, 510 P.3d at 1068.

195 *Id.* ¶ 28, 510 P.3d at 1068.

196 *Id.* ¶¶ 28–31, 510 P.3d at 1068–69 (cleaned up).

197 *Compare id.* ¶ 28, 510 P.3d at 1068 (citing to the Wyoming comparative fault statute), *with Bogdanski*, 2018 WY 7, ¶ 23, 408 P.3d at 1163 (citing California common law).

198 *See JTL Grp., Inc.*, 2022 WY 67, ¶ 32, 510 P.3d at 1069.

199 *Id.* ¶ 28, 510 P.3d at 1068 (quoting WYO. STAT. ANN. § 1-1-109(c)(i)(A) (2022)).

200 *See id.* ¶¶ 33-34, 510 P.3d 1060, 1069.

201 *Id.* ¶ 24, 510 P.3d at 1066.

changing the operative language of the rule to target duplicative claims and (2) by announcing situations where claims are not dismissable.[202]

First, Justice Fenn, writing for the majority, clarified that dismissible claims under the *McHaffie* rule are duplicative claims.[203] The majority in *JTL Group* stated the *McHaffie* rule from *Bogdanski* as follows: "when the liability of the principal is *wholly dependent* on the negligence of the agent and the principal admits vicarious liability, then any cause of action for direct negligence against the principal *becomes duplicative and cannot be pursued*."[204] The italicized language indicates that not all direct negligence claims are duplicative, rather, only those which are "wholly dependent" on the negligence of the agent.[205] This clarification is not present in the *Ferrer/Bogdanski* version of the rule.[206]

This additional phrase changed the rule dramatically.[207] Dismissal of a direct claim under *Ferrer/Bogdanski* required merely an admission of *respondeat superior* liability by the employer.[208] Under the *JTL Group* recitation, admission of *respondeat superior* liability is insufficient by itself to dismiss a direct negligence claim—the defendant must also show that the direct negligence claim is duplicative.[209] In basic logic terms, the *Bogdanski* formula is: If there is an admission of liability, then *the direct claim is dismissed*.[210] The *JTL Group* formula is: (1) If the employer's liability is dependent on that of the agent*, then the claim is duplicative,*[211] and (2) Duplicative claims *cannot be pursued*.[212]

Second, the *JTL Group* court shrunk the boundaries of the *McHaffie* rule.[213] Justice Fenn reasoned that, "*Bogdanski* does not stand for the broad proposition that a principal can never be listed on the verdict form for a direct negligence claim."[214] While this is what *Bogdanski* stood for, he went

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202 *See id.*

203 *See id.*

204 *Id.* (emphasis added) (citing Bogdanski v. Budzik, 2018 WY 7, ¶¶ 22–23, 408 P.3d 1156, 1162–63 (Wyo. 2018)).

205 *Id.*

206 *See* Bogdanski v. Budzik, 2018 WY 7, ¶ 19, 408 P.3d 1156, 1161 (quoting Ferrer v. Okbamicael, 2017 CO 14M, ¶ 24).

207 *See JTL Grp., Inc.*, 2022 WY 67, ¶¶ 33–34, 510 P.3d at 1069.

208 *See Bogdanski,* 2018 WY 7, ¶ 19, 408 P.3d at 1161 (quoting *Ferrer*, 2017 CO 14M, ¶ 24).

209 *See JTL Grp., Inc.*, 2022 WY 67, ¶ 24, 510 P.3d at 1067.

210 *See Bogdanski*, 2018 WY 7, ¶¶ 22–23, 408 P.3d at 1162–63 (Wyo. 2018).

211 *JTL Grp., Inc.*, 2022 WY 67, ¶ 24, 510 P.3d at 1066.

212 *Id.*

213 *See id.* ¶ 24, 510 P.3d at 1067.

