"IT'S NOT MY FAULT": MISSISSIPPI EMPLOYERS SHOULD NOT BE PERMITTED TO AVOID DIRECT LIABILITY BY ADMITTING VICARIOUS LIABILITY IN THE EVENT OF EMPLOYEE NEGLIGENCE

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INTRODUCTION

Mississippi has long recognized the doctrine of respondeat superior that imposes vicarious liability upon an employer for the torts of its employees acting within the scope of their employment.[1] When an employer is held vicariously liable, the

[1] *See* Odier v. Sumrall, 353 So. 2d 1370, 1372 (Miss. 1978). Common law recognition of vicarious liability is based on several rationales: (i) the employer's right to control the employee; (ii) the fact that the employer benefits from the employment; (iii) the argument that the employer is in the best position to spread the risk of an employee's negligence by obtaining liability insurance and transferring the cost to its customers; (iv) the idea that an employer who acts through an employee should be treated as the actor; and (v) employers' exposure to vicarious liability will motivate employers to prevent accidents. *See* W.J. Runyon & Son, Inc. v. Davis, 605 So. 2d 38, 45 (Miss. 1992), *overruled on other grounds*, J & J Timber Co. v. Broome, 932 So. 2d 1, 6-7 (Miss. 2006) (observing that employers who have the right to control have the ability and the incentive to prevent employees' negligence); White's Lumber & Supply Co. v.

employer and employee are held jointly and severally liable for the damages caused by the employee's tortious conduct, meaning that the plaintiff can recover fully from the employer, the employee, or both.[2] In such a case, although the employer and employee are subject to joint and several liability for the damages caused by the employee's negligence, they are not joint tortfeasors because only the employee's negligence caused the plaintiff's damage.[3] The employer, however, is held vicariously liable for the percentage of fault allocated to the employee.[4]

Mississippi law has also long recognized a plaintiff's right to bring direct negligence claims against the employer based upon the employer's own breach of duty.[5] While such claims may be

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Collins, 191 So. 105, 106 (Miss. 1939) ("The doctrine of respondeat superior has its basis in the fact that the employer has the right to supervise and direct the performance of the work by his employe[e] in all its details, and this right carries with it the correlative obligation to see to it that no torts shall be committed by the employe[e] in the course of the performance of the character of work which the employe[e] was appointed to do."); Slaughter v. Holsomback, 147 So. 318, 322 (Miss. 1933) ("The doctrine of respondeat superior is that he who acts through another is himself the actor."); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a, subdiv. 1 (A.L.I. 1958) (observing that it would be unjust for an employer/principal to benefit from the employment/agency relationship without being responsible for the mistakes of employees/agents). To determine whether the employee was acting in the scope of employment, the court will consider whether the conduct was in furtherance of the employer's business or incidental to authorized work. *See* Parmenter v. J & B Enters., Inc., 99 So. 3d 207, 216 (Miss. Ct. App. 2012). Employers may be held vicariously liable for unauthorized and even intentional torts if they are committed within the scope of employment. *See* Horton v. Jones, 44 So. 2d 397, 399-400 (Miss. 1950). If, however, the employee has abandoned employment and is pursuing a personal purpose, the employee's conduct is not within the scope of employment, and the employer is not subject to liability. *Id.* at 399. For a more detailed discussion of Mississippi law governing vicarious liability, see Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers' Liability for Workplace Violence*, 70 MISS. L.J. 505, 510-16 (2000).

[2] *See infra* notes 260-263 and accompanying text discussing joint and several liability.

[3] Richardson v. APAC-Miss. Inc., 631 So. 2d 143, 151-52 n.7 (Miss. 1994) ("Joint tortfeasor claims arise where the separate wrongful conduct of two or more individuals combine to cause an injury, and each because of *his* conduct bears some responsibility for the injury. . . . Where the principal is sought to be held liable for acts of his agent, as here, however, only one, the employee, has committed any wrong.").

[4] *J & J Timber Co. v. Broome*, 932 So. 2d at 6.

[5] *Id.* at 4 (acknowledging a clear "distinction between maintaining an action against the employer on the basis of negligence directly attributable to the employer and negligence based solely on vicarious liability"). *See, e.g.*, Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474, 489 (Miss. 2010) (acknowledging an

based upon allegations of negligent hiring, negligent retention, negligent training, negligent supervision, negligent entrustment, negligent failure to establish reasonable safety protocols and procedures, and negligent failure to maintain equipment, all such claims are simply basic negligence claims arising out of the employer's duty to use reasonableness in the operation of its business or activity.[6] It is a bedrock tort principle that an actor whose conduct poses a foreseeable risk of physical injury to others owes a duty to use reasonable care while conducting that activity.[7]

In cases where the plaintiff simultaneously pursues claims for vicarious liability and direct negligence against the employer, employers in some jurisdictions, including Mississippi, may successfully invoke a common law rule, often referred to as the preemption rule,[8] when seeking dismissal of the direct negligence

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employer's duty to supervise an employee acting outside the scope of employment and while using chattel of the master); Parmenter v. J & B Enters., Inc., 99 So. 3d 207, 217 (Miss. Ct. App. 2012) (holding that an employer may be held liable for negligent hiring or negligent retention if the employer knew or should have known of the employee's incompetence or unfitness and the employee's incompetence or unfitness caused injury to a third person); Eagle Motor Lines, Inc. v. Mitchell, 78 So. 2d 482, 487 (Miss. 1955) ("Retaining in employment a servant who is, or should be, known to be incompetent, habitually negligent, or otherwise unfit, is such negligence on the part of the master . . . ."). For a more detailed discussion of Mississippi law governing direct negligence claims against employers, see Whitten & Mosley, *supra* note 1, at 520-36.

[6] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (A.L.I. 2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."); *id.* § 19 ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."); *id.* § 41, 41 cmt. e (employers owe a duty to use reasonable care to third persons with respect to risks posed by its employees that arise within the scope of employment; this duty includes "the employer's duty to exercise reasonable care in the hiring, training, supervision, and retention of employees"); RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (A.L.I. 2006) ("A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent."); RESTATEMENT (SECOND) OF AGENCY § 213 (A.L.I. 1958) (recognizing liability on the part of an employer for negligently giving orders, "failing to make proper regulations," negligent hiring and supervision, and negligent use of instrumentalities).

[7] *See* sources cited *supra* note 6.

[8] *See, e.g.*, Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 245 n.3 (Tenn. 2024) (labeling the rule as the "preemption rule"); MV Transp., Inc. v. Allgeier, 433 S.W.3d 324, 334 (Ky. 2014) (same). The rule has also been referred to as the respondeat superior rule, the vicarious liability rule and the *McHaffie* rule, after McHaffie v.

claim. Pursuant to the rule, once the employer admits that it will be vicariously liable for any negligence of the employee, the plaintiff may no longer pursue the direct negligence claim.[9] In other words, the plaintiff's claim for direct negligence is preempted at the pleadings stage prior to discovery, leaving the plaintiff to pursue only the claim for vicarious liability.

The rule originated in earlier cases involving vehicular accidents where the employee driver was admittedly driving in the scope of employment.[10] In those early cases, appellate courts were reviewing the trial court's admission or exclusion of evidence of the employee driver's prior record of poor driving. Plaintiffs argued that such evidence was admissible to prove the direct negligent entrustment and negligent hiring claims against the employer. Defendants argued that the evidence was inadmissible with respect to the negligence claim against the employee driver and further argued that even though such evidence was relevant to the direct negligence claim against the employer, such evidence should be excluded because its probative value was substantially outweighed by unfair prejudice.[11] The appellate courts in those early cases reasoned that, in light of the employer's admission that the employee driver was acting in the scope of employment, evidence of the employee driver's prior driving record was unfairly prejudicial because the jury might impermissibly conclude that the employee driver was negligent at the time of the accident in question based solely on the driver's propensity to drive poorly.[12] In addition, the courts determined that such evidence was not essential to the plaintiff's recovery because a plaintiff who proves the employee driver's negligence is entitled to a full recovery

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Bunch, 891 S.W.2d 822 (Mo. 1995), a frequently cited opinion applying the rule. *See Binns*, 690 S.W.3d at 245 n.3.

[9] *See Binns*, 690 S.W.3d at 247 (explaining the rule); Carothers v. City of Water Valley, 242 So. 3d 138, 144-45 (Miss. Ct. App. 2017) (affirming dismissal of plaintiff's direct negligence claim for failure to state a claim pursuant to MISS. R. CIV. P. 12(b)(6) where the employer admitted it would be vicariously liable for the employee's negligence, if any).

[10] *See infra* notes 38-58 and accompanying text.

[11] *Id.*

[12] *Id.* Generally, a jury may not consider a person's propensity to drive poorly or other instances of a person's poor driving when determining whether the person was driving negligently at the time in question. *See inf*ra notes 357-359 and accompanying text for a discussion of MISS. R. EVID. 404.

based upon the employer's vicarious liability, thereby making evidence of the employer's negligence unnecessary.[13] Essentially, the appellate courts were reviewing the trial court's admission or exclusion of evidence on a case-by-case basis pursuant to the general rule that evidence that is admissible with respect to one claim but not another may be excluded if its probative value is substantially outweighed by unfair prejudice.[14]

Over time, however, that evidentiary rule has morphed into a procedural rule that requires dismissal of the plaintiff's claim for direct negligence as a matter of law on the pleadings.[15] There is a vast difference between an evidentiary rule that may require exclusion of unfairly prejudicial evidence on a case-by-case basis and a procedural rule that requires dismissal of an entire claim at the outset of litigation, prior to discovery.[16]

Dismissal of the direct negligence claim on the pleadings often renders evidence about the employer's business and safety practices irrelevant to the remaining vicarious liability claim, thereby enabling employers to shield evidence of their negligent business practices from public scrutiny. Many businesses and insurers are strategically employing the preemption rule for the very purpose of barring discovery of the employer's hiring, training, and safety practices.[17] If the plaintiff is not entitled to

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[13] *Id.*

[14] *See infra* notes 357-364 and accompanying text for a discussion of MISS. R. EVID. 105 and 403.

[15] Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 247 (Tenn. 2024) (observing that pursuant to the modern version of the rule, plaintiffs may not pursue claims for direct negligence if the employer admits vicarious liability for any negligence on the part of the employee). *See also* J.J. Burns, Note, *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 MICH. L. REV. 657, 671 (2001) (observing that there are various formulations of the rule – some of which appear to be evidentiary and others which appear to be procedural).

[16] *See* James v. Kelly Trucking Co., 661 S.E.2d 329, 331 (S.C. 2008) (observing that complete preclusion of a claim for direct negligence is quite different from precluding admission of evidence that a trial court has determined to be unfairly prejudicial).

[17] *See, e.g.*, William Rabb, *Employers Can't Use Vicarious Liability to Block Negligence Claims, TN High Court Says*, INS. J. (Apr. 10, 2024), http://www.insurancejournal.com/news/southeast/2024/04/10/768744.htm [https://perma.cc/7DWK-27UA] (reporting a plaintiff's attorney's statement that employers, particularly trucking companies, "use vicariously liability and preemption strategy to keep plaintiffs in accidents from discovering how little safety training had been provided to drivers or that the firms had a history of hiring problem drivers.");

conduct discovery into the employer's business practices, negligent, grossly negligent, and reckless employers may avoid liability for breach of their duty to use reasonable care in their business operations. Application of the preemption rule in its modern form not only eliminates some of tort law's deterrent effect by relieving employers of liability for their direct negligence but also causes a skewed allocation of fault because the fact finder must allocate fault that would otherwise be allocated to the employer to the plaintiff and any other tortfeasors, including other defendants to the action.

