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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).

entrustment, hiring, supervision, or training.⁶ Motor carriers, relying on this favorable rule, typically answer a petition or complaint by admitting respondeat superior liability.⁷ The admission does not harm the motor carrier because a tractor-trailer driver almost always acts within the scope of his or her employment, simply due to the fact the commercial vehicle is on the road. Importantly, the admission brings the reward of eliminating all additional claims and limiting the scope of discovery only to the incident in question.

If this were the end of the analysis, there would be little debate concerning the *McHaffie* rule. However, the Supreme Court of Missouri complicated the issue by discussing three potential exceptions to the rule.⁸ Notably, the court never answered whether any of the enumerated exceptions apply and flatly stated that the “issue[] await[s] another day.”⁹ One of the potential exceptions contemplated by the court occurs when the plaintiff alleges punitive damages against the motor carrier.¹⁰ And, while the court in *McHaffie* hinted it would return to clarify the issue,¹¹ the existence of the punitive damages exception has remained unanswered by Missouri’s highest court for the past nineteen years.

The lack of clarity on the punitive damages exception has left the Missouri state courts and the federal courts applying Missouri law in flux. Some courts denied the existence of any punitive damages exception while others accepted the exception but applied it in different ways.¹² The Missouri Court of Appeals for the Western District recently provided clarity on the issue,¹³ but the Supreme Court of Missouri denied granting transfer.¹⁴ The decision leaves the punitive damages exception still in question and provides minimal clarity on proper application.

This Comment discusses the *McHaffie* decision and the need for a punitive damages exception to its general rule. The Comment should provide helpful advice to plaintiff’s attorneys for proceeding against motor carriers. The first part of the Comment provides an overview of the facts and procedural history of the *McHaffie* case, the reasoning behind the *McHaffie* rule, and the Supreme

6. *McHaffie II*, 891 S.W.2d at 826.

7. See *King v. Taylor Express, Inc.*, No. 4:13cv1217 TCM, 2013 WL 5567721, at *1–2 (E.D. Mo. Oct. 9, 2013) and *Braxton v. DKMZ Trucking, Inc.*, No. 4:13-cv-1335-JCH, 2013 WL 6592771, at *2–4 (E.D. Mo. Dec. 16, 2013), for two recent examples of motor carriers answering the complaint with an admission of agency and a motion to dismiss all additional claims of imputed liability.

8. *McHaffie II*, 891 S.W.2d at 826.

9. *Id.*

10. *Id.*

11. *Id.*

12. See *infra* Part II.B.1.

13. *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 393 (Mo. Ct. App. 2013).

14. *Id.* at 386.

Court of Missouri's discussion of the punitive damages exception. The second part of this Comment reviews the various interpretations given to the punitive damages exception and provides an overview of the most recent and relevant Missouri decision on the issue.

The final part of the Comment discusses the need for the Supreme Court of Missouri to adopt the punitive damages exception and finally provide adequate guidance to the lower courts. This Comment proposes the adoption of the punitive damages exception and provides a framework to facilitate the ability of plaintiffs to discover evidence of a motor carrier's dealings with its drivers in order to support claims of negligent entrustment, supervision, training, or hiring. Such an approach would even the imbalance created by the *McHaffie* rule and enable plaintiffs to go after the most egregious motor carriers who violate federal regulations in an extremely dangerous industry.

I. THE *McHAFFIE* DECISION

A. *Background of the Case*

The facts of *McHaffie*, although hardly novel, presented the Missouri Supreme Court with an opportunity to decide basic legal principles about imputed liability. Plaintiff Laura McHaffie, a passenger in Cindy Bunch's motor vehicle, was severely injured in a collision with a tractor-trailer driven by Donald Farmer.¹⁵

The accident occurred at approximately 2:00 a.m. while Bunch and McHaffie drove eastbound on Interstate-44 in Greene County.¹⁶ The women were leaving the "Rocking K Bar" in Pittsburg, Kansas where they "danced, socialized, and drank beer."¹⁷ At trial, McHaffie introduced evidence demonstrating that Bunch was intoxicated at the time of the accident, although Bunch was never successfully prosecuted for driving while intoxicated.¹⁸

Bunch lost control of her vehicle and drove into oncoming traffic.¹⁹ While driving over the speed limit,²⁰ Bunch's vehicle fishtailed and "dipped" into the

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

16. *McHaffie ex rel. McHaffie v. Bunch (McHaffie I)*, Nos. 18097, 18107, 18116, 18187, 1994 WL 72430, at *2 (Mo. Ct. App. Mar. 10, 1994).

17. *Id.*

18. *McHaffie II*, 891 S.W.2d at 830–31; The court affirmed the trial court's decision to admit evidence of Bunch's "recent consumption of beer" and alcoholic odor after the accident as it created an inference of impairment at the time of the collision. *Id.* at 831. Cindy Bunch was initially arrested for a DWI, but charges were not filed within thirty days of the arrest. *Id.* Ms. Bunch ultimately plead guilty to careless and imprudent driving for failing to maintain control of her vehicle with a blood-alcohol concentration of "at least .05 and by driving off the main roadway and into the opposite lanes of traffic." *Id.*

19. *Id.* at 824.

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 keep her vehicle on the correct half of Interstate 44.²⁹ McHaffie similarly claimed Defendant Farmer was negligent for failing to keep a careful look out, failing to stop, swerve, or slacken speed, and failing to take evasive action before striking Defendant Bunch's vehicle.³⁰ McHaffie further alleged that Farmer was an employee of Defendants Bruce Transport and Rumble

20. Traffic reconstruction experts estimated that she was driving 75.55 miles per hour at the time of the accident. *Id.* at 832. An eyewitness, truck driver David Stiffler, testified that Bunch passed him with an estimated speed of seventy miles per hour. *McHaffie I*, 1994 WL 72430, at *2.

21. *McHaffie I*, 1994 WL 72430, at *2.

22. *Id.* The first loss of control would be important to McHaffie's case as Defendant Farmer admitted he saw Bunch's car initially cross the median and recognized the car "may come across, [sic] at least the potential that it would come across." *Id.* This admission and evidence that Farmer could have stopped his tractor-trailer in time to avoid the eventual collision supported claims for failure to keep a careful look out, failure to stop, swerve, or slacken speed, and failure to take evasive action. *Id.* at *2-6.

23. *Id.* at *2.

24. *Id.* at *1-3.

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

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *McHaffie ex rel. McHaffie v. Bunch (McHaffie I)*, Nos. 18097, 18107, 18116, 18187, 1994 WL 72430, at *2-6 (Mo. Ct. App. Mar. 10, 1994).

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 liability insurance. *See infra* Part III.A and accompanying text (discussing inherent dangers in the motor carrier industry).

45. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) (“Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct. This incentive may reduce the incidence of tortious conduct more effectively than doctrines that impose liability solely on an individual tortfeasor.”).

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

47. *Id.*

48. *Id.* at 824, 827.