214 *Id.*

on, "particularly when the actions of the principal are separate and independent from the agent's actions."[215]

Taking these two amendments together, the court returned to the language of *McHaffie* itself, which includes a similar limitation on its applicability: "Having said that, it may be possible that an employer or entrustor may be held liable on a theory of negligence that does not derive from and is not dependent on the negligence of an entrustee or employee."[216] The limitations on the *McHaffie* rule as stated in *JTL Group* are: (1) Duplicative direct negligence claims are dismissible, and (2) separate and independent claims against principals are not. Taking these points together, successful pleadings must show that the principal was "in any measure negligent," and such that the principal's negligence would have been sufficient, with or without negligence by the employee, to lead to the injuries of the plaintiff.[217]

C. Punitive Damages Exception

Outside of paring down the *McHaffie* rule, the *JTL Group* opinion acknowledges at least one pertinent exception: "[I]t is also possible that an employer or an entrustor may be liable for punitive damages which would not be assessed against the employee/entrustee."[218] In Wyoming, punitive damages require a showing that the defendant acted willfully and wantonly, a state of mind which "approaches an intent to do harm."[219] Alternatively, this mental state has been described as "recklessness."[220]

Adversaries to the exception have noted that a plaintiff must merely seek punitive damages under this exception is truly "an exception which

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215 Reiterating what was said above: the Court in *JTL Group* imported the Wyoming comparative statute language into its analysis of the McHaffie rule, importantly, it is "actor" focused. *Id.* ¶¶ 24, 27, 510 P.3d at 1066, 1067 (holding that a superintendent's "negligent instruction and approval" of traffic control devices was sufficiently separate and independent to evade dismissal).

216 *Id.* ¶ 26, 510 P.3d at 1067 (quoting McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995)).

217 WYO. STAT. ANN. § 1–1–109(a)(iv); *see JTL Grp., Inc.*, 2022 WY 67, ¶¶ 28–31, 510 P.3d at 1069 (quoting Beavis v. Campbell Cnty. Mem'l Hosp., 20 P.3d 508, 516–17 (Wyo. 2001)) (acknowledging that Wyoming's comparative fault statute can apply to the actions of a principal).

218 *JTL Grp., Inc.*, 2022 WY 67, ¶ 26, 510 P.3d at 1067 (quoting *McHaffie*, 891 S.W.2d at 826).

219 Bryant v. Hornbuckle, 728 P.2d 1132, 1136 (Wyo. 1986).

220 Sears v. Summit, Inc., 616 P.2d 765, 770 (Wyo. 1980); *see*, *also* Clooney v. Geeting, 352 So. 2d 1216, 1219–20 (Fla. Dist. Ct. App. 1977) ("No theory which permits the past driving record of *Geeting* should be presented to the jury unless there is a proper claim for punitive damages.").

swallows the rule."[221] In effect, the *McHaffie* rule, in jurisdictions acknowledging the punitive damages exception, merely asks plaintiffs to add to their pleadings to save their direct negligence claims.

However, "[w]here the rule is in effect, it is clear that the punitive damages exception is necessary, but the exception is far from an adequate solution."[222] Where an employer acts negligently outside the employee's control, the claim is clearly independent of the employee's negligence; this is particularly the case where the employer was in a position to know or act without the employee's awareness.[223] This has been labeled as "the 'ignorant intermediary' problem, which occurs when the employer's negligence is a proximate cause of a plaintiff's injuries but the employee is found to be non-negligent."[224]

D. An Overly Simple Rule for a Complicated Analysis

Cases come in a variety of shapes and sizes. Liability analysis in particular is a difficult calculus nuanced by the facts particular to each case.[225] Dismissal of claims under the *McHaffie* rule is an absurd and simplistic approach to assess these difficulties and nuances.[226]

Ironically, however, in the context of motor carrier vicarious liability and statutory employment, the analysis is at its most straightforward.[227] Under the FMCSRs, it is easy for plaintiffs to establish vicarious liability for a motor carrier's negligent drivers.[228] An admission of liability for a driver under the FMCSRs 'saves' the court and parties from a rather simple analysis.[229]

It seems to me that the nuances of liability analysis for motor carriers are not whether the motor carrier is on the hook for the damage, but what the harm is.[230] The negligence of a driver causes physical damage to plaintiffs, but negligent employment practices harm the public in the form

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221 James v. Kelly Trucking Co., 661 S.E.2d 329, 332 (S.C. 2008).