Although the Mississippi Supreme Court has not yet adopted or rejected the preemption rule,[18] the Mississippi Court of Appeals recognized the rule in 2017, in *Carothers v. City of Water Valley*,[19] and recently affirmed the rule's application in 2024, in *Taylor v. Johnson*.[20] In rendering both opinions, the Mississippi Court of Appeals failed to address whether adoption of the preemption rule is consistent with Miss. Code Ann. § 85-5-7, Mississippi's statute imposing several liability upon tortfeasors based upon their comparative share of fault and requiring the factfinder to "determine the percentage of fault for each party alleged to be at fault."[21] Although the statute is based on comparative fault principles and literally requires the factfinder to allocate fault to an employer whose negligence contributes to the plaintiff's injuries, the Mississippi Court of Appeals adopted the preemption rule, which prevents the factfinder from considering the

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New Colorado Law Allows Direct Negligence Claims Against Employers, HALL & EVANS, LLC (June 22, 2021), http://www.hallevans.com/new-colorado-law-allows-direct-negligence-claims-against-employers/ [https://perma.cc/L3B2-825Y] (noting that the preemption rule prohibits discovery of the employer's employment files containing evidence of an employee's bad driving record); *Direct Liability Claims in Mississippi Trucking,* COPELAND COOK TAYLOR & BUSH (July 1, 2015), http://www.copelandcook.com/2015/07/01/direct-liability-mississippi-trucking-cases/ [https://perma.cc/P3QW-S6C4] (noting that one advantage of the preemption rule is that it prevents discovery of the employer's hiring and training practices).

[18] Thompson v. Intermodal Cartage Co., No. 2:24-CV-34-KS-MTP, 2025 WL 699355, at *3 (S.D. Miss. Mar. 4, 2025) ("Surprisingly, after all this time, there has yet to be a pronouncement from the Mississippi Supreme Court on the issue of whether an employer who admits or stipulates to vicarious liability is entitled to a dismissal of direct negligence claims asserted against it.").

[19] 242 So. 3d 138 (Miss. Ct. App. 2017).

[20] 395 So. 3d 402 (Miss. Ct. App. 2024).

[21] MISS. CODE ANN. § 85-5-7(5) (2025).

employer's negligence, thereby causing a distorted allocation of fault. In addition, the Mississippi Court of Appeals failed to discuss, much less discredit, policy arguments against adoption of the rule that numerous state supreme courts have recently found compelling when rejecting the preemption rule.[22] Instead, the Mississippi Court of Appeals summarily relied on a single Mississippi federal district court opinion in which the court made an *Erie* guess.[23] Thus, although it appears that the Mississippi Court of Appeals adopted the preemption rule without thorough consideration, state and federal courts in Mississippi are widely applying the preemption rule,[24] and dismissing plaintiffs' claim for direct negligence on the pleadings at the outset of litigation.[25] While some Mississippi courts have recognized that a plaintiff may pursue a claim for punitive damages against the employer based upon the employer's gross negligence,[26] others have ruled that dismissal of a plaintiff's claim for direct negligence against the employer necessitates dismissal of the plaintiff's claim for

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[22] The preemption rule was rejected by the Tennessee Supreme Court in 2024, by the Louisiana and Illinois Supreme Courts in 2022, by the Utah Supreme Court in 2021, by the Georgia Supreme Court in 2020, by the Kentucky Supreme Court in 2014, and by the South Carolina Supreme Court in 2008. *See infra* notes 181-258 and accompanying text.

[23] *See infra* notes 160-175 and accompanying text discussing the *Carothers* and *Taylor* cases in more detail.

[24] *See* Thompson v. Intermodal Cartage Co., No. 2:24-CV-34-KS-MTP, 2025 WL 699355, at *4 (S.D. Miss. Mar. 4, 2025) ("[F]ederal district courts in Mississippi . . . have consistently dismissed direct, simple negligence claims against an employer who admits vicarious liability, and more specifically, claims of negligent hiring, supervision, and retention and negligent entrustment by making *Erie* guesses."); Moysey v. BMR Transp., LLC, No. 3:21-CV-473-KHJ-MTP, 2023 WL 2482017, at *2 (S.D. Miss. Mar. 13, 2023); Pennington v. UPS Ground Freight, Inc., No. 3:16-CV-00248-NBB-JMV, 2018 WL 847249, at *2 (N.D. Miss. Feb. 13, 2018).

[25] *See*, *e.g.*, Mackey v. U.S. Xpress, Inc., No. 3:22-CV-00023-CWR-LGI, 2022 WL 17345500, at *1-2 (N.D. Miss. Nov. 30, 2022) (dismissing plaintiff's claim for direct negligence pursuant to Rule 12(c)); Brumfield v. Biriho, No. 1:22CV141-LG-BWR, 2022 WL 17543702, at *1-2 (S.D. Miss. Nov. 21, 2022) (same); Crechale v. Carroll Fulmer Logistics Corp., No. 3:19-CV-617, 2022 WL 4927508, at *3-4 (S.D. Miss. Aug. 21, 2020) (same); Estate of Brown v. Morrison, No. 1:18-cv277-HSO-JCG, 2019 WL 3720053, at *2-3 (S.D. Miss. Aug. 7, 2019) (same); *Pennington*, 2018 WL 847249, at *1-2 (same).

[26] *See*, *e.g.*, *Thompson*, 2025 WL 699355, at *7; Williams v. Pemberton Truck Lines, Inc., No. 3:20-CV-00759-KHJ-LGI, 2022 WL 17640250, at *1-2 (S.D. Miss. Dec. 13, 2022); Dinger v. Am. Zurich Ins. Co., No. 3:13-CV-46-MPM-SAA, 2014 WL 580889, at *3 (N.D. Miss. Feb. 13, 2014).

punitive damages against the employer.[27] Even in those courts that recognize that a plaintiff may theoretically pursue a claim for punitive damages against the employer, plaintiffs may lack sufficient evidence to bring a claim for punitive damages at the outset and will be prevented from discovering sufficient evidence during discovery if the claim for direct negligence is dismissed on the pleadings.[28]

As should be evident, adoption or rejection of the rule in any given jurisdiction has significant ramifications for a wide range of cases, including cases against commercial trucking companies, delivery services, contractors, and other businesses whose employee operations pose a risk of property damage or personal injury to third parties.[29] Proponents of the rule argue that its adoption is necessary to: (i) prevent the admission of unfairly prejudicial evidence; (ii) prevent double recoveries against employers; (iii) prevent unnecessary discovery; (iv) avoid frivolous lawsuits and nuclear verdicts; and (v) thwart plaintiffs' implementation of "Reptile Theory" tactics,[30] while opponents

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[27] *See*, *e.g.*, *Crechale*, 2022 WL 4927508, at *5 ("This court already has ruled that Carroll Fulmer is only subject to vicarious liability for Brooks' actions; therefore, it cannot be liable for punitive damages.").

[28] *See* Jim Ribaudo, Comment, *Lane Change: The Need to Clarify* McHaffie *and Accept a Punitive Damages Exception*, 59 ST. LOUIS U. L.J. 967, 994 (2015) (arguing that early dismissal of plaintiff's direct negligence claim will make it difficult for the plaintiff to discover the employer's gross negligence without the assistance of a whistleblower).

[29] *See* Geoffrey Mitchell, *The Reptiles Are Coming:* Martin v. Thomas *Decision Issued Regarding Direct Negligence Claims from Employee Actions*, DEUTSCH KERRIGAN (July 18, 2022), http://www.deutschkerrigan.com/insights/the-reptiles-are-coming-martin-v-thomas-decision-issued-regarding-direct-negligence-claims-from-employee-actions [https://perma.cc/55CU-EMZC] (noting that Louisiana's rejection of the preemption rule will affect "all employers in any field or occupation in Louisiana"); Taylor E. Brett, William K. Wright IV & Mary Kate Fernandez, *Employers Beware: La Supreme Court Opens Line for Direct Negligence Claims From Employee Actions*, ADAMS & REESE (July 7, 2022), http://www.adamsandreese.com/insights/employers-beware-la-supreme-court-opens-line-for-direct-negligence-claims-from-employee-actions [https://perma.cc/E98M-WHY2] (noting that Louisiana's rejection of the rule will have "far-reaching consequences" in litigation against "all employers in all industries").

[30] *See* Joelle Nelson & Al Durrell, *To Admit or Not Admit the Admission Rule – That Is the Question,* MONDAQ (June 11, 2024), https://www.mondaq.com/unitedstates/professional-negligence/1477230/to-admit-or-not-admit-the-admission-rule-that-is-the-question [https://perma.cc/LW4L-BV83] (arguing that rejection of the preemption rule invites "an expansion of reptile theory

tactics and a rise in nuclear verdicts"); Mitchell, *supra* note 29 (warning that rejection of the preemption rule will subject employers to a "protoscopic examination of their employment practices, where any slight deviation from some imagined Platonic ideal will be caricatured as corporate indifference or cost-saving measures in the heartless pursuit of profit"); Tayler Bertelsman, McQueen v. Green*: New Illinois Law for Employers to Watch*, GAUSNELL, O'KEEFE & THOMAS, LLC, GOTLAW (May 20, 2020), http://gotlawstl.com/mcqueen-v-green-new-il-law-for-employers-to-watch/ [https://perma.cc/Q8E4-ZYAT] ("Proponents of the [preemption] rule state that the rule is necessary to prevent a plaintiff from obtaining durable recovery for the same injury and that the rule prevents irrelevant and unfairly prejudiced evidence from being admitted."). The Reptile Method is a trial tactic popularized by David Bell and Don Keenan in their book: REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009). Pursuant to the method, plaintiffs' counsel appeal to the reptilian part of jurors' brains that gives rise to an instinctive desire to protect themselves, as well as their family and community, from a defendant's dangerous wrongdoing by emphasizing the defendant's unreasonable and unsafe practices in an effort to get the jury to impose liability on the defendant. *See generally* Kenneth S. Abraham, *Shadow Tort Law: Lessons from the Reptile*, 122 COL. L. REV. F. 6 (discussing the Reptile Theory and its application in tort cases). Defendants argue that plaintiffs unfairly implement the Reptile Method in cases against employers by focusing on the employer's general safety practices rather than the specific incident at issue. *See*, *e.g.*, Eric Miller, *Plaintiff Attorneys Often Use 'Reptile Theory' to Win Nuclear Trucking Jury Verdicts, Experts Say*, TRANSP. TOPICS (Jan. 19, 2021, at 16:45 ET), http://www.ttnews.com/articles/plaintiff-attorneys-often-use-reptile-theory-solicit-nuclear-jury-verdicts-experts-say [https://perma.cc/Y8JB-K2TN] (observing that plaintiffs frequently implement the Reptile Method in trucking cases by focusing on "carrier's safety profiles and procedures, ranging from driver hiring, training and supervision to truck maintenance and use of motor carrier data."); Shawn M. Rogers, *Success in Tackling the "Reptile Theory" of Trucking Accident Litigation With a Motion to Dismiss and Strike*, LEXOLOGY (May 25, 2016), http://www.lexology.com/library/detail.aspx?g=324418b0-318c-446e-92da-1c451d582ba8 [https://perma.cc/EHR8-3RKA] (arguing that plaintiffs using the Reptile Theory focus on the trucking companies' practices rather than the driver's negligence); Cristina Commendatore, *Trucking Continues Battle Against Reptile Theory, Nuclear Verdicts*, FLEETOWNER (Aug. 3, 2021), http://www.fleetowner.com/safety/article/21171311/trucking-continues-battle-against-reptile-theory-nuclear-verdicts [https://perma.cc/C4X4-LP8G] (same); Larry Cheng, *Saving Time and Money: Preemption of Direct Negligence Claims Against Employers In Tennessee*, BUTLER SNOW (Jan. 31, 2022), http://www.butlersnow.com/news-and-events/saving-time-and-money-preemption-of-direct-negligence-claims-against-employers-in-tennessee [https://perma.cc/AL9J-EP35] (arguing that "[d]irect negligence claims against an employer are often followed by burdensome discovery requests for internal documents that are wholly irrelevant to the plaintiff's claims and time-consuming preparation for corporate representative depositions to discuss general business practices."). *But see* Kenneth S. Klein, *The First Thing We Do Is Kill All the Lawsuits*, 44 REV. LITIG. 47, 83-88 (2025) (arguing that there is no evidence that "reptile tactics" have caused an avalanche of improper verdicts and suggesting that insurers and big business are the ones who are improperly resorting to emotion to argue that adoption of the rule: (i) would allow employers to shield their practices from scrutiny, decrease deterrence, and lead to more accidents; (ii) is inconsistent with comparative fault principles and results in a skewed allocation of fault; and (iii) is unnecessary given that trial courts and defense counsel have a wide array of procedural and evidentiary rules that may be employed to protect against any unfairness to employers.[31]

Given that adoption or rejection of the preemption rule will broadly impact tort litigation, it is not surprising that stakeholders have been voicing their support for or condemnation of the rule. When the Arizona, Texas, Tennessee, and Louisiana Supreme Courts recently heard cases involving adoption or rejection of the preemption rule, numerous organizations, including the U.S. Chamber of Commerce, the American Trucking Association, and various lawyers' associations, filed appearances as amicus curiae, indicating that resolution of the issue has major implications.[32] Similarly, when state legislatures have recently

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falsely villainize plaintiffs' lawyers by blaming them for a litigation crisis that does not exist).