49. *Id.* at 828. It is unclear whether this was a violation of the continuous hourly limit, the total daily hourly limit, or the total weekly hourly limit. *New Hours of Service Safety Regulations*

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 Southern District agreed with the majority view for two basic reasons: prejudice to the employer and the unnecessary nature of the additional direct negligence claims against the employer.⁶⁰ The prejudice occurs by allowing evidence of prior acts of negligence to prove negligent hiring, when such evidence would otherwise be inadmissible to prove negligence at the time of the accident.⁶¹ Establishing negligent hiring or supervision is also unnecessary as the issue of attaching liability to an employer for the acts of the employee is uncontested once the employer admits *respondeat superior* liability.⁶² Admitting evidence of prior bad acts to prove a claim of negligent hiring or supervision diverts the jury's attention from the only contested issue—the negligence of the driver at the time of the accident.⁶³ The Southern District reasoned that a prejudicial effect clearly occurred in the case as Rumble Transport was assigned ten percent of the liability for negligent hiring, even though “the pleadings and evidence revealed no additional liability upon Rumble based upon negligent hiring principles.”⁶⁴

D. *The Supreme Court of Missouri*

The Supreme Court of Missouri granted transfer to decide whether McHaffie could submit a theory of liability against Rumble Transport for the negligent acts of Farmer and the negligent hiring or supervision of Farmer after Rumble Transport conceded he was acting in the course and scope of his employment.⁶⁵ The court ultimately held that the negligent hiring instruction should not have been submitted to the jury and the evidence concerning Farmer's lack of testing and inexperience, failure to maintain logbooks, and

59. *Id.* at *9 (quoting *Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178, 1181 (Idaho 1986)).

60. *Id.* at *10, *12.

61. *McHaffie I*, 1994 WL 72430, at *9.

62. *Id.* at *12.

63. *Id.*

64. *Id.*

65. *McHaffie ex rel. McHaffie v. Bunch (McHaffie II)*, 891 S.W.2d 822, 824 (Mo. 1995) (en banc). Also considered were the issues of whether sufficient evidence existed to submit a negligence claim against Farmer for failing to keep a careful outlook and avoid the collision, whether a juror's nondisclosure during voir dire colored her ability to fairly hear the case, whether the trial court abused its discretion in determining the prejudicial effect of the juror's nondisclosure without an evidentiary hearing, whether evidence of Bunch's intoxication was admissible, whether the police report was admissible, and whether a comparative fault instruction against McHaffie was proper for negligently riding in a vehicle with an intoxicated driver. *Id.* at 828–32.

Rumble Transport's failure to enforce regulations were inadmissible for being irrelevant and prejudicial.⁶⁶ Despite comprehensively reviewing all of Rumble Transport's motor carrier violations,⁶⁷ the court never considered whether it should be exposed to liability beyond that of Farmer.

The case was remanded for a retrial with instructions that the 20% total assessment of fault against Farmer, Bruce Transport, and Rumble Transport be set aside.⁶⁸ Notably, the court rejected the defendants' argument that the prejudicial evidence affected the size of the verdict. The court instructed the retrial court to only instruct the jury to allocate 20% of the total damages, \$1,051,600, to McHaffie, Bunch, Farmer, Rumble Transport, or Bruce Transport.⁶⁹ At the retrial, the jury apportioned 5% of the disputed amount of fault to Bunch (totaling her fault at 75%) and the remaining 15% back to Farmer, Bruce Transport, and Rumble Transport.⁷⁰

On appeal to the Supreme Court of Missouri, defendants Farmer, Bunch, and Rumble Transport⁷¹ asserted two positions, one narrow and one much more broad: (1) the negligent hiring claim was inappropriate because Rumble Transport admitted that Farmer was acting within the course and scope of his employment at the time of the collision and any recovery was dependent on Farmer's negligence and (2) that respondeat superior and negligent hiring or entrustment theories of recovery were by definition inconsistent and could not both be submitted to a jury.⁷²

The court began its analysis with an overview of the three theories of imputed liability alleged by McHaffie against Bruce Transport and Rumble Transport to hold them responsible for the conduct of Farmer: (1) respondeat superior, (2) negligent entrustment,⁷³ and (3) negligent hiring.⁷⁴

66. *Id.* at 824–27.

67. *Id.*

68. *Id.* at 827–28.

69. *Id.* at 828.

70. *McHaffie ex rel. Wieland v. Bunch*, 951 S.W.2d 340, 341 (Mo. Ct. App. 1997). From the original jury verdict on March 3, 1992 to the final disposition on April 2, 1998, which included the first appeal to the Southern District Court of Appeals, the appeal to the Missouri Supreme Court, the retrial, and the second appeal to the Southern District Court of Appeals disputing prejudgment interest, the amount owed to McHaffie only decreased \$22,000.

71. *McHaffie II*, 891 S.W.2d at 825. Presumably, Defendant Bruce Transport took no issue with the instruction since the negligent hiring claim was only made against Rumble Transport and resulted in ten percent of the liability going exclusively to Rumble Transport.

72. *Id.*

73. Negligent entrustment requires the plaintiff prove “that (1) the entrustee is incompetent, (2) the entrustor knew or had reason to know of the incompetence, (3) there was an entrustment of a chattel, and (4) the negligence of the entrustor concurred with the negligence of the entrustee to harm the plaintiff.” *Id.* (citing *Evans v. Allen Auto Rental and Truck Leasing, Inc.*, 555 S.W.2d 325, 326 (Mo. 1977) (en banc)).

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 The court gave three primary reasons for dismissing additional claims of imputed liability after an employer admits an agency relationship for the purposes of respondeat superior.⁸¹ First,

74. Proof of negligent hiring does *not* require the negligent conduct occur within the course and scope of the employee’s employment. *Id.* The Court in *McHaffie* notes that the negligent hiring cause of action is not clearly drawn out by Missouri case law and seems to turn on the presence of a situation where “the employer knew or should have known of a particular dangerous proclivity of an employee followed by employee misconduct consistent with such dangerous proclivity by the employee.” *Id.*

75. *Id.*

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

77. *Id.* at 826.

78. *Id.*

79. *Id.*

80. *Id.* The court cited to the decisions from six other states (Arkansas, California, Florida, Georgia, Idaho, and Maryland) as well as American Jurisprudence and American Law Reports: *Elrod v. G & R Construction Co.*, 628 S.W.2d 17, 19 (Ark. 1982); *Armenta v. Churchill*, 267 P.2d 303, 308–09 (Cal. 1954); *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1997); *Willis v. Hill*, 159 S.E.2d 145, 157 (Ga. 1967); *Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178, 1181 (Idaho 1986); *Houlihan v. McCall*, 78 A.2d 661, 664–65 (Md. 1951); 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 643 (1980); Debra E. Wax, Annotation, *Propriety of Allowing Person Injured in Motor Vehicle Accident to Proceed Against Vehicle Owner Under Theory of Negligent Entrustment Where Owner Admits Liability Under Another Theory of Recovery*, 30 A.L.R. 4th 838 (1984). *Id.*

81. *McHaffie II*, 891 S.W.2d at 826.

