ADVANCE SHEET HEADNOTE
September 27, 2021

2021 CO 67

No. 20SA429, *Brown v. Long Romero*—Vicarious Liability—Negligence—Labor and Employment.

In this case, the supreme court considers whether a plaintiff's direct negligence claims against the employer are subject to dismissal where the plaintiff does not assert vicarious liability for the employee's negligence, but the employer acknowledges vicarious liability nonetheless. The plaintiff gave birth at Denver Center for Birth and Wellness ("DCBW"), where her child died during labor. She and her husband (collectively, "Brown") asserted that DCBW and its employee's negligence ultimately caused the death of their child. The plaintiff brought direct negligence claims against DCBW and the employee but did not assert vicarious liability. Nevertheless, DCBW acknowledged vicarious liability. The trial court then dismissed the negligence claim citing *McHaffie*, which held that "where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred." The supreme

court makes the rule absolute and holds that a plaintiff's direct negligence claims against an employer are not barred where the plaintiff does not assert vicarious liability for an employee's negligence. Thus, the plaintiff's negligent hiring claim is reinstated.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 67

Supreme Court Case No. 20SA429
Original Proceeding Pursuant to C.A.R. 21
Arapahoe County District Court Case No. 20CV31012
Honorable John L. Wheeler, Judge

In Re
Plaintiffs:

Erica Murphy Brown and Steven Brown,

v.

Defendants:

Shari L. Long Romero, R.N., C.N.M, R.X.N. and Denver Center for Birth and Wellness, LLC.

Rule Made Absolute
en banc
September 27, 2021

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CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 In *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 19, 390 P.3d 836, 841–42, we adopted the Missouri Supreme Court's rule from *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995), and held that "where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred." This case asks whether the "*McHaffie* Rule" applies even where the plaintiff *chooses not to assert vicarious liability* for an employee's negligence and, instead, asserts *only direct negligence claims* against the employer.

¶2 Here, Erica Murphy Brown and Steven Brown (collectively, "Brown") sued Denver Center for Birth and Wellness ("DCBW") for negligence and negligent hiring. Brown also sued Shari L. Long Romero, a DCBW employee and certified nurse-midwife, for wrongful death. The suit arose from the death of Brown's child during labor at DCBW. After acknowledging vicarious liability[1] for Long Romero's negligence—by admitting, in its Answer, that Long Romero's alleged acts and omissions occurred within the course and scope of her employment—

[1] At several points in this opinion, we use the phrase "acknowledge vicarious liability" as shorthand for an employer's acknowledgement that the alleged tortfeasor qualified as an employee as well as acted within the course and scope of employment at the time of the alleged acts and omissions. The employer's acknowledgement does not constitute an admission that the employee, in fact, acted negligently.

DCBW moved for partial judgment on the pleadings under C.R.C.P. 12(c) on Brown's negligent hiring claim.

¶3 The trial court, citing the *McHaffie* Rule, granted DCBW's motion and dismissed Brown's negligent hiring claim—even though Brown had chosen not to assert vicarious liability for Long Romero's negligence. Brown filed a C.A.R. 21 petition, and we issued a rule to show cause.

¶4 We now hold that a plaintiff's direct negligence claims against an employer are not barred where the plaintiff does not assert vicarious liability for an employee's negligence. *See Ferrer*, ¶ 31 n.11, 390 P.3d at 845 n.11 ("Nothing in this opinion precludes a plaintiff from bringing only direct negligence claims against the employer . . . .").[2] Thus, the trial court erred in granting DCBW's motion for partial judgment on the pleadings and dismissing Brown's negligent hiring claim.

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[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*, 390 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." Ch. 147, sec. 1, § 13-21-111.5(1.5)(c), 2021 Colo. Sess. Laws 863.

In abrogating *Ferrer*, the General Assembly repealed the *McHaffie* Rule and allowed plaintiffs to simultaneously assert vicarious liability and direct negligence claims against an employer. Although we issue this opinion to vacate the trial court's grant of partial judgment on the pleadings, as a result of the General Assembly's action, we do not address or express any opinion on the parties and amici's broader arguments about the proper scope of the now-repealed *McHaffie* Rule and related issues.

¶5 Accordingly, we make the rule to show cause absolute, vacate the trial court's grant of partial judgment on the pleadings, and remand with directions to reinstate Brown's negligent hiring claim.

I. Facts and Procedural History

¶6 When the time came for Brown to give birth, she went to DCBW—a "birth center" that, under Colorado law, may provide care to expectant mothers with low-risk pregnancies and their newborn infants. Dep't of Pub. Health and Env't, 6 Colo. Code Regs. 1011-1:22.2.1, 2.6 (2021). Tragically, Brown's child died during labor at DCBW. Brown sued, alleging essentially that DCBW and Long Romero failed to appropriately monitor Brown, recognize signs and symptoms of fetal distress, provide appropriate emergency care, and initiate transfer to a hospital or higher level of care when necessary. According to Brown, DCBW and Long Romero's negligence ultimately caused the death of her child.