[31] *See, e.g.,* Derek M. Causey, *Understanding the New Texas Law on Trucking Company Liability*, HOPE & CAUSEY, P.C. (Aug. 10, 2022), http://www.hope-causey.com/blog/understanding-the-new-texas-law-on-trucking-company-liability/ [https://perma.cc/KG2K-CL9Y] ("Critics of the [Texas] law asserted that shielding trucking companies from liability will discourage them from maintaining robust driver safety training programs and that as a result, road safety will be compromised."); *What Business Owners Need to Know About Negligence Claims*, MERIDIAN L. (Sep. 16, 2024), http://meridian.law/blog/what-business-owners-need-to-know-about-negligence-claims [https://perma.cc/CMW7-62EL] (noting that rejection of the preemption rule encourages "robust hiring practices and employee training … to educate employees and prevent harmful conduct"); *see also infra* notes 178-258 and accompanying text discussing recent opinions rejecting the rule.

[32] For example, when the Tennessee Supreme Court was deciding *Binns v. Trader Joe's East Inc.*, the American Trucking Association and the Tennessee Trucking Association filed amicus briefs in support of the rule, while the Tennessee Trial Lawyers Association filed an amicus brief supporting rejection of the rule. *See* Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 248 (Tenn. 2024). *See infra* notes 181-198 and accompanying text discussing the court's rejection of the rule in *Binns*. Similarly, when the Illinois Supreme Court was deciding *McQueen v. Green*, Illinois Defense Counsel filed an amicus brief in support of the rule while the Illinois Trial Lawyers Association filed an amicus brief opposing the rule. *See* McQueen v. Green, 202 N.E.3d 268, 277 (Ill. 2022). *See infra* notes 211-231 and accompanying text discussing the court's rejection of the rule in *McQueen*. When the Texas Supreme Court recently decided *Werner Enterprises, Inc. v. Blake*, 719 S.W.3d 525 (Tex. 2025), numerous associations and individuals, including the American Trucking Association, Texans for Lawsuit

considered bills either enacting or rejecting the preemption rule, interested parties engaged in considerable lobbying efforts.[33]

To illustrate how application of the preemption rule might affect tort litigation, consider the following facts taken from a fairly recent case.[34] David Johnson applied to an international trucking company to be a commercial truck driver. After the

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Reform, the U.S. Chamber of Commerce, the Texas Trucking Association, the Texas Industry Defense Association, the Texas Association of Defense Counsel, the Texas Civil Justice League, a trucking company, an insurance company, and two law professors, all appeared as amicus curiae. Entries are available on the Texas Judicial Branch docket for the case (No. 23-0493). *Case Detail*, SUP. CT. OF TEX., https://search.txcourts.gov/Case.aspx?cn=23-0493&coa=cossup [https://perma.cc/F69R-SLK8]. Although the Texas Court of Appeals held that Texas had not adopted the preemption rule in *Werner Enterprises, Inc. v. Blake*, 672 S.W.3d 554, 588 (Tex. Ct. App. 2023), the Texas Supreme Court decided the case on other grounds even though the importance of the decision to adopt or reject the preemption rule heavily influenced the court's decision to grant the petition for certiorari. Werner Enters., Inc. v. Blake, 719 S.W.3d 525, 541 (Tex. 2025) (Young, J., concurring). Similarly, when the Arizona Supreme Court decided *Roaf v. Rebuck Consulting, LLC*, 550 P.3d 173 (Ariz. 2024), a case in which the defendant employer requested the court to adopt the preemption rule, the Arizona Association for Justice and the Arizona Municipal Risk Retention Pool filed amicus briefs. The Arizona Supreme Court did not address the merits of the preemption rule because the defendant had not moved to dismiss the direct negligence claims. *Roaf*, 550 P.3d at 179.

[33] In 2021, when the Texas Legislature was considering H.B. 19, which enacted a version of the preemption rule, traffic safety experts, consumer advocates and personal injury attorneys protested the law, while trucking companies and business groups lobbied for its passage, arguing that the rule would prevent frivolous lawsuits. *See Texas Legislature Takes Up Bill Limiting Commercial Liability in Personal Injury*, MARTIN WALKER L. (Aug. 25, 2021), http://martinwalkerlaw.com/texas-legislature-takes-up-bill-limiting-commercial-liability-in-personal-injury/ [https://perma.cc/BN6A-HK8B]; *We Need Safe Roads*, TEX. WATCH, http://www.texaswatch.org/we-need-safe-roads [https://perma.cc/L2FV-3KDY]. See also *infra* notes 156-159 for a discussion of Texas House Bill 19. In 2020, when the Colorado Legislature considered H.B. 21-1188, which effectively repealed the Colorado Supreme Court's common law adoption of the preemption rule, the plaintiffs' bar lobbied in favor of the bill while business groups and associations lobbied against the bill. *See* Katherine Vaughn & Amy Johnson, *Colorado Legislature Overturns Ferrer, Permits Direct Negligence Claims Alongside Respondeat Superior Claim*, LEWIS BRISBOIS BISGAARD & SMITH LLP (Sep. 21, 2021), https://lewisbrisbois.com/newsroom/legal-alerts/colorado-legislature-overturns-ferrer-permits-direct-negligence-claims-alongside-respondeat-claim [https://perma.cc/UB2X-7GRV] (noting that the plaintiffs' bar lobbied for the law); COLO. HOSP. ASS'N, 2021 LEGISLATIVE REPORT 10 (2021) (noting that the state hospital association lobbied against the law). See also *infra* notes 154-155 for a discussion of Colorado Bill 21-1188.

[34] The facts described in this paragraph and the following two paragraphs are taken from *Denton v. Universal Am-Can, Ltd.*, 146 N.E.3d 103, 107-09 (Ill. App. Ct. 2019).

company's safety coordinator reviewed Johnson's application and conducted a background check, she determined that his application should be denied "based on the company's well-established safety standards" because her review revealed that: (i) Johnson had been employed by seven different companies in the ten-year period prior to his application and had been terminated by four of them "for reasons that included tailgating a motorist, a felony conviction, too many points on his license, and crashing into a vehicle after refusing to let it merge onto an interstate ramp;" and (ii) in the seven-year period prior to his application, Johnson was involved in four accidents, convicted of nine traffic related offenses (three of which were for exceeding the speed limit by more than ten miles per hour) and convicted of felony reckless aggravated assault for taking a tire thumper and attempting to bust the headlights of a vehicle that he believed had been tailgating him. Nevertheless, the trucking company's safety director approved Johnson's application, even though the director later conceded that Johnson was a "marginal driver" who should not have been allowed to drive a company truck. The safety director acknowledged that the trucking company was sometimes forced to hire marginal drivers in order earn a profit.

The trucking company continued to employ Johnson even though he failed to attend mandatory safety meetings, had a suspended license, and was cited for speeding, three moving violations, and a logbook violation. Even though the company policy called for the termination of drivers who accumulate more than thirty points, the company continued to employ Johnson even though he had been assessed thirty-six points. At the time of the accident in question, Johnson was speeding on the interstate, driving with a suspended license, and completely unaware of surrounding traffic.

If the plaintiff's claim for direct negligence had been dismissed on the pleadings at the outset of that case pursuant to the preemption rule, the jury's allocation of fault for the plaintiff's compensatory damages would be skewed and distorted, and the plaintiff may have been unable to discover evidence of the employer's grossly negligent and reckless conduct.[35] Even though some plaintiffs may have a sufficient basis upon which to allege direct negligence on the part of the employer at the time the complaint is filed, few will likely have sufficient evidence to support a claim for punitive damages at the outset of litigation. If the plaintiff's claim for direct negligence is dismissed on the pleadings based on the employer's admission that the employee was acting within the scope of employment, evidence of the employer's gross negligence or recklessness may well go undetected because employers will argue that discovery regarding their business practices is not relevant and therefore beyond the scope of discovery.[36]

This Article argues that Mississippi should not blindly follow the preemption rule without carefully considering whether it is necessary and consistent with Mississippi law and precedent.[37] Section I of this Article examines the origins of the preemption rule. Section II examines the manner in which jurisdictions other than Mississippi are currently applying the rule and their justifications for adoption of the rule. Section III examines the Mississippi Court of Appeals' adoption of the preemption rule. Section IV surveys recent opinions by several state appellate courts rejecting the preemption rule and explores their rationales for rejection. Section V concludes that, when the opportunity first arises, the Mississippi Supreme Court should reject the preemption rule because the preemption rule: (i) is inconsistent with Miss. Code Ann. § 85-5-7, Mississippi's comparative fault statute which requires the fact finder to allocate fault to any person whose fault caused or contributed to the accident; (ii) forces a skewed allocation of fault because the factfinder will allocate fault that would otherwise have been allocated to the employer to the plaintiff, thereby reducing the plaintiff's recovery in a case involving negligence on the part of the plaintiff, and/or to other

[35] The Illinois Court of Appeals rejected defendants' request to adopt the preemption rule. *Id.* at 112-13. In addition, the court refused to entertain defendants' argument that the $35 million punitive damage award was unconstitutionally excessive because defense counsel failed to raise the issue in their post-trial motions and thereby failed to preserve any error. *Id.* at 115.

[36] *See* Ribaudo, *supra* note 28, at 994.

[37] *See*, *e.g.*, Burns, *supra* note 15, at 681 (arguing that "[r]ote incantation" of the preemption rule has led to its "unnecessary and unjust application").

defendants in cases involving multiple defendants, thereby subjecting them to liability for a greater portion of damages; (iii) will prevent any recovery in a case where the employer was negligent but the jury determines that the employee was not; (iv) thwarts tort law's goal of deterrence; (v) contradicts the long-standing principle that the plaintiff is the master of the complaint and has the right to determine which claims to pursue; and (vi) ignores the numerous and comprehensive procedural and evidentiary rules that may be employed by trial courts and defense counsel to address any unfair prejudice to the employer.

I. ORIGINS OF THE PREEMPTION RULE

The preemption rule originated in *Houlihan v. McCall,*[38] a 1951 case decided by the Maryland Court of Appeals involving a vehicular accident between an automobile and a commercial truck.[39] Plaintiff sued the truck driver for negligence and asserted vicarious liability, negligent hiring and negligent retention claims against the driver's employer.[40] The court denied the defendants' motions to dismiss.[41] Prior to trial, the defendants admitted that the truck driver was acting in the scope of employment.[42] At trial, over the defendants' objection, the plaintiffs introduced evidence that the defendant truck driver had twice been convicted of reckless driving prior to his employment by the defendant employer and had been convicted of speeding and driving in the wrong lane of traffic just weeks before the accident in question.[43] Judgment was entered on the jury's verdict in favor of the plaintiffs.[44]

The Maryland Court of Appeals reversed, holding that in cases involving claims for vicarious liability, negligent hiring, and negligent retention against an employer, if the employer admits agency, evidence of the defendant driver's prior record "can serve

[38] 78 A.2d 661 (Md. 1951).