the court reasoned that if a plaintiff were allowed to proceed on all possible theories⁸² 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.⁸⁴ Second, the additional evidence would be potentially inflammatory in addition to being unnecessary.⁸⁵ The first two reasons echoed the primary holding of the Southern District, although the Supreme Court focused more on the unnecessary nature of the additional claims, rather than the potential for prejudice.⁸⁶

In its final reason for barring additional imputed negligence claims, the court noted the fundamental problem of allocating damages in a comparative fault system after vicarious liability has been admitted.⁸⁷ Because respondeat superior holds the employer strictly liable for the conduct of its employee, the fault of the employee and the employer should be equal.⁸⁸ In the court’s words, “[t]he liability of the employer is fixed by the amount of liability of the employee.”⁸⁹ By adding negligent hiring or negligent entrustment on top of the respondeat superior claim, the employer may be attributed more fault than the employee.⁹⁰ Indeed, this is exactly what happened at the first trial where Rumble Transport was assigned 20% of the fault, while only 10% of the fault was assigned to its employee.⁹¹ The court recognized this unfair allocation whereby an employer may be imputed more liability than that of its agent.⁹² So, while negligent hiring remains a legitimate cause of action in the state of

82. The court discussed negligent entrustment of a chattel to an incompetent, conspiracy, the family purpose doctrine, joint enterprise, and ownership liability statutes as other potential legal theories to impute liability to an employer. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Indeed, the court rejected the notion that the evidence of prior bad acts prejudiced the verdict amount and was only limited to prejudicing the ability of the jury’s “assessment of liability as to Farmer, Rumble and Bruce.” *McHaffie II*, 891 S.W.2d at 827.

87. *Id.* at 826.

88. *Id.*

89. *Id.*

90. *Id.* at 827.

91. Ten percent of Bruce Transport’s liability was based on the imputed negligence of Farmer and ten percent was due to negligently hiring Farmer. *McHaffie II*, 891 S.W.2d at 825. The court was only concerned with an improper allocation of damages and dismissed the idea that the prejudicial evidence regarding negligent entrustment somehow impaired the jury’s ability to follow the damages instruction or made some discernible difference with how damages would be assessed. *Id.* at 827.

92. *Id.*

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 reasoning from the minority approach due to the undesirable result of an employer being given more percentage of the fault than created by the employee.⁹⁵ The court derisively commented on the minority approach, stating the minority's reasoning was "plainly illogical" and it was "little wonder that these cases are and properly should remain cited as contrary to 'the overwhelming weight of authority.'"⁹⁶

McHaffie relied on *Prosser and Keeton on the Law of Torts* to assert the proposition that an employer/master may be subjected to vicarious liability for the torts of his servant, as well as being liable for his own negligence for "selecting or dealing with the servant."⁹⁷ The court rejected *Prosser* as persuasive authority, noting it only restated the general rule regarding "multiple theories" of imputing liability, but without commenting on the submission of dual theories.⁹⁸ The court reasoned the general statement of law failed to support any argument that multiple theories of imputed liability could be submitted simultaneously and thus permit the jury to make a "separate assessment of fault" to an employer beyond the acts of his employee.⁹⁹ Indeed, *Prosser* states that when an employer's liability is entirely derivative from an employee's negligence, both should share the liability equally, with no apportionment of fault between the two.¹⁰⁰

93. *Id.* at 826–27.

94. *Id.* at 827. McHaffie cited *Perin v. Peuler*, 130 N.W.2d 4 (Mich. 1964), *Clark v. Stewart*, 185 N.E. 71 (Ohio 1933), and *Bruck v. Jim Walter Corp.*, 470 So. 2d 1141 (Ala. 1985). *Id.*

95. *Id.*

96. *McHaffie II*, 891 S.W.2d at 827 (quoting *Willis v. Hill*, 159 S.E.2d 145, 157 (Ga. Ct. App. 1967)).

97. *Id.* McHaffie specifically cited to PROSSER AND KEETON, *supra* note 43, § 70, at 501–02. ("Once it is determined that the man at work is a servant, the master becomes subject to vicarious liability for his torts. He may, of course, be liable on the basis of any negligence of his own in selecting or dealing with the servant, or for the latter's acts which he has authorized or ratified, upon familiar principles of negligence and agency law.").

98. *Id.*

99. *Id.*

100. *See Glidewell v. S.C. Mgmt., Inc.*, 923 S.W.2d 940, 946–47 (Mo. Ct. App. 1996) (quoting KEETON ET AL., *supra* note 43, § 52, at 346 for the rule: "The liability of a master for the acts of a servant . . . within the scope of the employment . . . stands upon grounds that do not support apportionment. Under the doctrine of respondeat superior, the master becomes responsible for the same act for which the servant is liable, and for the same consequences. Ordinarily there is a sound basis for indemnity, but not for any apportionment of damages between the two.").

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 Perhaps the exceptions came up because at least one of the jurisdictions cited recognized a punitive damages exception¹⁰⁴ or because the Southern District posited a hypothetical whereby an employee could be non-negligent, but an employer could.¹⁰⁵ It is also possible that the dicta tried to clarify that respondeat superior and negligent hiring were not per se mutually exclusive, as argued by defendants.

For whatever reason, the court put forth three potential exceptions in which the additional claims of liability against the employer would be properly submitted to the jury.¹⁰⁶ First, the court considered a situation where the theory of liability did not depend on the negligence of the employee.¹⁰⁷ Other than this generalized statement, the court did not offer much insight as to what fact patterns might satisfy this potential exception or a citation to any case precedent providing an example.¹⁰⁸ Next, the court considered a situation where the employer, but not the employee, would be liable for punitive

101. *McHaffie II*, 891 S.W.2d at 826–27.

102. *Id.* at 826.

103. *Id.*

104. *See* Clooney v. Geeting, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977) (noting that had allegations proved sufficient, the jury would have considered a claim for punitive damages).

105. *See* *McHaffie ex rel. McHaffie v. Bunch (McHaffie I)*, Nos. 18097, 18107, 18116, 18187, 1994 WL 72430, at *8 (Mo. Ct. App. Mar. 10, 1994). The Southern District posited a hypothetical in which Farmer caused the accident due to a medical condition of which Rumble Transport was aware, or should have been aware, when Farmer was hired. The Southern District reasoned that under these circumstances Farmer would not be negligent if the complication was unforeseeable to him at the time of the accident, but Rumble Transport would be negligent in hiring a truck driver with a medical condition capable of impairing his ability to drive. The court correctly pointed out that these limited set of facts would permit the submission of both claims as they were not “separate and apart.” In other words, the same evidence could prove one claim while not proving the other, making evidence of negligence at the time of the accident and negligent business practices independently relevant—even if agency was admitted by Rumble Transport. *Id.*

106. *McHaffie II*, 891 S.W.2d at 826.