¶7 These allegations take the form of three separate and distinct claims: First, Brown asserts a wrongful death claim against Long Romero for deviating from the standard of care expected of certified nurse-midwives. Importantly, Brown does not assert vicarious liability against DCBW on this claim. Second, Brown asserts a negligence claim against DCBW for failure to ensure that its employees had adequate training and experience.

¶8 The present dispute revolves around the third claim. There, Brown asserts a negligent hiring claim against DCBW. In short, Brown alleges that Long Romero had an extensive, documented history of disciplinary proceedings and orders, in Colorado and elsewhere, for violations of nursing practice standards, deceit, and alcohol and substance abuse. In Brown's view, DCBW either knew or should have known this information and, therefore, acted negligently in hiring Long Romero as a certified nurse-midwife.

¶9 In its Answer, DCBW acknowledged vicarious liability by admitting that "at all relevant times when Dr. Long Romero provided treatment to plaintiff Erica Brown at DCBW, Dr. Long Romero was an employee of DCBW and was acting within the course and scope of her employment at DCBW." Then, based on this admission and our decision in *Ferrer*, DCBW moved for partial judgment on the pleadings under C.R.C.P. 12(c) on Brown's negligent hiring claim.

¶10 In its Order, the trial court noted that, "[f]or all intents and purposes," the "factual circumstances in this case and *Ferrer* (and *McHaffie*) are identical." The court specifically found, however, that unlike in *Ferrer* and *McHaffie*, Brown did *not* assert vicarious liability against DCBW—"plaintiffs state *no claim* for *respondeat*

superior[3] liability against DCBW." Thus, the court framed the question as "whether . . . direct 'imputed' liability claims are barred in the *absence* of a *respondeat superior* liability claim when the employer unilaterally and voluntarily *admits* to *respondeat superior* liability."

¶11 In considering the question, the court found "sufficient grounds stated in the [Colorado] Supreme Court's analysis in *Ferrer* to *extend* the express ruling in that case . . . to *include* the factual circumstance where the employer unilaterally admits vicarious liability for an employee's negligent actions *without* a specific *respondeat superior* claim pleaded by the plaintiff." As a result, the court, citing the *McHaffie* Rule, granted DCBW's motion and dismissed Brown's negligent hiring claim.

¶12 Brown filed a C.A.R. 21 petition, and we issued a rule to show cause. We now explain our decision to exercise original jurisdiction.

II. Original Jurisdiction

¶13 We exercise original jurisdiction and grant relief under C.A.R. 21 only when "no other adequate remedy . . . is available." C.A.R. 21(a)(1). We deem such relief

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[3] The trial court used "respondeat superior" to refer to the doctrine we call "vicarious liability." *See Ferrer*, ¶ 20 n.4, 390 P.3d at 842 n.4 ("The doctrine of respondeat superior rests on the theory that an employee acting within the scope of his employment acts on behalf of an employer. In such circumstances, the employer is vicariously liable for the employee's negligent acts.").

appropriate, for example, "when an appellate remedy would be inadequate, when a party may otherwise suffer irreparable harm, [or] when a petition raises issues of significant public importance that we have not yet considered." *People v. Huckabay*, 2020 CO 42, ¶ 9, 463 P.3d 283, 285 (alteration in original) (quoting *People v. Kilgore*, 2020 CO 6, ¶ 8, 455 P.3d 746, 748). Indeed, C.A.R. 21 provides relief that is "extraordinary in nature" and "wholly within [this court's] discretion." C.A.R. 21(a)(1).

¶14 In granting the petition, we concluded that the issue in this case—namely, whether the *McHaffie* Rule applies even where the plaintiff chooses not to assert vicarious liability for an employee's negligence and, instead, asserts only direct negligence claims against the employer—constitutes a question of significant public importance. In light of the considerable number of cases involving vicarious liability or direct negligence claims, we viewed the issue as one highly likely to recur and, therefore, in need of resolution.

¶15 We now consider the petition on its merits.

III. Analysis

¶16 We first determine that a de novo standard of review applies. Then, we review the Missouri Supreme Court's decision in *McHaffie* as well as our decision in *Ferrer* and hold that a plaintiff's direct negligence claims against an employer are not barred where the plaintiff does not assert vicarious liability for an

employee's negligence. We ultimately conclude, applying that holding to the facts of this case, that the *McHaffie* Rule does not apply here. Thus, the trial court erred in granting DCBW's motion for partial judgment on the pleadings and dismissing Brown's negligent hiring claim. Accordingly, we make the rule to show cause absolute, vacate the trial court's grant of partial judgment on the pleadings, and remand with directions to reinstate Brown's negligent hiring claim.