[39] *See* Ferrer v. Okbamicael, 390 P.3d 836, 842 (Colo. 2017) (observing that the preemption rule has its origins in the *Houlihan* case).

[40] *Houlihan*, 78 A.2d at 664.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 663-66.

[44] *Id.*

no purpose except to inflame the jury."[45] The court reasoned that because the agency had been admitted, it was not necessary for the plaintiff to present evidence supporting the direct negligence claim because a judgment in the plaintiff's favor on the vicarious liability claim would fully compensate the plaintiff.[46] The court was concerned that the trial court's admission of evidence of the driver's previous traffic convictions created the risk that the jury might impermissibly infer "that because the [driver] had been negligent on other occasions, he was negligent at the time of the accident."[47] Thus, the court held that it was reversible error to admit evidence of the defendant driver's record.[48]

Shortly thereafter, in 1954, the California Supreme Court applied similar reasoning in *Armenta v. Churchill,*[49] a case in which a dump truck ran over and killed a road worker.[50] There, plaintiffs sued the dump truck driver and the driver's employer, who also owned the dump truck.[51] Plaintiff alleged that the driver was negligent, that the driver's employer was vicariously liable, and that the driver's employer had negligently entrusted the dump truck to the driver.[52] Prior to trial, the defendants admitted that the defendant driver was acting within the scope of employment of the defendant truck owner.[53] The trial court excluded evidence that the truck owner was aware that the driver had thirty-seven traffic violations, including a manslaughter conviction.[54] Judgment was entered reflecting the jury's verdict for the defendants.[55]

The California Supreme Court affirmed, reasoning that the only way the jury could have returned a verdict on the negligent

[45] *Id.* at 666.
[46] *Id.* at 666.
[47] *Id.* at 665. See *infra* notes 357-359 and accompanying text for a more detailed discussion of the evidentiary rules governing admissibility of "propensity" evidence.
[48] *Houlihan*, 78 A.2d at 666.
[49] 267 P.2d 303 (Cal. 1954). *See also* Ferrer v. Okbamicael, 390 P.3d 836, 842 (Colo. 2017) (noting that *Armenta* followed *Houlihan*).
[50] *Armenta*, 267 P.2d at 305.
[51] *Id.* at 308.
[52] *Id.*
[53] *Id.* at 308-09.
[54] *Id.* at 308.
[55] *Id.* at 305.

entrustment claim was to find that the driver was negligent.[56] "Since the legal issue of [the employer's] liability for the alleged tort was thereby removed from the case [by her admission of agency], there was no material issue remaining to which the offered evidence could be legitimately directed."[57] Thus, the court found no error in the trial court's exclusion of the employee's poor driving record.[58] Notably, both the Maryland Court of Appeals and the California Supreme Court simply reviewed the trial court's admission of evidence. Neither court established a rule that plaintiffs' claims for direct negligence are subject to dismissal on the pleadings if the employer admits the employee was acting in the scope of employment.

Decades later, in 1995, the Missouri Supreme Court decided *McHaffie v. Bunch*,[59] the seminal case recognizing the preemption rule.[60] There, Laura McHaffie was riding as a passenger in a car driven by Cindy Bunch.[61] A tractor-trailer driven by Donald Farmer collided with the vehicle driven by Bunch.[62] The tractor-trailer was owned by Bruce Transport and Leasing (Bruce), but was leased to Rumble Transport (Rumble).[63] McHaffie suffered permanent physical and mental injuries.[64] McHaffie's guardian sued Bunch, Farmer, Bruce, and Rumble. The plaintiff alleged that: (i) Bunch negligently drove on the wrong side of the road; (ii) Farmer was fatigued, negligently failed to maintain a proper lookout and negligently failed to take action to avoid the accident; (iii) Bruce and Rumble were vicariously liable for Farmer's negligence; and (iv) Bruce and Rumble had negligently hired and supervised Farmer.[65] Bruce and Rumble admitted that Farmer was their employee acting in the scope of employment.[66]

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[56] *Id.* at 308-09.
[57] *Id.* at 309.
[58] *Id.*
[59] 891 S.W.2d 822 (Mo. 1995).
[60] *See* Ferrer v. Okbamicael, 390 P.3d 836, 842 (Colo. 2017) (noting that *McHaffie* is the "most frequently cited case articulating [the] rule").
[61] *McHaffie*, 891 S.W.2d at 824.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* At trial, plaintiff only submitted the direct claim against Rumble to the jury.
[66] *Id.* at 824.

At trial, the plaintiff introduced evidence that "Rumble did not require Farmer to have adequate experience, testing, training, and medical evaluations," that Rumble did not enforce regulations requiring Farmer to properly maintain logbooks, and that Farmer had driven longer than the legally permissible time period.[67] The plaintiff also introduced expert testimony that Farmer could have avoided the collision if he had been "properly observant."[68] The jury returned a verdict for the plaintiff, determined that the plaintiff's damages totaled more than $5.25 million, and allocated 70% of the fault to Bunch, 10% to Farmer (which was imputed to Bunch and Rumble based on their vicarious liability for Farmer), 10% to Rumble based on its negligent hiring and supervision of Farmer, and 10% to McHaffie based on her negligence in riding with a visibly intoxicated driver.[69]

The Missouri Supreme Court held that the trial court erred in admitting evidence of Rumble's direct negligence and in submitting that claim to the jury.[70] The court explained that there are at least three theories pursuant to which an employer can be held liable based upon an employee's negligence—(i) vicarious liability; (ii) negligent entrustment; and (iii) negligent hiring.[71] The court determined that to succeed on any of the three claims, the plaintiff must prove the employee's negligence.[72] The court then concluded that if all three claims are submitted to a jury in a case where the employer has admitted that the employee was acting in the scope of employment, the evidence of the employer's negligence is not necessary, "serves no real purpose," and wastes

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[67] *Id.* at 824, 828.

[68] *Id.* at 828.

[69] *Id.* at 825. Evidence was introduced that on the evening in question, prior to the accident, McHaffie and Bunch were together, and Bunch had been drinking. *Id.* at 831-32.

[70] *Id.* at 827.

[71] *Id.* at 825-26.

[72] *Id.* With respect to negligent entrustment, the court observed that the plaintiff must prove that the employer negligently entrusted the employee with chattel in light of the employee's past experience and that the employee's negligent operation of the chattel caused the plaintiff's injury. *Id.* at 825. With respect to negligent hiring, the court noted that the plaintiff must prove that the employer negligently hired the employee in light of the employee's history and experience, and that the employee's negligence caused the plaintiff's injury. *Id.* at 825-26.

the courts' and litigants' time and energy.[73] The court reasoned that once vicarious liability is established, the employer's liability is fixed and is coextensive with the employee's fault.[74] The court expressed concern that admission of evidence of the driver's prior record in support of the claim for direct negligence might cause the jury to allocate more fault to the employer than to the employee—a result the court characterized as "plainly illogical."[75]

Rather than order a completely new trial, however, the court determined that only Farmer, Bruce, and Rumble were prejudiced by the admission of evidence of Rumble's direct negligence and that only the jury's allocation of fault to them should be set aside.[76] Thus, the court ordered that the 10% of fault allocated to Farmer (and imputed to Bunch and Rumble based on their vicarious liability) and the 10% of fault allocated to Rumble (based upon its negligent hiring and supervision of Farmer) be reallocated among Bunch, McHaffie, and Farmer.[77] On remand, the jury increased the allocation of fault to Bunch from 70% to 75%, left McHaffie's fault at 10%, and increased the fault allocated to Farmer from 10% to 15%.[78]

Importantly, the Missouri Supreme Court did not establish a clear rule pursuant to which a plaintiff's direct negligence claim is subject to dismissal at the pleading stage prior to discovery. Instead, the court held that it was error to submit the direct negligence claim to the jury at trial.[79] Although the *McHaffie* court cited opinions in a handful of states as establishing what it characterized as the majority rule,[80] none of the cited cases established a rule that direct negligence claims are subject to dismissal at the pleadings stage prior to discovery.[81] Moreover, the

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[73] *Id.* at 826.

[74] *Id.*

[75] *Id.* at 827.

[76] *Id.* at 827-28.

[77] *Id.* at 828.

[78] McHaffie v. Bunch, 951 S.W.2d 340, 341 (Mo. Ct. App. 1997).

[79] *McHaffie*, 891 S.W.2d at 827.

[80] *Id.* at 826.

[81] The *McHaffie* court cited the Arkansas Supreme Court's opinion in *Elrod v. G & R Construction Co.*, 628 S.W.2d 17 (Ark. 1982), as adopting the "majority" view that it is improper to permit the plaintiff to proceed on a claim for direct negligence once an employer has admitted that it will be vicariously liable for any negligence on the part of the employee. *McHaffie*, 891 S.W.2d at 826. In *Elrod*, the Arkansas Supreme Court

Missouri Supreme Court acknowledged that there may be circumstances where it is necessary to submit direct negligence claims to the jury.[82] The court surmised that it may be possible in some cases for an employer to be held directly liable even when

affirmed the trial court's dismissal of the plaintiff's negligent entrustment claim immediately prior to trial based upon the employer's admission that the driver was acting within the scope of employment. *Elrod*, 628 S.W.2d at 18. The *Elrod* court reasoned that evidence of the employer's negligent entrustment was not necessary since both claims required the plaintiff to prove the employee's negligence. *Id.* at 19. The court observed that a jury finding that the employee was negligent would subject the employer to vicarious liability, thereby making the potentially prejudicial evidence of negligent entrustment unnecessary. *Id.* The court acknowledged, however, that a plaintiff might be able to pursue claims for punitive damages based upon the employer's conduct but noted that the plaintiff had insufficient evidence to support such a claim. *Id.* The *Elrod* court did not adopt a rule that a plaintiff's claim for direct negligence is subject to dismissal at the pleadings stage before discovery. Moreover, courts in Arkansas have since recognized exceptions to the preemption rule in cases where the employer may be held liable even if the jury determines the employee was not negligent and in cases where the plaintiff has a valid claim for punitive damages. *See* McCaslin v. French Trucking, Inc., No. 2:16CV000049 JLH, 2017 WL 4228204, at *3 (E.D. Ark. Sep. 22, 2017).

The *McHaffie* court also cited the Idaho Supreme Court's opinion in *Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178 (Idaho 1986), as one recognizing the "majority" rule. *McHaffie*, 891 S.W.2d at 826. The *Wise* court affirmed the trial court's exclusion of plaintiff's evidence in support of the direct negligence claims after the employer admitted at trial that it would be responsible for any negligence attributable to the employer. *Wise*, 718 P.2d at 1180-81. The court characterized the rule as one prohibiting evidence of direct negligence at trial and acknowledged that the rule should not apply when the plaintiff's claim of direct negligence is not reliant upon the employee's negligence or when the plaintiff is pursuing punitive damages. *Id.* at 1181-82.