107. *Id.*

108. *Id.* *See supra* note 105 for a potential fact pattern satisfying this exception.

damages.¹⁰⁹ Finally, the court considered an exception for when there is relative fault between the employer and the employee.¹¹⁰ After scratching the surface of these potential exceptions, the court noted that no facts in the case supported any potential exception and that deciding if there was any exception to the general rule of *McHaffie* “await[s] another day.”¹¹¹

2. Punitive Damages Exception

The potential punitive damages exception would serve to be the most influential and effective method for plaintiffs to get around the *McHaffie* rule. The basis for the punitive damages exception, and the court’s cited precedent, comes from *Clooney v. Geeting*, a decision from the Florida Court of Appeals.¹¹² In *Clooney*, much like in *McHaffie*, the plaintiff was struck by a tractor-trailer and asserted claims of negligence against the driver and his employer, as well as negligent hiring, employment, and entrustment claims only against the employer.¹¹³ Again, the element of agency for respondeat superior was uncontested by the employer.¹¹⁴

The only distinction between *Clooney* and *McHaffie* was that the plaintiff in *Clooney* asserted a claim for punitive damages against the employer on the basis that it knew the employee/driver was “neither physically nor mentally able to properly drive the truck, and that its safety manager had pointed this out prior to the accident.”¹¹⁵ Despite this evidence, the Florida appellate court upheld the trial court’s decision to not submit on the issue of punitive damages because the evidence was insufficient to amount to malice or wanton, willful, or outrageous conduct.¹¹⁶

The Florida court recognized, however, that if a plaintiff could allege facts sufficient to state a claim for punitive damages, then verdict instructions for negligent hiring, employment, or entrustment would be submissible to the jury.¹¹⁷ The court remanded the case for a new trial with the instructions that if the plaintiff could amend the pleadings with sufficient ultimate facts for punitive damages, then the negligent hiring, employment, and entrustment claims would be submissible.¹¹⁸ Notably, the court in *Clooney* decided the

109. *McHaffie II*, 891 S.W.2d at 826. The court cited to *Clooney*, 352 So. 2d at 1220 in support of the punitive damages exception. No other sources were cited for the other two potential exceptions.

110. *McHaffie II*, 891 S.W.2d at 826.

111. *Id.*

112. *Id.*

113. *Clooney*, 353 So. 2d at 1218, 1220.

114. *Id.* at 1220.

115. *Id.* at 1219.

116. *Id.* at 1219–20.

117. *Id.* at 1220.

118. *Clooney*, 353 So. 2d at 1220.

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

B. *How to Interpret McHaffie*

1. A Problem of Opportunity

Recent decisions from Missouri state courts and federal courts applying Missouri law tend to find the dicta in *McHaffie* persuasive and hold that a punitive damages exception to the general rule exists.¹²³ Despite a recent trend towards acceptance, it is difficult to gauge the full effect of the *McHaffie* rule, as its application almost necessarily occurs at the trial level, usually in the form of a motion to dismiss or a motion to strike, and will rarely make it to appeal.

The typical procedure will be for a defendant employer to admit its employee was within the scope of his or her employment and motion to dismiss any additional claims of imputed negligence in reliance on the *McHaffie* rule.¹²⁴ The motor carrier may also motion to strike the claim for punitive damages, knowing that even if the court agrees the exception exists, it cannot be invoked without evidence of a valid claim for punitive damages.¹²⁵ The *McHaffie* rule will often carry the day unless the trial court concludes a punitive damages exception exists *and* the plaintiff pled sufficient facts for punitive damages. An early victory for the plaintiff at the pleading stage will likely not mean much, as the plaintiff still has to justify *submitting* an additional claim of imputed liability for punitive damages against the employer. Given the recent trend in Missouri law, the plaintiff is more likely to lose by a dismissal of the punitive damages claim for failure to state a claim rather than a denial of the punitive damages exception.¹²⁶

damages because the motor carrier exhibited a conscious disregard for public safety by failing to comply with federal and state motor carrier regulations and industry standards).

122. The retrial would have to be bifurcated with the respondeat superior claim decided at the first stage and the issue of negligent entrustment or hiring and punitive damages decided at the second stage. See *infra* III.C and accompanying text on the best way to permit such a claim and evidence of motor carrier violations without creating unfair prejudice against defendant motor carriers.

123. See *infra* Part III.B.3 for a more in-depth discussion concerning the recent decision in *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386 (Mo. Ct. App. 2013).

124. See *King v. Taylor Express, Inc.*, No. 4:13cv1217 TCM, 2013 WL 5567721, at *1–2 (E.D. Mo. Oct. 9, 2013) (admitting vicarious liability for the negligent acts of its employee in its answer, defendant motor carrier company moved to strike claims for punitive damages and to dismiss direct claims of negligent hiring and entrustment).

125. *Id.* at *1 & n.3.

126. *Braxton v. DKMZ Trucking, Inc.*, No. 4:13-cv-1335-JCH, 2013 WL 6592771, at *1, *3–4 (E.D. Mo. Dec. 16, 2013) (dismissing additional claims of imputed negligence against motor

More importantly, the plaintiff will likely doubt that sufficient evidence exists to support submitting a claim for punitive damages. A plaintiff's attorney will have little more than a police report to draft the petition or complaint, and will almost certainly have no idea as to whether the motor carrier was in violation of federal regulations to support a claim for punitive damages before discovery begins.¹²⁷ Since the plaintiff cannot know if there is sufficient evidence to support a claim for punitive damages, there is not much incentive or a procedural basis for appealing a granted motion to dismiss the additional imputed liability claims.¹²⁸

Given the hurdles for plaintiffs, any question of the punitive damages exception will most likely only be appealed where the plaintiff was able to submit a respondeat superior claim and an additional claim of imputed liability seeking punitive damages against the employer.¹²⁹ The best way to do this would be by alleging the employer violated federal motor carrier regulations.¹³⁰ But, because it is rare for a claim of punitive damages to be submitted to the jury and the application of the *McHaffie* rule typically occurs at the pleading stage, the punitive damages exception is rarely presented to the Missouri Court of Appeals.¹³¹ Due to a general lack of opportunity, the Missouri appellate courts have struggled to clarify the extent of the exception.¹³² And, due to the lack of guidance by the *McHaffie* decision itself,

carrier after applying *Bell Atlantic Corp. v. Twombly* "plausible" standard and finding the plaintiff "[did] not even attempt a 'formulaic recitation of the elements'").

127. See *infra* Part III.A and accompanying text for a discussion concerning the best way to invoke the punitive damages exception with the petition.

128. Because the *McHaffie* rule works so well for defendant employers, but does not end the litigation altogether, plaintiffs can only file for an interlocutory appeal and will be rarely incentivized to do so. See MO. SUP. CT. R. 74.01 (explaining the Missouri standard to file an interlocutory appeal); see also 28 U.S.C. §§ 1291, 1292 (2012) (explaining the federal standard to file an interlocutory appeal).

129. Only two Missouri Court of Appeals cases have addressed whether any exception to *McHaffie* exists, with only one addressing the punitive damages exception. See *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 392–93 (Mo. Ct. App. 2013) (finding an exception for punitive damages when the plaintiff claims direct liability by the employer and not merely vicarious liability via the employee's negligence).

130. See *infra* Part III.A and accompanying text.

131. For instance, only one Missouri Appellate Court has addressed the dicta set forth in *McHaffie*. *Wilson*, 400 S.W.3d at 392–93 (finding the dicta persuasive and reasoning that the Supreme Court would find a punitive damages exception if faced with a similar issue today).