A. De Novo Standard of Review

¶17 Whether a court properly granted a motion for judgment on the pleadings under C.R.C.P. 12(c) presents a question of law that we review de novo. *In re Estate of Ramstetter*, 2016 COA 81, ¶ 13, 411 P.3d 1043, 1046. In considering such a motion, a court "must construe the allegations of the pleadings strictly against the movant, must consider the allegations of the opposing parties' pleadings as true, and should not grant the motion unless the pleadings themselves show that the matter can be determined on the pleadings." *Melat, Pressman & Higbie, L.L.P. v. Hannon L. Firm, L.L.C.*, 2012 CO 61, ¶ 17, 287 P.3d 842, 847 (quoting *Conn. Gen. Life Ins. Co. v. A.A.A. Waterproofing, Inc.*, 911 P.2d 684, 687 (Colo. App. 1995), *aff'd sub nom. Const. Assocs. v. N.H. Ins. Co.*, 930 P.2d 556 (Colo. 1996)).

¶18 We now review the Missouri Supreme Court's decision in *McHaffie* and our decision in *Ferrer*.

B. *McHaffie*, *Ferrer*, Footnote 11, and the Requirement That a Plaintiff Assert Vicarious Liability

¶19 In *McHaffie*, the plaintiff sustained injuries when the intoxicated driver of the car in which she was a passenger veered across the median of a freeway, hit a guardrail, and slammed into an oncoming truck. 891 S.W.2d at 824. The plaintiff sued, among others, the driver of the truck and the operator-lessee of the truck. *Id.* With respect to the driver of the truck, the plaintiff asserted a negligence claim. *Id.* With respect to the operator-lessee, the plaintiff asserted direct negligence claims (specifically negligent hiring and supervision) and a vicarious liability claim. *Id.* at 824–25.

¶20 The operator-lessee acknowledged vicarious liability by admitting that the driver of the truck qualified as an employee and was acting within the course and scope of his employment at the time of the collision. *Id.* at 824. At trial, the plaintiff nevertheless presented evidence that the operator-lessee did not require the driver of the truck to have sufficient experience, training, testing, and medical evaluations. *Id.* After the jury found the driver of the truck and the operator-lessee partially liable and apportioned fault, they appealed, arguing that the trial court should not have allowed the plaintiff to assert both vicarious liability and direct negligence claims. *See id.* at 825.

¶21 The Missouri Supreme Court agreed, holding that "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." *Id.* at 826; *see also id.* at 827 ("The Court concludes that once the agency relationship was admitted, it was error to permit a separate assessment of fault to [the operator-lessee] based upon the 'negligent entrustment' or 'negligent hiring' theories of liability. It was also error to admit evidence on those theories."). The court reasoned that both vicarious liability and direct negligence claims seek to attach liability for an employee's negligence to his or her employer, and therefore, when the employer admits vicarious liability, evidence supporting direct negligence claims proves redundant and unnecessary. *See id.* at 826–27. Accordingly, the court reversed and remanded for a new trial on the apportionment of fault. *Id.* at 832.

¶22 We faced the same issue in *Ferrer*. There, the plaintiff sustained injuries when a taxi struck her while she crossed the street. *Ferrer*, ¶ 2, 390 P.3d at 839. The plaintiff sued both the taxi driver and the taxi company. *Id.* With respect to the taxi driver, the plaintiff asserted a negligence claim. *Id.* With respect to the company, the plaintiff asserted direct negligence claims (specifically negligence as a common carrier as well as negligent hiring, training, entrustment, and supervision) and a vicarious liability claim. *Id.*

¶23 In its amended answer, the taxi company acknowledged vicarious liability by admitting that the taxi driver qualified as an employee and was acting within

the course and scope of his employment at the time of the collision. *Id.* at ¶ 3, 390 P.3d at 839. Then, the taxi company moved for partial judgment on the pleadings on the plaintiff's direct negligence claims. *Id.* The trial court granted the taxi company's motion and dismissed the plaintiff's direct negligence claims. *Id.* The plaintiff sought our original jurisdiction, and we issued a rule to show cause. *Id.* at ¶ 6, 390 P.3d at 840.

¶24 We ultimately affirmed the trial court's grant of the taxi company's motion and discharged the rule. *See id.* at ¶ 58, 390 P.3d at 850. In so doing, we adopted the Missouri Supreme Court's rule from *McHaffie* and held that "where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred." *Id.* at ¶ 19, 390 P.3d at 841–42. In our analysis, we expressed concern that evidence supporting direct negligence claims—in *Ferrer*, negligence as a common carrier as well as negligent hiring, training, entrustment, and supervision—would prove unfairly prejudicial to the employee, especially where the employer had already acknowledged vicarious liability for the employee's negligence. *Id.* at ¶ 32, 390 P.3d at 845.