The *McHaffie* court also cited the Florida Court of Appeals opinion in *Clooney v. Geeting*, 352 So. 2d 1216 (Fla. Dist. Ct. App. 1977) as one adopting the "majority" rule. *McHaffie*, 891 S.W.2d at 826. The *Clooney* court held that when the direct liability claim will impose no additional liability over and above the liability that would be imposed if the employee is found negligent, the "trial court should not allow [both claims] to be presented to the jury." *Clooney*, 352 So. 2d at 1220. The *Clooney* court acknowledged the need for a different approach when it is possible that the employer may be held liable on the direct claim even if the jury determines the employee was not negligent, such as a claim for punitive damages or a claim where the employer negligently entrusts a vehicle with a brake defect to an employee who has no actual or constructive knowledge of the brake defective brake. *Id.*

[82] *McHaffie*, 891 S.W.2d at 827. Many of the opinions cited by the *McHaffie* court similarly recognized the need for exceptions in cases where the employer could be subject to direct liability even in the absence of an employee's negligence or in cases where the plaintiff is pursuing punitive damages against the employer. *See* cases cited *supra* note 81.

the employee has not acted negligently.[83] Similarly, the court posited that the plaintiff might have a claim for punitive damages against the employer, which would presumably require the plaintiff to prove the employer's gross negligence or recklessness.[84] Finally, the court noted that an employer might have a claim for indemnity against the employee, in which case an allocation of fault between the two would seemingly be necessary.[85] Because the case before it did not raise any of those issues, the Missouri Supreme Court determined that it could "await another day."[86] Although Missouri had adopted comparative fault with respect to negligence on the part of the plaintiff in the early 1980s,[87] the *McHaffie* court did not acknowledge that its ruling could cause a distorted allocation of fault by precluding an allocation of fault to the employer.[88]

II. MODERN APPLICATION OF THE PREEMPTION RULE

Even though the preemption rule originated as an evidentiary rule, many jurisdictions currently treat it as a procedural rule pursuant to which a plaintiff's claim for direct negligence is barred once the employer admits the employee was acting within the scope of employment. In addition, although the rule originated before many states adopted comparative fault, some jurisdictions continue to apply the rule even after moving to a comparative fault scheme.

A. Maryland

Although *Houlihan v. McCall* involved appellate review of the trial court's admission of evidence,[89] courts in Maryland are treating that opinion as precedent that requires dismissal of the

[83] *McHaffie*, 891 S.W.2d at 826.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *See* Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983).
[88] *See McHaffie*, 891 S.W.2d 822. At the time *McHaffie* was decided, Missouri imposed joint and several liability upon joint tortfeasors. In 2005, section 537.067 of the Missouri Revised Statutes was amended to limit joint and several liability. *See* H.B. 393, 93d Gen. Assemb., Reg. Sess. (Mo. 2005).
[89] 78 A.2d 661, 665-66 (Md. 1951).

plaintiff's claim for direct negligence on the pleadings at the outset of litigation if the employer has admitted the employee was acting in the scope of employment.[90] Given that Maryland still imposes joint and several liability and contributory negligence,[91] there is no argument that Maryland's adoption of the preemption rule is inconsistent with the manner in which it imposes liability. Although no Maryland appellate court appears to have determined whether there is an exception when the plaintiff sues the employer for punitive damages,[92] some federal courts have refused to recognize an exception.[93]

B. California

In 2011, the California Supreme Court decided *Diaz v. Carcamo* and held that its 1954 *Armenta* opinion continues to control, even though California adopted comparative fault principles in 1986.[94] In *Diaz*, the plaintiff sued a truck driver, the truck driver's employer, and another motorist for negligence.[95] The plaintiff brought vicarious liability, negligent hiring, and negligent retention claims against the employer.[96] The employer admitted that its employee was driving in the scope of employment and argued that its admission precluded the plaintiff from pursuing her direct negligence claim.[97] Over the employer's objection, the trial court admitted evidence relevant to the negligent hiring and negligent retention claims, including evidence of other accidents in which the employee driver had been involved and evidence related to the employer's hiring of the

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90 *See, e.g.*, Sneed v. SW Trucking LLC, No. ADC-19-626, 2020 WL 1812866, at *4 (D. Md. Apr. 9, 2020); Day v. Stevens, No. 17-02638-JMC, 2018 WL 2064735, at *5 (D. Md. May 3, 2018).

91 *See* Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 MD. L. REV. 701, 704 (2014).

92 *See* Villalta v. B.K. Trucking & Warehousing, L.L.C., No. DKC 2007-1184, 2008 WL 11366412, at *6 (D. Md. Aug. 4, 2008).

93 *See, e.g.*, Est. of Grillo *ex rel.* Grillo v. Thompson, No. GLR-21-3132, 2022 WL 3027859, at *8 (D. Md. Aug. 1, 2022).

94 253 P.3d 535, 542-44 (Cal. 2011).

95 *Id.* at 538.

96 *Id.* at 538-39.

97 *Id.*

driver.[98] The jury allocated 20% of the fault to the employee truck driver, 35% of the fault to the truck driver's employer, and 45% of the fault to the other motorist.[99] Judgment was entered in accordance with California's Fair Responsibility Act of 1986 (Proposition 51), which imposes joint and several liability for economic damages but several liability for non-economic damages.[100] Thus, a defendant is severally liable for the amount of "non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault," which is equal to "his or her proportionate share of fault as compared with all fault responsible for the plaintiff's injuries."[101]

The Court of Appeals affirmed, holding that *Armenta* was no longer controlling because it was decided long before California's adoption of comparative fault.[102] The California Supreme Court reversed, holding that *Armenta* continues to control and is consistent with Proposition 51 and comparative fault principles.[103] The court held that an assignment of fault to the employer "greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss."[104] The court determined that absent the rule, the employer would be prejudiced because the employer would likely be liable for more total damages if the jury were permitted to separately allocate fault to the employee and employer.[105]

Although the California Court of Appeals has since held that the preemption rule does not bar a plaintiff's claim for punitive damages against the employer,[106] California courts have held that once the employer admits the employee was acting in the scope of employment, the plaintiff can no longer conduct discovery regarding the direct negligence claim because such discovery is no

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[98] *Id.* at 539.

[99] *Id.*

[100] *Id.* at 541.

[101] *Id.* (first quoting CAL. CIV. CODE § 1431.2(a) (West 1986); and then quoting DaFonte v. Up-Right, Inc., 828 P.2d 140, 146 (Cal. 1992)).

[102] *Id.* at 539.

[103] *Id.* at 543-44.

[104] *Id.* at 544.

[105] *Id.* at 545.

[106] *See* CRST, Inc. v. Super. Ct., 218 Cal. Rptr. 3d 664, 673 (Ct. App. 2017).

longer relevant and is not proportional to the needs of the case, unless the plaintiff has asserted a claim for punitive damages against the employer.[107]

C. Missouri

In the wake of the Missouri Supreme Court's decision in *McHaffie*, some Missouri courts view the opinion as requiring dismissal of the plaintiff's claim for direct negligence at the pleadings stage,[108] while others view the opinion as addressing admission of evidence and allocation of fault at trial.[109] Although the Missouri Supreme Court left the issue of a punitive damages exception for another day, the Missouri Court of Appeals recognized such an exception in 2013, but emphasized that the plaintiff must plead sufficient facts to support a claim for punitive damages.[110]

D. Wyoming

The Wyoming Supreme Court first adopted the preemption rule in 2018 in *Bogdanski v. Budzik*.[111] There, a plaintiff injured in a commercial trucking accident brought a negligence claim against the commercial truck driver and vicarious liability and negligent training claims against Fed Ex, which had contracted with the driver's employer to haul trailers.[112] FedEx stipulated that it would be vicariously liable if the jury determined that the driver was negligent and later moved for summary judgment, arguing that the preemption rule barred the plaintiff's claim for direct negligence.[113] The trial court granted the motion.[114]

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[107] *See, e.g.*, Moore v. Superway Logistics, Inc., No. 1:17-cv-01480-DAD-BAM, 2019 WL 2285392, at *5-7 (E.D. Cal. May 29, 2019).

[108] *See, e.g.*, Brown v. Larabee, No. 04-1025-CV-W-HFS, 2005 WL 1719908, at *1 (W.D. Mo. July 25, 2005).

[109] *See, e.g.*, Ershen v. Keep Running Trucking Corp., No. 4:19 CV 1200 RWS, 2019 WL 13198752, at *1 (E.D. Mo. May 31, 2019); Cisco v. Mullikin, No. 4:11 CV 295 RWS, 2012 WL 549504, at *1 (E.D. Mo. Feb. 21, 2012).

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

[111] 408 P.3d 1156, 1162 (Wyo. 2018).

[112] *Id.* at 1157-59.

[113] *Id.* at 1159-60. As explained by the court, title 49, section 390.11 of the Code of Federal Regulations imposed a duty upon FedEx, a commercial motor carrier, to "ensure that its contractors' drivers obey federal safety rules." *Id.* at 1162.

The Wyoming Supreme Court affirmed and adopted the preemption rule after determining that the plaintiff's claims for vicarious liability and direct negligence were duplicative because both required the plaintiff to prove that the driver was negligent.[115] The court reasoned when an employer has admitted the employee was acting in the scope of employment, if the plaintiff proves the employee was negligent, the plaintiff is entitled to recover the same damages that could be recovered pursuant to the direct negligence clam.[116] Importantly, the court's adoption of the preemption rule was based on its determination that proving tortious conduct by an employee is a predicate requirement for any claim for negligent training or supervision.[117] The court concluded that the rule was consistent with Wyoming's comparative fault scheme because it determined that allowing separate allocations of fault to the employee and the employer could lead to a double allocation, and that allowing both claims to be tried simultaneously could lead to practical complications.[118] The court also expressed concern that in cases involving claims for vicarious liability, negligent training, and negligent entrustment, the jury might impermissibly consider evidence of the driver's prior record as evidence of driver's negligence in the case at issue.[119]

A few years later, however, the Wyoming Supreme Court qualified its adoption of the preemption rule in *JTL Group, Inc. v. Gray-Dockham*.[120] There, the plaintiff brought a wrongful death accident against a road contractor and subcontractor responsible for a pavement resurfacing project, alleging that defendants caused her father's death in a motorcycle-vehicle collision in a construction work zone.[121] The plaintiff brought a negligence claim against the subcontractor and vicarious liability and direct negligence claims against the contractor.[122] At trial, the jury

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114 *Id.* at 1160.
115 *Id.* at 1162-64.
116 *Id.* at 1162.
117 *Id.* at 1162-63.
118 *Id.* at 1163.
119 *Id.* at 1163-64.
120 510 P.3d 1060, 1066 (Wyo. 2022).
121 *Id.* at 1061-62.
122 *Id.* at 1064.

returned a verdict in favor of the plaintiff and allocated 10% of the fault to the vehicle driver, 60% of the fault to the contractor, and 30% of the fault to the subcontractor.[123]

On appeal, the contractor and subcontractor argued that, pursuant to the preemption rule, the trial court erred in allowing the plaintiff to simultaneously pursue the vicarious liability and direct negligence claims against the contractor.[124] The Wyoming Supreme Court affirmed the judgment, holding that "*Bogdanski* does not stand for the broad proposition a principal can never be listed on the verdict form for a direct negligence claim, particularly when the actions of the principal are separate and independent from the agent's actions."[125] The court reasoned that where the direct negligence and vicarious liability claims are not wholly tethered to one another such that the direct negligence claim will fail if the plaintiff is unable to prove negligence on the part of the employee, the preemption rule has no application because it is possible for the plaintiff to prevail on the direct negligence claim against the employer even if the plaintiff does not prevail on the negligence claim against the employee.[126] In light of evidence of independent negligence on the part of the contractor, the court held that Wyoming's comparative fault statute required that the jury be permitted to separately allocate fault to the contractor and to the subcontractor.[127] Thus, if there is any negligent conduct on the part of the employer that would give rise to liability absent negligence on the part of the employee, dismissal of the direct negligence claim is improper.[128] Although

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[123] *Id.* at 1065-66.

[124] *Id.* at 1066.

[125] *Id.* at 1066.

[126] *Id.* at 1066-68.

[127] *Id.* at 1068-69 (citing WYO. STAT. ANN. § 1-1-109). A few years later, the Wyoming Supreme Court held that "Wyoming law allows a plaintiff to simultaneously pursue direct and vicarious liability claims when the direct liability claim is premised on the actions of the principal that are separate and independent from the actions on the agent." Elsner v. Campbell Cnty. Hosp. Dist., 566 P.3d 894, 913 (Wyo. 2025).