132. Besides *Wilson*, only *Coomer* has addressed the dicta in *McHaffie* and the potential for any exception to the general rule. *Coomer v. Kansas City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at *5 (Mo. Ct. App. Jan. 15, 2013). In *Coomer*, the plaintiff asserted additional negligent hiring claims after an employer admitted respondeat superior on the basis that its theory of negligence was not derivative "'from and . . . not dependent on the negligence of an entrustee or employee.'" *Id.* (quoting *McHaffie ex rel. McHaffie (McHaffie II)* v. Bunch, 891 S.W.2d 822, 824) (Mo. 1995) (en banc)). The court did address whether any such

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 the very outset of litigation. A lack of reporting from the trial level is much less of a problem in the federal realm with the advent of PACER.gov and the publishing of unreported district court orders.¹³⁴ As such, one of the best gauges for the application of the *McHaffie* rule and its possible punitive damages exception come from the United States District Courts for the Eastern and Western Districts of Missouri sitting in diversity and applying Missouri law.

2. Federal Courts' Application of *McHaffie*

In many instances, the application of the *McHaffie* rule at the district court level is fairly straightforward: If the defendant admits vicarious liability under the respondeat superior claim and the plaintiff has not asserted a claim for punitive damages, then the additional claims of imputed liability are dismissed.¹³⁵ In cases without a claim for punitive damages, there is relatively

exception existed after concluding that the facts of the case were “indistinguishable from those rejected in *McHaffie*” and nothing in the evidence indicated that the employer’s lack of care might have caused the injuries absent any negligence by the employee. *Id.*

133. Compare *Young v. Dunlap*, 223 F.R.D. 520, 522 (E.D. Mo. 2004) (reasoning that allowing a plaintiff to argue negligent entrustment after the employer admitted imputed liability is “both redundant and prejudicial”), with *Sargent v. Justin Time Transp., LLC*, No. 4:09cv596 HEA, 2009 WL 4559222, at *2 (E.D. Mo. Nov. 30, 2009) (reasoning that striking a negligent entrustment claim immediately after the employer admits imputed liability and before discovery would be “premature”).

134. PACER is the Public Access to Court Electronic Resources government website that serves as the filing hub for all federal court matters. PACER, <https://www.pacer.gov> (last visited Oct. 31, 2014).

135. See *Young*, 223 F.R.D. at 521–22 (granting employer defendant’s motion to dismiss negligent entrustment after the defendant admitted to imputed liability for the negligence of its employee, if any, under a respondeat superior claim). The court in *Young* found the case indistinguishable from *McHaffie* and held that allowing the plaintiff to argue negligent entrustment in addition to the respondeat superior claim would be “both redundant and prejudicial.” *Id.* at 522. See also *Brown v. Larabee*, No. 04-1025-CV-W-HFS, 2005 WL 1719908, at *1 (E.D. Mo. Jul. 25, 2005) (granting defendant motor carrier’s motion to dismiss claims of negligent hiring, retention, and training after the defendant admitted to imputed liability, if any, for the negligence of its employee). The court rejected any potential exception as it was clear from the case that negligence was dependent upon the employee truck driver. *Id.* at *2. See also *Hoch v. John Christner Trucking, Inc.*, No. 05-0762-CV-W-FJG, 2005 WL 2656958, at *2 (W.D. Mo. Oct. 18, 2005) (granting defendant’s motion to dismiss plaintiff’s negligent entrustment, hiring, and training after the defendant admitted to imputed liability for the negligence of its employee, if any, under a respondeat superior claim). The plaintiff in *Hoch*

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

attempted to argue that the causes of action were inconsistent and that it had the right to elect a remedy prior to the case being submitted to the jury. *Id.* The court rejected this argument noting that the claims were actually consistent and once vicarious liability is admitted, the additional actions “serve no real purpose.” *Id.* (quoting *McHaffie ex rel. McHaffie v. Bunch (McHaffie II)*, 891 S.W.2d, 822, 826 (Mo. 1995)).

136. There is at least one case where the court considered an allegation concerning the negligent maintenance of the tractor-trailer against the defendant motor carrier company to be a potential exception to the *McHaffie* rule. See *King v. Taylor Express, Inc.*, No. 4:13cv1217 TCM, 2013 WL 5567721, at *3 (E.D. Mo. Oct. 9, 2013) (reasoning that the negligence of the employer would not be dependent on the negligence of the employee).

137. Most plaintiffs, as a matter of course, will allege punitive damages from the outset of litigation. See *infra* Part III.A for a discussion of various regulations motor carriers could evade that would potentially serve as allegations sufficient to claim punitive damages.

138. *Allstate Ins. Co. v. Hasty*, No. 10-00209-CV-W-DW, 2010 U.S. Dist. LEXIS 144965, at *7–8 (W.D. Mo. Sep. 14, 2010) (granting motion to dismiss plaintiff’s claim of negligent entrustment after rejecting the punitive damages exception); *Jackson v. Myhre*, No. 1:06CV188 CDP, 2007 WL 2302527, at *2 (E.D. Mo. Aug. 7, 2007) (rejecting the punitive damages exception to *McHaffie* and Judge Catherine Perry commentating “I cannot find any more recent Missouri decision that recognizes any such an exception.”); *Connelly v. H.O. Wolding, Inc.*, No. 06-5129-CV-SW-FJG, 2007 WL 679885, at *2 (W.D. Mo. Mar. 1, 2007) (granting a defendant’s motion to dismiss plaintiff’s claims of negligent entrustment, negligent hiring, and negligent training after rejecting the punitive damages exception).

139. See *supra* Part II.B.1.

140. *Connelly*, 2007 WL 679885, at *2.

141. *Id.*

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.*

Despite this conclusion, the court still dismissed all additional claims of imputed liability against the employer—making all evidence sufficient for punitive damages against the employer inadmissible.¹⁴⁹

The previous three cases proved to be the minority, and the majority of federal district courts currently recognize a punitive damages exception to the *McHaffie* rule.¹⁵⁰ Despite this consensus, not all federal district courts agree on its application.¹⁵¹ Nevertheless, the federal district courts interpreting Missouri law generally view the discussion of a punitive damages exception in *McHaffie* as a strong indicator that the Supreme Court of Missouri would have adopted the exception if the facts were present.¹⁵² The *McHaffie* dicta thus leads most courts to the conclusion that the Missouri Supreme Court wanted to allow plaintiffs, with sufficient evidence, to hold employers accountable for willful and wanton behavior.¹⁵³ Under such circumstances, the jury can consider the conduct of the employer, “beyond the actions of the negligent employee and increase the exemplary award based on such conduct.”¹⁵⁴ Some courts further reason that the punitive damages exception serves public policy by not allowing motor carriers to insulate themselves from liability for egregious business practices.¹⁵⁵

3. The Western District Attempts to Resolve the Exception

The Missouri Court of Appeals for the Western District of Missouri (“Western District”) in *Wilson v. Image Flooring, LLC*, recently provided a great deal of clarity by adopting the punitive damages exception.¹⁵⁶ The court reasoned that the Supreme Court of Missouri would adopt the exception if it were to decide the issue in the right circumstances.¹⁵⁷ This is the only

149. *Id.* The court might have been indicating that additional claims of imputed liability would later become available if the plaintiff could discover evidence to support a claim for punitive damages, but this seems doubtful as the court bluntly stated “there is nothing to be gained by permitting plaintiff to proceed against [the defendant] on other theories of imputed liability.” *Id.*

150. *See supra* Part II.B.1.