¶25 To clarify the scope of our holding, we included footnote 11, which explains that the *McHaffie* Rule does not apply in cases where the plaintiff chooses not to

assert vicarious liability for an employee's negligence and, instead, asserts only direct negligence claims against the employer:

> *Nothing in this opinion precludes a plaintiff from bringing only direct negligence claims against the employer* . . . . We hold only that if a plaintiff *also* alleges that the employer is vicariously liable for the negligence of its employee and the employer thereafter concedes vicarious liability for its employee's negligence, then the plaintiff's additional, direct negligence claims against the employer must be dismissed.

Id. at ¶ 31 n.11, 390 P.3d at 845 n.11 (first emphasis added).

¶26 In this case, the trial court quoted footnote 11 and correctly characterized it as "draw[ing] a 'bright line' under the factual and procedural circumstances through which these imputed or 'direct' liability claims against an employer are barred." Indeed, the trial court explained that "[i]f footnote 11 controls, the [Colorado] Supreme Court's bar on direct 'imputed' claims does *not* apply if a *respondeat superior* claim is not pleaded." Nevertheless, the trial court granted DCBW's motion for partial judgment on the pleadings and dismissed Brown's negligent hiring claim, reasoning that allowing such a claim to go forward could prove unfairly prejudicial "regardless of whether the employer's admission was through the plaintiff's *respondeat superior* claim, as in *Ferrer*, or through a unilateral admission, as with DCBW."

¶27 This was error. Although our general holding in *Ferrer*—that "where an employer acknowledges vicarious liability for its employee's negligence, a

plaintiff's direct negligence claims against the employer are barred," ¶ 19, 390 P.3d at 841–42—might not explicitly state that the *McHaffie* Rule only applies where the plaintiff asserts vicarious liability, a thorough reading of the case makes that requirement plain.

¶28 First, in both *Ferrer* and *McHaffie*, the plaintiff *did* assert vicarious liability, so we did not need to address the opposite scenario. *See Ferrer*, ¶ 8, 390 P.3d at 840; *McHaffie*, 891 S.W.2d at 824. Yet we still attempted to clarify, in footnote 11, that "[n]othing in this opinion precludes a plaintiff from bringing *only* direct negligence claims against the employer." *Ferrer*, ¶ 31 n.11, 390 P.3d at 845 n.11 (emphasis added). Second, our decision in *Ferrer* relied primarily on the fact that vicarious liability and direct negligence claims prove redundant because they both "effectively impute the employee's liability for his negligent conduct to the employer." ¶ 28, 390 P.3d at 844. With both theories, "one element of imposing liability on the employer is a finding of some level of culpability by the employee in causing injury to a third party." *Id.* at ¶ 30, 390 P.3d at 845 (quoting *McHaffie*, 891 S.W.2d at 825). We thus concluded that, given the taxi company's acknowledgment of vicarious liability, the plaintiff's direct negligence claims—"*likewise* seeking to attach liability to [the taxi company]"—proved "duplicative and unnecessary." *Id.* at ¶ 50, 390 P.3d at 849 (emphasis added). Where a plaintiff does *not* assert vicarious liability, however, this logic vaporizes because the direct

negligence claims *alone* seek to attach liability to the employer and do not prove redundant.

¶29 Therefore, we hold that a plaintiff's direct negligence claims against an employer are not barred where the plaintiff does not assert vicarious liability for an employee's negligence. *See id. at* ¶ 31 n.11, 390 P.3d at 845 n.11 ("Nothing in this opinion precludes a plaintiff from bringing only direct negligence claims against the employer . . . ."). A plaintiff may bring direct negligence claims against an employer if she does not assert vicarious lability for an employee's negligence—regardless of whether the employer acknowledges vicarious liability for the employee's negligence. We now apply that holding to the facts of this case.

C. The *McHaffie* Rule Does Not Apply Here

¶30 Here, the trial court specifically found that "plaintiffs state *no claim* for *respondeat superior* liability against DCBW." Therefore, because Brown didn't assert vicarious liability against DCBW for Long Romero's negligence, the *McHaffie* Rule does not apply. Accordingly, the trial court erred in granting DCBW's motion for partial judgment on the pleadings and dismissing Brown's negligent hiring claim.

IV. Conclusion

¶31 For the foregoing reasons, we make the rule to show cause absolute, vacate the trial court's grant of partial judgment on the pleadings, and remand with directions to reinstate Brown's claim against DCBW for negligent hiring.