[128] *See* Benjamin B. Hoyer, Comment, *The Gate Keepers of Trucking Safety: Keeping Motor Carriers Accountable for Their Negligent Employment Actions*, 24 WYO. L. REV. 535, 557 (2024).

the court recognized the potential need for a punitive damages exception to the rule, it did not explicitly adopt one.[129]

E. Indiana

In 2017, the Indiana Supreme Court adopted the preemption rule in *Sedam v. 2JR Pizza Enterprises, LLC.*[130] After a scooter operator was killed in an accident, his estate sued a pizza delivery driver who collided with the rear of the scooter, the driver's employer, and another motorist who ran over the scooter operator after he was thrown from the scooter.[131] Plaintiff asserted vicarious liability and direct negligence claims against the employer.[132] After the defendant employer admitted that the pizza delivery driver was acting within the scope of employment, the trial court granted summary judgment to the employer on the plaintiff's direct negligence claims.[133] The Indiana Court of Appeals reversed and held that, consistent with Indiana's Comparative Fault Act, the plaintiff could pursue claims for vicarious liability and direct negligence.[134]

The Indiana Supreme Court disagreed and affirmed the trial court's grant of partial summary judgment.[135] It held that once the employer admits course and scope, the plaintiff may not simultaneously pursue claims for vicarious liability and direct negligence, reasoning that "[i]f a jury were allowed to allocate fault under both theories, the employer could be assessed fault in excess of the employee's negligence it already assumed in full."[136] The court concluded that allowing the plaintiff to pursue both claims would "prejudice the employer, confuse the jury, and waste judicial resources."[137] In the wake of *Sedam*, courts in Indiana have granted defendant employers' motions to dismiss direct

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[129] *JTL Group, Inc.*, 510 P.3d at 1067 (citing McHaffie *ex rel.* McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995)).
[130] 84 N.E.3d 1174, 1178-79 (Ind. 2017).
[131] *Id.* at 1176.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 1179,
[136] *Id.* at 1179.
[137] *Id.* at 1178.

negligence claims on the pleadings.[138] Federal district courts in Indiana have recognized a punitive damages exception.[139]

F. Colorado

In a split decision in 2017, the Colorado Supreme Court adopted the preemption rule in *Ferrer v. Okbamicael*.[140] There, a pedestrian who had been run over by a cab sued the cab driver for negligence and negligence per se, and sued the cab driver's employer for vicarious liability and direct negligence.[141] The trial court dismissed the direct negligence claims on the pleadings and entered an order prohibiting discovery regarding the employer's hiring, retention, training, and supervision.[142]

The Colorado Supreme Court affirmed and adopted the preemption rule.[143] In the court's view, the direct negligence claims asserted against the employer required evidence of negligent conduct by the employee.[144] Thus, the court reasoned that evidence of the employer's negligence is superfluous and unnecessary.[145] The court also expressed concern that evidence of a driver's prior record could be unfairly prejudicial and that direct negligence claims might expose employers to duplicative damages.[146] The court held that the preemption rule is consistent with Colorado's comparative fault system, reasoning that rejection of the rule would encourage a plaintiff to assert direct negligence claims in an attempt to reduce the fault allocated to the plaintiff.[147] The court acknowledged that the rule is not applicable to cases where the employer's liability on the claim for direct negligence does not require a finding of negligence on the part of

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[138] *See, e.g.*, Massey v. Schneider Nat'l Carriers, Inc., No. 1:24-CV-399-HAB, 2025 WL 1633744, at *2 (N.D. Ind. June 4, 2025).

[139] *See, e.g.*, LeBlanc v. Singh, No. 1:24-CV-00838-SEB-MKK, 2025 WL 754491, at *2 (S.D. Ind. Mar. 10, 2025).

[140] 390 P.3d 836, 850 (Colo. 2017).

[141] *Id.* at 840.

[142] *Id.*

[143] *Id.* at 844-45.

[144] *Id.* at 844 ("[T]ortious conduct by an employee is a predicate in direct negligence claims against the employer.").

[145] *Id.* at 845.

[146] *Id.*

[147] *Id.* at 846-47.

an employee.[148] The court refused to recognize an exception for punitive damages claims, reasoning that a claim for punitive damages is not a separate claim and holding that once the plaintiff's claim for direct negligence is dismissed at the pleading stage, there is no remaining freestanding claim against the employer warranting punitive damages.[149]

The dissent strongly disagreed with the majority's conclusion that the preemption rule is consistent with Colorado's comparative negligence statute. The dissent demonstrated the inconsistency with an example based on the facts of the case.[150] If the direct liability claim were to remain in the case and the jury were to determine that the plaintiff, defendant employee driver, and defendant employer were equally at fault, the plaintiff would be entitled to recover two-thirds of her damages.[151] If, however, the direct liability claims are preempted, and the jury allocates fault evenly between the plaintiff and the defendant employee driver, the plaintiff would not be entitled to any recovery because the statute bars recovery if the plaintiff's fault is equal to or greater than that of the defendant.[152] The dissent argued that the rule creates a litigation tactic that allows an employer "to manipulate a plaintiff's [well-pleaded complaint] to its significant advantage."[153]

In 2021, the Colorado Legislature reversed the court's holding in *Ferrer* by amending an existing statute to explicitly authorize plaintiffs to pursue vicarious liability and direct negligence claims simultaneously against an employer, even if the employer concedes that the employee was acting in the scope of employment.[154] As amended, the statute expressly states the legislature's intent to reverse the *Ferrer* holding, provides that a plaintiff's claim for direct negligence is not barred simply because the employer admits vicarious liability, and specifically authorizes

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148 *Id.* at 845-46. For instance, an employer could negligently entrust a vehicle with defective brakes to an employee who has no reason to know of the defect.

149 *Id.* at 848.

150 *Id.* at 853 (Gabrielle, J., dissenting).

151 *Id.*

152 *Id.*

153 *Id.* at 854.

154 2021 Colo. Legis. Serv. 863 (West) (amending COLO. REV. STAT. ANN. § 13-21-111.5).

plaintiffs to conduct discovery regarding the direct negligence and vicarious liability claims.[155]

G. Texas

In 2021, the Texas Legislature enacted House Bill 19, which governs litigation against commercial motor vehicle owners and operators.[156] The Bill partially codifies the preemption rule. If the driver's employer stipulates that the driver was acting in the scope of employment, then the employer may seek a bifurcated trial.[157] During the first phase, the jury would determine liability for actual damages and their amount. If the plaintiff is pursuing claims for vicarious liability and direct negligence and the direct negligence claim is contingent on the employee's negligence, such as a negligent entrustment claim, the plaintiff may not introduce evidence of the employer's direct negligence during the first phase of trial.[158] If, however, the plaintiff's claim for direct negligence is not contingent upon the employee's negligence, such as a negligence maintenance claim, then the plaintiff may introduce evidence of the employer's direct negligence during the first phase of trial. The plaintiff may pursue punitive damages in the second phase of trial and may introduce evidence of the employer's gross negligence.[159]

The contemporary justifications offered for the preemption rule can be summarized as follows: (i) the rule is necessary to prevent the jury from hearing unfairly prejudicial evidence; (ii) the rule is necessary to avoid excessive and irrelevant discovery; (iii) the rule is necessary prevent the employer from paying duplicative damages; (iv) the rule is necessary to avoid excessive verdicts; (v) the rule is necessary to save resources; and (vi) the rule is consistent with comparative fault principles. Although some jurisdictions have recognized the need for exceptions when the plaintiff sues the employer for punitive damages or when the direct negligence claim against the employer is not contingent on the employee's negligence, others do not.

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[155] COLO. REV. STAT. ANN. § 13-21-111.5(1.5)(a), (c) (West 2021).
[156] 2021 Tex. Sess. Law Serv. 1855 (West) (H.B. 19).
[157] TEX. CIV. PRAC. & REM. CODE ANN. §§ 72.052(a), 72.054(a) (West 2023).
[158] *Id.* § 72.054(b).
[159] *Id.* § 72.054(f).

III. RECOGNITION AND APPLICATION OF THE PREEMPTION RULE IN MISSISSIPPI

The Mississippi Court of Appeals first affirmed the application of the preemption rule in *Carothers v. City of Water Valley*.[160] There, a motorist sued the city pursuant to the Mississippi Tort Claims Act for injuries she sustained when her vehicle was rear-ended by a police car.[161] Pursuant to the act, she was required to prove that the city and/or police officer was acting with reckless disregard for the safety of others.[162] The plaintiff alleged that the officer acted with reckless disregard in the operation of the police car and that the city acted with reckless disregard in its hiring, training, and supervision of the officer and its entrustment of the patrol car to the officer.[163] The city admitted that it would be vicariously liable for the officer's conduct if he acted with reckless disregard.[164] The city moved to dismiss the plaintiff's direct liability claim, arguing that it was barred as a matter of law given that the city admitted vicarious liability in the event the officer was reckless.[165] The court granted the motion to dismiss.[166] After a bench trial, the court entered judgment for the city.[167]

On appeal, the Mississippi Court of Appeals rejected the plaintiff's argument that the trial court erred in dismissing her direct liability claim against the city for failure to state a claim.[168] The Court of Appeals noted the absence of controlling Mississippi law and adopted the reasoning of *Davis v. ROCOR International*, a federal district court case in which the court made an *Erie* guess as to whether Mississippi would follow the preemption rule.[169]

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[160] 242 So. 3d 138, 144-45 (Miss. Ct. App. 2017).

[161] *Id.* at 139-40.

[162] *Id.* at 140; MISS. CODE ANN. § 11-46-9(1)(c) (2025).

[163] *Carothers*, 242 So. 3d at 140.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* at 144-45.

[169] *Id.* (adopting the reasoning of Davis v. ROCOR Int'l, No. 3:00-CV-864, 2001 U.S. Dist. LEXIS 26216 (S.D. Miss. Dec. 19, 2001)). Although some have suggested that Mississippi adopted a preemption rule in *Nehi Bottling Co. of Ellisville v. Jefferson*, 84 So. 2d 684 (Miss. 1956), later courts recognized that the *Nehi Bottling* court did not adopt a preemption rule; it merely ruled that the lower court's admission of evidence of

In *Davis*, the plaintiff sued the defendant employer for negligent entrustment, negligent hiring, negligent retention, and negligent training.[170] The *Davis* court granted the employer's motion for summary judgment on the plaintiff's claims for direct negligence based on the employer's admission of scope.[171] The court's ruling was not based on any insufficiency in the plaintiff's evidence. Instead, the court reasoned that because the employer's liability on the claims for direct negligence required a finding that the employee was also negligent, any evidence of the employer's direct negligence was not necessary to the plaintiff's recovery and could be unfairly prejudicial.[172]

Based on the federal district court's rationale in *Davis*, the *Carothers* court held that the trial court's dismissal of plaintiff's direct negligence claims for failure to state a claim pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure was proper.[173] Given the weighty implications of the preemption rule, it is surprising that neither the Mississippi Court of Appeals, nor the *Davis* court upon which it relied, discussed Section 85-5-7 of the Mississippi Code, which requires the factfinder to "determine the percentage of fault for each party alleged to be at fault."[174] Although the Mississippi Court of Appeals recently affirmed application of the preemption rule in 2024, in *Taylor v. Johnson*,[175] it did so summarily—without any discussion of Section 85-5-7, and without any discussion of the recent cases in which the rule was rejected by the Supreme Courts of Georgia, Illinois, Kentucky, Louisiana, South Carolina, Tennessee and

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the employee's driving record in support of the plaintiff's direct negligence claim was error. *Nehi Bottling*, 84 So. 2d at 686. *See also* Thompson v. Intermodal Cartage Co., LLC, No. 2:24-CV-34-KS-MTP, 2025 WL 699355, at *4 (S.D. Miss. Mar. 4, 2025) (observing that the *Nehi Bottling* court did not establish a preemption rule, it merely reviewed the trial court's admission of evidence); Dinger v. Am. Zurich Ins. Co., No. 3:13-CV-46-MPM-SAA, 2014 WL 580889, at *2 (N.D. Miss. Feb. 13, 2014) (similarly observing that the Mississippi Supreme Court did not adopt a preemption rule in *Nehi Bottling*). Moreover, *Nehi Bottling* was decided long before the Mississippi Legislature enacted section 85-5-7 of the Mississippi Code, governing allocation of fault in tort actions.