151. *See supra* Part II.B.2.

152. *Miller v. Crete Carrier Corp.*, No. 4:02-CV-797 CAS, 2003 WL 25694930, at *1, *3–4 (E.D. Mo. Aug. 7, 2003).

153. *Kwiatkowski v. Teton Transp., Inc.*, No. 11-1302-CV-W-ODS, 2012 WL 1413154, at *4 (W.D. Mo. Apr. 23, 2012) (“If the Missouri Supreme Court was presented with the issue, the Court believes it would recognize a punitive-damage exception to the rule stated in *McHaffie*.”).

154. *Jodlowski v. Donovan Decker & Lindsey Petroleum Transp., Inc.*, No. 09-05051-CV-SW-JTM, 2010 U.S. Dist. LEXIS 144966, at *5 (W.D. Mo. June 8, 2010).

155. *Kwiatkowski*, 2012 WL 1413154, at *4 (citing J.J. Burns, Note, *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 MICH. L. REV. 657, 676 (2011)).

156. *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 392–93 (Mo. Ct. App. 2013).

157. *Id.*

significant Missouri appellate decision concerning the punitive damages exception, or any potential exception, in the nineteen years since the initial *McHaffie* decision. The holding of *Image Flooring* should be binding on all federal courts applying Missouri law, as it the highest Missouri court decision on the issue and thus is “the best evidence of Missouri law.”¹⁵⁸ But the decision still may not change the ultimate outcome depending on how strictly the federal district court applies the pleading standard for motions to dismiss.¹⁵⁹

The *Image Flooring* decision presents the familiar facts of a plaintiff alleging both imputed liability via respondeat superior and liability based on negligent hiring, training, supervision, and entrustment against an employer who freely admitted liability for the negligence of its employee.¹⁶⁰ The defendant won on the additional claims of direct negligence at summary judgment and the case proceeded to trial only on the negligence and respondeat superior claims.¹⁶¹ The plaintiff unsuccessfully argued that both claims could be submitted because sufficient facts existed to justify punitive damages.¹⁶² Notably, the trial court did not outright deny the punitive damages exception, but simply held that the facts of the case would not support submitting a claim of punitive damages—a holding that would later be reversed.¹⁶³ After winning at trial on the negligence claim,¹⁶⁴ the plaintiff appealed the trial court’s decision to grant summary judgment to the defendant on the direct liability negligence claims against the employer for negligent hiring, training, supervision, and entrustment.¹⁶⁵

The Missouri Court of Appeals for the Western District agreed with the plaintiff and explicitly held the punitive damages exception existed and that the facts supported a claim for punitive damages.¹⁶⁶ The court began its discussion

158. *Bockelman v. MCI Worldcom, Inc.*, 403 F.3d 528, 531 (8th Cir. 2005).

159. *Compare* *King v. Taylor Express, Inc.*, No. 4:13cv1217 TCM, 2013 WL 5567721, at *3 (E.D. Mo. Oct. 9, 2013) (relying on *Image Flooring* to deny a motion to dismiss a negligent entrustment claim), *and* *Harris v. Decker Truck Line, Inc.*, No. 4:12CV1598 DDN, 2013 WL 1769095, at *1, *2–3, *6 (E.D. Mo. Apr. 24, 2013) (also relying on *Image Flooring* to deny a motion to dismiss claims of negligent hiring, entrustment, supervision, and training) *with* *Braxton v. DKMZ Trucking, Inc.*, No. 4:13-cv-1335-JCH, 2013 WL 6592771, at *2–4 (E.D. Mo. Dec. 16, 2013) (granting a motion to dismiss additional claims of imputed negligence and not discussing the punitive damages exception from *Image Flooring*).

160. *Wilson*, 400 S.W.3d at 388.

161. *Id.* at 390–91.

162. *Id.* at 390.

163. *Id.* at 390, 399.

164. The jury rendered a verdict assigning 75% of the fault to the defendant employer and employee and 25% to the plaintiff. *Id.* The total amount won by the plaintiff totaled roughly \$1.17 million. *Id.*

165. *Wilson*, 400 S.W.3d at 391.

166. *Id.* at 392–93.

by noting that no Missouri court had addressed the issue since the original *McHaffie* decision.¹⁶⁷ With little precedent to rely on, the court found the dicta to be persuasive because a successful claim for punitive damages against the employer neutralizes the two concerns of the *McHaffie* decision: prejudice to the employer and judicial economy.¹⁶⁸

The court reasoned that punitive damages become a reality once an employer's business practices can be characterized as showing a complete indifference or conscious disregard to the safety of others.¹⁶⁹ After this threshold event, all evidence concerning prior bad acts is now "both relevant and material" and no longer a "waste [of] time" as determined by the Supreme Court of Missouri in *McHaffie*.¹⁷⁰ More importantly, the once forbidden evidence is no longer prejudicial or unfair since it directly goes to prove a substantive claim against the employer—negligent hiring, entrustment, training, and supervision.¹⁷¹ The court did not discuss how the trial court on remand could ensure the evidence of past business practices would not prejudice the jury with regard to deciding the central issue of negligence at the time of the accident. But, the court probably did not have to give much direction since both the trial court and the defendant employer could opt to bifurcate the trials as to not taint the jury with prejudicial evidence concerning prior bad acts.¹⁷²

III. CLARIFYING THE *McHAFFIE* RULE

A. *The Need for a Punitive Damages Exception*

The *McHaffie* decision failed to properly carve out necessary exceptions—namely one for punitive damages against the motor carrier. The casual discussion of such exceptions by the court, without more, is particularly frustrating as the holding left lower courts with a seemingly hard and fast rule. The overall decision provides a considerable safety blanket to motor carrier companies seeking to keep evidence of bad business practices away from plaintiffs. If the court dismisses all additional claims outside respondeat superior, all evidence concerning business practices, hiring policies, regulation compliance, logbooks, or prior incidents becomes inadmissible, and more importantly, undiscoverable. Without additional claims of imputed liability, any evidence concerning bad business practices would not relate "to the claim

167. *Id.* at 392.

168. *Id.* at 393.

169. *Id.*

170. *Wilson*, 400 S.W.3d at 393 (citing *McHaffie ex rel. McHaffie v. Bunch (McHaffie II)*, 891 S.W.2d 822, 826 (Mo. 1995)).