222 Burns, *supra* note 94, at 677.

223 *Id.* at 674.

224 *Id.*

225 *Id.* at 665.

226 *See supra* Part III.B.

227 *See supra* Part II.A.

228 *See* Ill. Bulk Carrier, Inc. v. Jackson, 908 N.E.2d 248, 255 (Ind. Ct. App. 2009) (citing Brown v. Truck Connections Int'l, Inc., 526 F. Supp. 2d 920, 924 (E.D. Ark. 2007)).

229 *See id.* (explaining the ease with which vicarious liability is found under the FMCSRs statutory employment).

230 *See supra* Part II.A.

of dangerous drivers on the road in semi-trucks.[231] Thus, under a comparative fault regime, all negligent parties should be brought into the courtroom for a jury to allocate the appropriate fault since the harm giving rise to the damage is often not the fault of the driver but of the employer.[232]

Rather than accountability—as the FMCSRs intends—the *McHaffie* rule shields negligent employer practices from the public.[233] A motor carrier who never checks to see if their drivers can drive safely or if their drivers have any prior driving convictions will be responsible for the same number of crashes either way.[234] However, the net decrease to highway safety by these negligent practices damages public safety and trust, which falls on the shoulders of the courts to adjudicate. Under the *McHaffie* rule, however, they cannot.[235]

Courts that have adopted the *McHaffie* rule should lose it.[236] It is a "blunt procedural instrument" that shelters motor carriers at the expense of public safety.[237] At a minimum, courts should develop the *McHaffie* rule to bar *only* truly duplicative claims and adopt limiting exceptions to reflect the sophistication that liability analysis requires.[238]

V. CONCLUSION: AMERICA RUNS ON TRUCKS

Courts should follow Wyoming's treatment of the *McHaffie* rule and limit its application to duplicative claims only by adopting the separate and independent standard, acknowledging a punitive damages exception, and focusing the intent of the rule on truly duplicative claims.[239] The FMCSRs clearly intend to regulate motor carriers' employment practices through the court system.[240] Part of this intent is to ensure that motor carriers are accountable for the accidents that occur while their shipments are being transported.[241] Limiting plaintiffs to vicarious theories of liability alone

231 *See supra* Part II.A.

232 *See e.g.*, WYO. STAT. ANN. § 1-1-109(c)(i)(A) (2022); *see also* Gray-Dockham, 2022 WY 67, ¶¶ 28–31, 510 P.3d 1060, 1069 (Wyo. 2022) (acknowledging that, under Wyoming's comparative fault statute, all negligent actors are to be placed before the jury).

233 Bogdanski v. Budzik, 2018 WY 7, ¶¶ 22–23, 408 P.3d 1156, 1162–63 (Wyo. 2018).

234 *See* Mincer, *supra* note 88, at 233 ("[W]hether or not the master is also negligent does not change the legal fact that the master is liable for all of the negligence of its servant.").

235 *Bogdanski*, 2018 WY 7, ¶¶ 22–23, 408 P.3d 1156, 1162–63.

236 *See supra* Part III.B.

237 McQueen v. Green, 2022 IL 126666, ¶ 47, 202 N.E.3d 268, 280 (quoting Ramon v. Nebo Sch. Dist., 2021 UT 30, ¶ 21, 493 P.3d 613).

238 *See supra* Part III.B.

239 *See supra* Part III.B.

240 *See supra* Part II.A.

241 *See supra* Part II.A.

prevents holding the gatekeepers of trucking safety accountable.[242] The *McHaffie* rule inhibits the intentions of the FMCSRs and hides motor carrier negligence from judicial and public scrutiny.[243] Without this accountability, trucks are more dangerous than ever. Courts should realize that though America runs *on* trucks, an America under the *McHaffie* rule should also run *from* them.

242 Rediehs Express, Inc. v. Maple, 491 N.E.2d 1006, 1010 (Ind. Ct. App. 1986).

243 *See infra* Part III.B.1-3.; *see also Rediehs Express, Inc.*, 491 N.E.2d at 1010 (Ind. Ct. App. 1986).