170 *Davis*, 2001 U.S. Dist. LEXIS 26216, at *4.

171 *Id.* at *22-24.

172 *Id.* at *19-20.

173 *Carothers*, 242 So. 3d at 144.

174 MISS. CODE ANN. § 85-5-7(5) (2025).

175 395 So. 3d 402, 408 (Miss. Ct. App. 2024).

Utah.[176] Although some federal courts in Mississippi have recognized a punitive damages exception, others have not.[177]

IV. RECENT REJECTION OF THE PREEMPTION RULE BY OTHER STATES

Although some have asserted that the preemption rule is the majority rule, courts are split on the issue,[178] and several recent decisions by state supreme courts indicate that rejection of the rule is the modern trend.[179] Rather than arguing that Mississippi reject the preemption rule simply because that is the modern trend, it is more illuminating to evaluate the rationales offered by state supreme courts that have recently rejected the preemption rule.[180]

A. Tennessee

In 2024, the Tennessee Supreme Court unanimously rejected the preemption rule in *Binns v. Trader Joe's East, Inc*.[181] There, a plaintiff who had slipped and fallen at a Trader Joe's store sued Trader Joe's for vicarious liability, premises liability, negligent training and negligent supervision.[182] Trader Joe's moved for partial judgment on the pleadings, arguing that plaintiff's claims for negligent training and negligent supervision should be dismissed pursuant to the preemption rule.[183] The trial court denied the motion.

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[176] *See id.*; *see also infra* notes 181-258 and accompanying text discussing these recent cases.

[177] *See* cases cited *supra* note 26.

[178] *See* McQueen v. Green, 202 N.E.3d 268, 278 (Ill. 2022); MV Transp., Inc. v. Allgeier, 433 S.W.3d 324, 334 n.8 (Ky. 2014).

[179] *See infra* notes 181-258 and accompanying text discussing recent supreme court opinions rejecting the preemption rule; *see also* Seth Howton, Note, *Passing the Buck: How Employers Suppress Evidence and Reduce Liability Through the Admission Rule*, 76 BAYLOR L. REV. 659, 663, 667 n.13 (2024) (noting that the modern trend is to reject the rule and listing thirteen jurisdictions that have rejected the rule).

[180] *See MV Transp., Inc.*, 433 S.W.3d at 334 n.8. Rather than giving a rule weight simply because it is the majority rule or because it reflects the modern trend, it is more prudent to evaluate the rule based upon its merits, "which may or may not correspond with [the rule's] popularity . . . ." *Id.*

[181] 690 S.W.3d 241 (Tenn. 2024).

[182] *Id.* at 244-45.

[183] *Id.* at 245.

The Tennessee Supreme Court affirmed, concluding that "the preemption rule conflicts with Tennessee's system of modified comparative fault and certain well-established principles of Tennessee jurisprudence."[184] The court reviewed its 1992 opinion in *McIntyre v. Balentine*,[185] where the court: (i) abolished contributory negligence as a complete bar to a plaintiff's recovery and adopted a system of modified comparative fault pursuant to which a negligent plaintiff may recover proportional damages when the plaintiff's fault is less than the combined fault of all other tortfeasors, thereby making it necessary for the fact finder to allocate fault and (ii) held that several liability, rather than joint and several liability, would be imposed upon joint tortfeasors.[186] The *Binns* court reasoned that the *McIntyre* court sought to achieve "a tighter fit between liability and fault"[187] and concluded that adoption of the preemption rule would yield the opposite result because the factfinder would be required to allocate the employer's fault to the plaintiff and any other tortfeasors, including other defendants.[188] The court observed that such a distortion of the allocation of fault could not only increase the damages owed by other defendants but might even bar the plaintiff's recovery by increasing the plaintiff's share of fault to an amount above 50%.[189]

In addition to finding the preemption rule inconsistent with Tennessee's system of comparative fault, the court held that "[o]ther considerations also cut in favor of rejecting the rule."[190] The court acknowledged the possibility of inflammatory evidence but expressed its preference to trust trial courts to determine whether the probative value of evidence is necessary to prove a

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[184] *Id.* at 253.

[185] 833 S.W.2d 52 (Tenn. 1992).

[186] *Id.* at 57-58. The court later decided that fault could be allocated to immune parties and parties that had settled with the plaintiff. *See* Carroll v. Whitney, 29 S.W.3d 14, 21 (Tenn. 2000); McNabb v. Highways, Inc., 98 S.W.3d 649, 654-55 (Tenn. 2003).

[187] *Binns*, 690 S.W.3d at 251 (citing *Carroll*, 29 S.W.3d at 16).

[188] *Id.*

[189] *Id.*

[190] *Id.* at 252.

direct negligence claim is substantially outweighed by unfair prejudice.[191]

The court further held that the preemption rule is inconsistent with "the basic principle in Tennessee jurisprudence that '[p]laintiffs are the masters of their complaint.'"[192] Noting that Tennessee Rule of Civil Procedure 8.1 authorizes a plaintiff to seek relief in the alternative and to seek different types of relief and that Tennessee Rule of Civil Procedure 8.05(2) permits plaintiffs to state as many claims as they have "regardless of consistency," the court determined that adoption of the rule would conflict with the assumption that "plaintiffs are free to . . . structure their claims in the manner that is most beneficial to them."[193]

The court recognized that a claim for direct negligence based upon negligent training and negligent supervision is separate and distinct from a vicarious liability claim based upon an employee's negligence, making it possible and appropriate for the factfinder to separately allocate fault to the employee and to the employer.[194] The court concluded that an "employer may be directly liable for its own negligent conduct, as well as vicariously liable for the negligent conduct of its employee under the doctrine of respondeat superior."[195] The court emphasized that the liability stemming from direct negligence is not vicarious and may be imposed in some cases where the fact finder determines that the employee was not negligent.[196]

Finally, the *Binns* court concluded that the rule was "not entirely consistent with the principle of deterrence[] . . . [and] long considered an 'operative polic[y] of tort law.'"[197] The court reasoned that adoption of the rule would eliminate some of the deterrent effect raised by an employer's exposure to liability because the fact finder will allocate the employer's share of fault to the plaintiff or to other tortfeasors.[198]

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[191] *Id.*
[192] *Id.* at 253 (citing Mullins v. State, 294 S.W.3d 529, 540 (Tenn. 2009)).
[193] *Id.* (citing Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 909 (Tenn. 1999)).
[194] *Id.* at 250-51.
[195] *Id.* at 251 (citing RESTATEMENT (SECOND) OF AGENCY § 213 cmt. h (A.L.I. 1958)).
[196] *Id.* at 250 n.6 (citing McQueen v. Green, 202 N.E.3d 268, 280-81 (Ill. 2022)).
[197] *Id.* at 253 (citing Smith v. Gore, 728 S.W.2d 738, 748 (Tenn. 1987)).
[198] *Id.*

B. Louisiana

In June 2022, in *Martin v. Thomas*,[199] the Louisiana Supreme Court unanimously rejected the preemption rule.[200] There, a motorist asserted negligence claims against the driver of a tractor-trailer and vicarious liability, negligent hiring, negligent training, and negligent entrustment claims against the truck driver's employer.[201] After the defendant employer admitted that the driver was acting in the scope of employment,[202] the trial court dismissed the plaintiff's direct negligence claim, holding that once an employer admits the employee was acting in the scope of employment, a plaintiff cannot simultaneously pursue vicarious liability and direct negligence claims.[203]

The Louisiana Supreme Court reversed. The court noted that claims for vicarious liability and direct negligence against employers are separate and distinct claims and that Louisiana procedural law entitles plaintiffs to plead multiple and alternative causes of action.[204] The court also considered Louisiana's Civil Code, which imposes several liability,[205] and requires the factfinder to determine "the degree or percentage of fault of all persons causing or contributing to the injury, death or loss."[206] The court also cited Louisiana precedent holding that Louisiana's comparative fault principles apply to any and all actions and claims for damages and "require that each actor be assigned an appropriate percentage of fault regardless of the legal theory of liability asserted."[207] The court concluded that adoption of the preemption rule may magnify the fault of the plaintiff and/or other defendants in direct contravention of comparative fault principles and also thwart "the deterrent aims of tort law."[208] The

[199] 346 So. 3d 238 (La. 2022).
[200] *Id.* at 248.
[201] *Id.* at 238.
[202] *Id.* at 240.
[203] *Id.* at 240-41.
[204] *Id.* at 242-43.
[205] *Id.* at 244 (quoting LA. CIV. CODE ANN. art. 2324(B) (2025)).
[206] *Id.* (quoting LA. CIV. CODE ANN. art. 2323(A) (2025)).
[207] *Id.* at 245 (quoting Thompson v. Winn-Dixie Montgomery, Inc., 181 So. 3d 656, 664 (La. 2015)).
[208] *Id.* (quoting Gordon v. Great W. Cas. Co., No. 2:18-CV-00967, 2020 WL 3472634, at *4 (W.D. La. June 25, 2020)).

court acknowledged that summary judgment or judgment as a matter of law is appropriate where the plaintiff has insufficient evidence of direct negligence, but held that an employer's mere admission of vicarious liability for any employee negligence does not entitle the employer to dismiss the claim for direct negligence as a matter of law.[209] Instead, the court held that "[t]he evidence should determine whether the negligence of both the employer and the employee caused the damages claimed."[210]

C. Illinois

In April 2022, in *McQueen v. Green*,[211] the Illinois Supreme Court unanimously rejected the preemption rule.[212] There, a general contractor directed its employee, Lavonta Green, to drive a truck and trailer to pick up a skid steer weighing more than three tons from a third party.[213] After the third party's employees loaded the skid steer onto the trailer, Green requested the third party's employees reload the skid steer because he believed that the steer had been improperly loaded.[214] When the third-party's employees refused to reload the skid steer, Green called his supervisor to express his concern that the skid steer was "crooked" and had not been properly loaded.[215] Green's supervisor spoke with one of the third party's employees and then told Green to "be safe" and to return with the skid steer.[216] While returning with the skid steer, Green was involved in an accident with another motorist.[217]

The motorist sued Green for negligently operating a truck and trailer with a skid steer that was not properly loaded and sued Green's employer for vicarious liability and direct negligence.[218] The plaintiff sought actual and punitive damages

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209 *Id.* at 248.
210 *Id.*
211 202 N.E.3d 268 (Ill. 2022).
212 *Id.* at 279.
213 *Id.* at 272.
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.* at 273.

from both defendants.[219] The plaintiff alleged that the employer negligently trained Green and negligently ordered Green to drive the truck and return with the skid steer even though the employer knew or should have known that the skid steer was improperly loaded.[220] Prior to trial, the employer acknowledged that Green was acting within the scope of his employment.[221] At trial, the jury returned a verdict for the plaintiff against the employer, but not against Green, and awarded actual and punitive damages.[222] The trial court denied the defendant's motion for judgment notwithstanding the verdict.[223] The intermediate appellate court held that the defendant was entitled to a new trial, in part because the preemption rule barred the plaintiff's direct negligence claim and in part because the jury's verdict in favor of Green, but against his employer, was an inconsistent verdict.[224]

The Illinois Supreme Court reversed the intermediate appellate court and affirmed the trial court's judgment, rejecting the preemption rule and holding that the jury verdict was not inconsistent.[225] The court held that if a plaintiff has a good-faith basis, the plaintiff should be able to simultaneously pursue claims for vicarious liability and direct negligence.[226] The court noted that the claims are distinct and require evidence of different elements, and concluded that a non-frivolous cause of action should not be barred merely because the employer stipulates that it will be vicariously liable for its employee's negligence, if any.[227]

The court rejected arguments that the preemption rule is necessary to prevent the admission of irrelevant and unfairly prejudicial evidence, noting that, generally, trial courts are entrusted with determining whether relevant evidence should be excluded because its probative value is substantially outweighed by the risk of unfair prejudice.[228] The court concluded that

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219 *Id.*
220 *Id.*
221 *Id.*
222 *Id.* at 275.
223 *Id.* at 276.
224 *Id.* at 276-77.
225 *Id.* at 282.
226 *Id.* at 279.
227 *Id.* at 280.
228 *Id.*

precluding an entire cause of action because of potential unfair prejudice "gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of the trial, and to the jury's ability to follow the trial court's instructions."[229] With respect to the argument that rejection of the rule might make it possible for the plaintiff to obtain a double recovery, the court argued that such a possibility could be prevented through the use of jury instructions, special interrogatories, special verdict forms, and post-trial motions.[230]

Finally, the court held that the jury's verdict that Green was not negligent and its verdict that Green's employer was negligent were not inconsistent because a reasonable jury could find that Green acted reasonably by complying with his supervisor's direction and deferring to his supervisor's expertise while also finding that Green's employer acted unreasonably by ordering Green to drive on the highway with a heavy skid steer without fully understanding the extent of the problem.[231] As the jury verdict in *McQueen* clearly demonstrates, if the preemption rule precludes the plaintiff from trying the direct negligence claim, the plaintiff will be completely deprived of recovery if the jury finds that the employee was not negligent, even though the jury would have found the employer negligent.