171. *Id.*

172. MO REV. STAT. § 510.263 (2013).

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 potential for harm justifies the punitive damages exception.¹⁷⁴ Besides having to carry a minimum amount of liability insurance, motor carriers have numerous duties including: using drivers who are qualified according to federal regulation,¹⁷⁵ not encouraging or requiring drivers to violate federal regulations,¹⁷⁶ procuring a twelve month history of the traffic law and ordinance convictions of drivers,¹⁷⁷ investigating the safety performance of drivers for the preceding three years with previous employers,¹⁷⁸ not scheduling runs that would require drivers to exceed the speed limit,¹⁷⁹ and ensuring all drivers are physically qualified to drive and do not abuse illegal substances while driving.¹⁸⁰ These are just a few of the numerous regulations imposed on motor carriers, any violation of which may justify invoking the punitive damages exception.¹⁸¹

The most important regulations, both for plaintiffs and the public, are the limits on how many hours a driver can operate a tractor-trailer. The Department of Transportation (DOT) carefully regulates drivers’ operating hours.¹⁸² In 2013, the DOT reduced the amount of weekly operating hours from 82 hours a week to 70 hours a week.¹⁸³ Any driver reaching this maximum is further required to sleep for two consecutive days before returning to start the next work week, and the sleep must encompass the hours from 1:00 to 5:00 a.m.¹⁸⁴ These seemingly draconian regulations serve the important

173. MO. SUP. CT. R. 56.01(b)(1). It would most likely be possible to inquire into the logbooks of the driver for the time leading up to the accident to prove fatigue at the time of the accident, but most motor carriers would likely try to limit the scope of discovery as much as possible to the incident in question.

174. Due to the great potential for harm, motor carriers are required to carry a significant amount of liability insurance. *See supra* note 44 and accompanying text; see also 49 C.F.R. § 387.303 (2013) for some of the various requirements.

175. 49 C.F.R. § 391.11.

176. 49 C.F.R. § 390.13.

177. 49 C.F.R. § 391.27(a).

178. 49 C.F.R. §§ 391.23(a)(2), (c)(1).

179. 49 C.F.R. § 392.6.

180. 49 C.F.R. §§ 391.41(a)(12)(i), 391.43, 392.4(a).

181. *See Rules & Regulations*, FED. MOTOR CARRIER SAFETY ADMIN., http://www.fmcsa.dot.gov/regulations/title49/b/5/3?section_type=C%29 (last visited Oct. 12, 2014), for a comprehensive list of all regulations with which motor carriers must comply.

182. 49 C.F.R. § 395.3.

183. *See New Hours-of-Service Safety Regulations to Reduce Truck Driver Fatigue Begin Today*, FED. MOTOR CARRIER SAFETY ADMIN., <http://www.dot.gov/briefing-room/new-hours-service-safety-regulations-reduce-truck-driver-fatigue-begin-today> (July 1, 2013).

184. *Id.*

purpose of preventing driver fatigue in tractor-trailer operators—a major cause of collisions.¹⁸⁵

The inherent danger of tractor-trailer operation and the incentive for motor carriers to have drivers log as many hours as possible requires accountability and deterrence through punitive damages.¹⁸⁶ Due to such danger, Missouri case law recognizes that proof of regulatory violations is sufficient to submit a claim of punitive damages to a jury.¹⁸⁷ This is a logical policy as the intentional or even unintentional violation of motor carrier regulations generally demonstrates “willful, wanton, malicious or . . . reckless [behavior] as to be in utter disregard of the consequences.”¹⁸⁸

1. A Simple Case for the *McHaffie* Rule and a Punitive Damages Exception

A basic hypothetical reveals the necessity of both the general *McHaffie* rule and its punitive damages exception. Posey Plaintiff is struck by a tractor-trailer while driving to the park. The tractor-trailer is driven by Calvin Careless, an employee of Hasty Delivery, LLC. Suppose Hasty Delivery admits Calvin was acting within the scope of his employment. But, assume Calvin Careless, despite his moniker, was truly not at fault for the accident. Further, assume that Hasty Delivery failed to keep adequate logs for Calvin, failed to reprimand Calvin for working too many hours, implicitly encouraged Calvin to falsify his driving logs, and generally ignored all federal regulations in its business practices and supervision of Calvin.

The initial query for the jury should be the negligence of Calvin Careless at the time of the accident, not the many negligent business practices of Hasty Delivery. And, it would be difficult for a jury to separate the past negligence from the issue of negligence at the pertinent time if it heard all the evidence at once. The feared and likely result would be the jury looking past the incident in question and punishing both Hasty Delivery and Calvin for prior bad acts and dangerous business practices.¹⁸⁹ Because liability is only “imputed” to the

185. Fatigue is considered one of the three “major factors” for all crashes and responsible for thirteen percent of all tractor-trailer crashes. See *The Large Truck Crash Causation Study*, FED. MOTOR CARRIER SAFETY ADMIN. (July 2007), <http://www.fmcsa.dot.gov/safety/research-and-analysis/large-truck-crash-causation-study-analysis-brief>.

186. *Trotter v. B & W Cartage Co., Inc.*, No. 05-cv-0205-MJR, 2006 WL 1004882, at *1, *7, *9 (S.D. Ill. Apr. 13, 2006) (applying Missouri law and holding the evidence suggested the defendant motor carrier “sen[t] a message to drivers that hours of service violations were acceptable conduct” and sustaining an award of punitive damages).

187. *Harris v. Decker Truck Line, Inc.*, No. 4:12CV1598 DDN, 2013 WL 1769095, at *5 (E.D. Mo. Apr. 24, 2013).

188. *Warner v. Sw. Bell Tel. Co.*, 428 S.W.2d 596, 603 (Mo. 1968).

189. This is precisely why prior bad acts are inadmissible to show negligence at the pertinent time.

extent the employee was negligent, the extraneous evidence concerning Hasty Delivery's business practices should not be considered—until it can be proven that Calvin was negligent at the time of the accident.

Changing the hypothetical, suppose Calvin Careless lived up to his name and was entirely at fault for the accident due to fatigue. Further, assume he was fatigued because he had been driving twenty-hour days for the past week with minimal rest. To the extent the jury needs to decide whether Calvin was negligent, the initial query remains the same as before: was he negligent at the time of the accident? Evidence concerning the number of hours Calvin logged that week may be relevant to show his general fatigue at the time in question, but the evidence of prior business practices and violations remains forbidden fruit and is considered unrelated as to whether Calvin was negligent at the time of the collision.

Assuming *McHaffie* applies and only the respondeat superior claim can be submitted, the jury would only hear evidence concerning negligence at the time in question to determine liability. Hasty Delivery would be able to keep the jury from hearing any damning evidence concerning its poor business practices and continue to overwork and under-supervise its drivers. While Hasty Delivery and its Calvin Careless should not be deemed to be negligent at the time in question merely because they were negligent in the past, Hasty Delivery should still not get away with breaking federal regulations if Calvin was indeed at fault. Without any punitive damages exception to the *McHaffie* rule, employers like Hasty Delivery or Rumble Transport insulate themselves from any independent liability on the basis of egregious business conduct.¹⁹⁰

2. Are Punitive Damages Ever Warranted?

At least one commentator, Richard A. Mincer, has questioned whether a motor carrier will ever engage in conduct egregious enough to warrant punitive damages.¹⁹¹ Mincer asserts, "It is simply counterintuitive to assert that a motor carrier is going to willfully and wantonly send an untrained driver out on the road in expensive equipment if the motor carrier believes there is a high likelihood that the driver will be involved in an accident."¹⁹² The hypothetical offered is not well tethered in reality, as no business will deliberately try to harm motorists. But, there certainly are motor carriers willing to break regulations to keep the cost of business low and motor carriers who fail to

190. *Kwiatkowski v. Teton Transp., Inc.*, No. 11-1302-CV-W-ODS, 2012 WL 1413154, at *4 (W.D. Mo. Apr. 23, 2012).

191. 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, 261–62 (2010).

192. *Id.* at 261.

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 Donald Farmer was unqualified to drive his vehicle.¹⁹⁵

A more tragic example occurred in *Garrett v. Albright*, where the plaintiffs offered evidence that the driver of a tractor-trailer drove well beyond the mandated hours and violated logbook-recording rules on a frequent basis and that his employer “failed to act on or even observe those violations.”¹⁹⁶ Even though this driver should have been disqualified for a number of other reasons,¹⁹⁷ he still managed to get behind the wheel of a tractor-trailer and kill four people in a tragic accident.¹⁹⁸ Not surprisingly, eyewitness testimony stated the driver appeared “inattentive” and “like he was falling asleep” right before the accident.¹⁹⁹ The court correctly held that such failure to observe industry standards and corporate policies were sufficient to submit a claim for punitive damages, as those rules have “the clear purpose of preventing injury to the motoring public from unsafe drivers.”²⁰⁰

193. *Id.*

194. *Id.* at 262.

195. *McHaffie ex rel. McHaffie (McHaffie II) v. Bunch*, 891 S.W.2d 822, 828 (Mo. 1995) (en banc).

196. *Garrett v. Albright*, Nos. 06-CV-4137-NKL, 06-CV-0785, 06-CV-4139, 06-CV-4209, 06-CV-4237, 2008 WL 795613, at *1–3, *6 (W.D. Mo. Mar. 21, 2008).

197. The driver had a medical history of heart attack and stroke and was considered a “red flag” health risk. *Id.* at *2.

198. *Id.* at *1.

199. *Id.* at *3 (internal quotation marks omitted).

200. *Id.* at *6.

The role of punitive damages in this context will also properly encourage high compliance from motor carriers and deter bad business practices that put motorists at risk of injury or death. If motor carriers know that evidence of negligent hiring, supervision, or entrustment may be presented to a jury, there will be considerable deterrence of regulatory violations or “missteps”²⁰¹ by motor carrier companies. Such a result creates a strong incentive for compliance and safety—the entire point of punitive damages.

B. The McHaffie Rule Should Not Bar Punitive Damages Claims at the Pleading Stage

Assuming the Supreme Court of Missouri officially recognizes the punitive damages exception, plaintiffs could still likely not provide sufficient facts to submit a claim for punitive damages at the pleading stage. Most attorneys will have little more than the police report to draft a petition. Without an allowance for discovery, it will be near impossible to state specific allegations to claim punitive damages in the face of a motion to dismiss. If the court were inclined to decide the question at the outset of the lawsuit, the plaintiff will almost always lose.²⁰² This creates a problem for the rest of the lawsuit, as any evidence going to the business practices of the motor carrier is undiscoverable.²⁰³ Once dismissed, the only real hope for a plaintiff to claim punitive damages will be evidence provided by a whistleblower.²⁰⁴

An early dismissal of independent liability claims against the motor carrier continues to overprotect defendants by shielding business records, hiring practices, and prior incidents. The end result of early dismissals gives the worst motor carriers the most incentive to seek dismissal of all additional negligence claims to hide any evidence of non-compliance. Motor carriers who do comply with the rules really have nothing to fear from additional claims of liability, as punitive damages are extremely rare and will only be proven by the most egregious business practices.

The alternative and better application of the *McHaffie* rule is to evaluate the exception at the end of discovery when the trial court can adequately assess whether a claim for punitive damages exists. This application only punishes the worst actors and would not subject those motor carriers who comply with

201. Mincer, *supra* note 191, at 262. Mincer asserts that the dominant source of violations from smaller motor companies will be “missteps” and only amount to “negligence at most.” *Id.*

202. See *Braxton v. DKMZ Trucking, Inc.*, No. 4:13-cv-1335-JCH, 2013 WL 6592771, at *2–4 (E.D. Mo. Dec. 16, 2013) (dismissing additional claims of imputed negligence against motor carrier after applying *Bell Atlantic Corp. v. Twombly* “plausible” standard and finding the plaintiff did not even attempt “a formulaic recitation of the elements” (internal quotation marks omitted)).

203. See MO. SUP. CT. R. 56.01(b)(1).

204. *Wright v. Watkins & Shepard Trucking, Inc.*, F. Supp. 2d 1092, 1094, 1096 (D. Nev. 2013) (the court reopened discovery in response to “an anonymous letter Plaintiffs had received regarding Watkins & Shepard’s hiring practices.”).

federal regulations. It also allows the plaintiff to control his or her own lawsuit and decide which claims to submit to the jury—something the defendant should not be allowed to dictate.

The late application of a punitive damages exception will also not consume the general *McHaffie* rule. Commentator Mincer also expresses concerns that a plaintiff will be able to present prejudicial testimony just by pleading punitive damages.²⁰⁵ However, this concern conflates pleading and discovering evidence regarding negligent entrustment, hiring, or supervision with submitting such evidence to the jury. A simple fix to the exception potentially swallowing the rule is to allow for a relaxed pleading standard for punitive damages, but cut off discovery or dismiss any such claim once it becomes apparent punitive damages are unobtainable. Indeed, the trial court is in the best position to control the extent of discovery and prevent costly “fishing expeditions.” Furthermore, defendant motor carriers have the choice to seek bifurcation of the trial into two stages: the first for negligence at the time of the accident and the second for punitive damages.²⁰⁶ Any motor carrier company deciding not to split the claims into two trials could only blame itself for the likely prejudicial effect on the jury.

C. The Supreme Court of Missouri Needs to Resolve the Issue

Given the soundness of the punitive damages exception and the court’s implicit recognition of the exception in *McHaffie*, it is time for the court to grant transfer in an appropriate case and clarify Missouri common law. Unfortunately, the court inexplicably declined to do so in *Wilson v. Image Flooring, LLC*, and left the meaning of *McHaffie*, yet again, in a state of uncertainty. It may be some time before similar facts come before the court again²⁰⁷—leaving doubt in the lower Missouri courts and federal courts applying Missouri law. The *McHaffie* decision needs clarification and the Supreme Court of Missouri should formally adopt the punitive damages exception and dictate its application. The Supreme Court of Missouri needs to guide the lower courts in crafting an application of the punitive damages exception that protects defendants from unfair prejudice, while allowing plaintiffs to deter egregious business practices by permitting discovery into prior bad acts by motor carriers.

205. Mincer, *supra* note 191, at 263.

206. MO. REV. STAT. § 510.263 (2013).

207. See *infra* Part II.B.1 and accompanying text (discussing the difficulty of appeal and opportunity).

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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