D. Utah

In 2021, in *Ramon v. Nebo School District*,[232] the Utah Supreme Court unanimously rejected the preemption rule, primarily because it found the rule "incompatible with Utah's Liability Reform Act."[233] There, a motorist who was injured in an accident when a school bus turned in front of his vehicle sued the school district, alleging that it was vicariously liable for the bus driver's negligence and that it negligently retained the driver after

[229] *Id.* (quoting James v. Kelly Trucking Co., 661 S.E.2d 329, 331 (S.C. 2008)).

[230] *Id.*

[231] *Id.* at 281. Green testified that he agreed to transport the equipment based upon his supervisor's and the third-party's employees' assurances that the skid steer could be safely transported and also because Green feared that he would be fired if he did not comply with his supervisor's instructions. *Id.* at 272.

[232] 493 P.3d 613 (Utah 2021).

[233] *Id.* at 620.

he had been involved in previous accidents.[234] The school district admitted that the bus driver was acting in the scope of employment, but denied that the driver was negligent.[235] The school district moved for judgment on the pleadings with respect to the plaintiff's direct negligence claim, arguing that it was unnecessary in light of the school district's admission.[236] The trial court granted the motion.[237]

The Utah Supreme Court reversed, noting that the Utah Liability Reform Act authorizes allocation of fault to plaintiffs, defendants, immune parties, and "any other person . . . for whom there is a factual and legal basis to allocate fault."[238] The court concluded that the plaintiff could simultaneously pursue claims for vicarious liability and direct negligence because Utah law recognizes both distinct claims,[239] and because the Utah "statute allows a plaintiff, or a defendant, to ask the jury to apportion fault to anyone a party identifies as being legally responsible."[240]

The Utah Supreme Court further determined that the preemption rule conflicts with the principle that the plaintiff is the "master of her complaint" and has the "prerogative of identifying the claims or causes of action she seeks to sustain in court."[241] The court was not persuaded by the argument that the preemption rule is necessary to prevent the plaintiff from obtaining a double recovery, observing that "refusing to allow a plaintiff to move forward with a well-pled claim is an unnecessarily harsh method"—"a blunt instrument"—when "[the] court has myriad other tools to address a potential double recovery," such as jury instructions, special verdict forms, and remittitur.[242] Nor was the court persuaded that the preemption rule is necessary to prevent admission of unfairly prejudicial

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234 *Id.* at 616.
235 *Id.* at 617.
236 *Id.*
237 *Id.*
238 *Id.* (citing UTAH CODE ANN. § 78B-5-819(1) (West 2008)).
239 *Id.* at 618.
240 *Id.* at 620-21.
241 *Id.* at 618. The court cited a state procedural rule that allows a plaintiff to plead independent or alternative claims. UTAH R. CIV. P. 18(a).
242 *Id.* at 619.

evidence.[243] Rather than strip trial courts of their discretion to rule on evidentiary matters on a case-by-case basis to determine whether exclusion is warranted, the Utah Supreme Court determined to leave the 403 balancing test to the trial courts.[244]

E. Georgia

In 2020, in *Quynn v. Hulsey*,[245] the Georgia Supreme Court addressed the issue of whether the preemption rule, as adopted by the Georgia Court of Appeals in 1967 in *Willis v. Hill*,[246] was abrogated by the Georgia Tort Reform Act of 2005, which requires "the trier of fact [to] consider the fault of all persons or entities who contributed to the alleged injury or damages" when "assessing percentages of fault."[247] The court held that the preemption rule was "inconsistent with the plain language of the apportionment statute[]" because the statute requires the jury to allocate fault to all persons who are at fault.[248] The court reasoned that if there is sufficient evidence that the employer breached a duty, the jury must be permitted to apportion fault to the employer.[249] The court noted that although the employer would be liable for its own negligence and any negligence of its employee acting in the scope of employment, the employee would not be liable for the negligence of the employer[250] and concluded that "[a]dherence to the plain and explicit terms of [the Georgia apportionment statute] requires the elimination of the [preemption] Rule."[251]

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243 *Id.* at 619-20.

244 *Id.* at 620. Utah Rule of Evidence 403 permits a trial court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . [or] confusi[on] . . . ."

245 850 S.E.2d 725 (Ga. 2020).

246 159 S.E.2d 145 (Ga. Ct. App. 1967), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968).

247 *Quynn*, 850 S.E. 2d at 728 (quoting GA. CODE ANN. § 51-12-33 (2022)). Noting that the Georgia Supreme Court had not adopted or rejected the preemption rule, the court presumed that the rule was valid prior to Georgia's adoption of the apportionment statute. *Id.* at 728 n.3.

248 *Quynn*, 850 S.E.2d at 728-29.

249 *Id.* at 477-80.

250 *Id.* at 730.

251 *Id.* at 732.

F. Other States

The preemption rule has similarly been rejected in several other states. The South Carolina Supreme Court rejected the rule in 2008, in *James v. Kelly Trucking Co.*,[252] reasoning that: (i) claims for vicarious liability and direct negligence are separate and distinct; (ii) trial courts are capable of instructing a jury regarding permissible and impermissible use of evidence and determining when it is necessary to exclude unfairly prejudicial evidence; and (iii) adoption of the rule would necessitate a punitive damages exception, thereby complicating trial procedure.[253] Largely based upon the court's reasoning in *James v. Kelly Trucking Co.*, the Kentucky Supreme Court similarly rejected the preemption rule in 2014, in *MV Transportation, Inc. v. Allgeier*.[254] The Kansas Supreme Court also rejected the preemption rule in *Marquis v. State Farm Fire and Casualty Co.*,[255] reasoning that "the torts of negligent hiring, retention, or supervision are recognized in Kansas as separate torts that are not derivative of the employee's negligence."[256] The Superior Court of Delaware rejected the rule in *Smith v. Williams*,[257] noting that allowing the claims for negligent hiring and retention to go forward would hold the employer accountable for its practices and concluding that prejudicial evidence can be addressed by a limiting instruction or severance of the claims for trial.[258]

As demonstrated above, numerous states have recently rejected the preemption rule based on the following rationales: (i) the rule is inconsistent with the state's comparative fault law and will cause a distorted allocation of fault; (ii) the rule would bar a plaintiff's direct negligence claim even when the employer's negligence is not contingent upon the employee's negligence; (iii) the rule is not necessary because there are numerous procedural and evidentiary rules that protect defendant employers from

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[252] 661 S.E.2d 329 (S.C. 2008).

[253] *Id.* at 330-32.

[254] 433 S.W.3d 324, 336 (Ky. 2014) ("[T]he sound reasoning set forth in *James* persuades us that the non-preemption rule is the better course.").

[255] 961 P.2d 1213 (Kan. 1998).

[256] *Id.* at 1225.

[257] No. 05C-10-307 PLA, 2007 WL 2677131 (Del. Super. Ct. Sep. 11, 2007).

[258] *Id.* at *7.

excessive discovery, prejudicial evidence, duplicative damages and excessive verdicts; (iv) the rule thwarts a plaintiff's ability to be master of the complaint; and (v) the rule decreases the deterrent effect of tort law.

V. ARGUMENTS AGAINST ADOPTION OF THE PREEMPTION RULE IN MISSISSIPPI

A. The Preemption Rule is Inconsistent with Miss. Code Ann. § 85-5-7

1. Legislative History of Miss. Code Ann. § 85-5-7

Through a series of tort reform measures, the Mississippi Legislature abolished joint and several liability and replaced it with several liability, which limits each tortfeasor's liability to the amount of damages that correspond to the percentage of fault allocated to that tortfeasor. In 1989, the legislature passed House Bill 1171 ("The Bill"), a tort reform measure that limited the imposition of joint and several liability and thereby "reduce[d] the extent to which one defendant could be held liable for the negligence of another."[259] The Bill was codified in part in Miss. Code Ann. § 85-5-7. Prior to the statute's enactment in 1989, Mississippi law imposed joint and several liability upon joint tortfeasors.[260] If a plaintiff was injured by the negligence of A and B, the plaintiff could sue A and B and fully recover from either one or both, or the plaintiff could sue just A or just B and fully recover from either.[261] The plaintiff, however, was limited to a single recovery.[262] A defendant who was minimally at fault could be held responsible for all of the plaintiff's damages. Moreover, a joint tortfeasor who was required to pay all of the plaintiff's damages could only seek contribution from co-defendants against whom a

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[259] H.B. 1171, 1989 Gen. Assemb., Reg. Sess., 1989 Miss. Laws 19; Est. of Hunter v. Gen. Motors Corp., 729 So. 2d 1264, 1274 (Miss. 1999) (discussing the statute's effect).

[260] *See* Bailey v. Delta Elec. Light, Power & Mfg. Co., 38 So. 354, 355 (Miss. 1905). Joint tortfeasors are persons whose separate tortious conduct combines to cause the plaintiff's indivisible injury. *See* D & W Jones, Inc. v. Collier, 372 So. 2d 288, 294 (Miss. 1979).

[261] *See Bailey*, 38 So. at 355.

[262] *Id.*

judgment was rendered and only for a pro-rata share.[263] The Bill was targeted towards the "mischief" that arises when a minimally responsible joint tortfeasor is held liable for all of the plaintiff's damages and may be deprived of any claim for contribution because the plaintiff chose to sue only the minimally responsible party.[264]

The Bill defined "fault" as "an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, . . . or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability[,] or failure to warn."[265] The Bill also provided that "the trier of fact shall determine the percentage of fault for each party alleged to be at fault."[266] The Bill further provided that when the "liability of [the] employer . . . has been caused by the wrongful or negligent act or omission of the employee," the employee and employer shall be treated as one for purposes of allocation of fault.[267] Finally, The Bill provided that joint and several liability would only be imposed "to the extent necessary for the person suffering injury, death or loss to recover [50%] . . . of his recoverable damages."[268]

In 2002, the Mississippi Legislature passed House Bill 2, a medical malpractice tort reform measure, which added subsection (8) to Miss. Code Ann. § 85-5-7, which further limited the imposition of joint and several liability in medical malpractice cases.[269] Pursuant to the amendments, health care providers were only subject to joint and several liability for a plaintiff's economic damages if the defendant was at least 30% at fault and only to the

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[263] *See* Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131, 1137-38 (Miss. Ct. App. 1999) (discussing Miss. Code Ann. § 85-5-5, which governed claims for contribution and was repealed by H.B. 1171). A defendant's claim was for contribution was for a pro-rata share (one half of the damages paid to plaintiff if there were two defendants, one third of the damages paid to the plaintiff if there were three defendants, etc.). *Id.*

[264] *Id.* at 1138.

[265] H.B. 1171, 1989 Gen. Assemb., Reg. Sess., 1989 Miss. Laws 19, 19. The Bill further provided that "fault" does not "include any tort which results from an act or omission committed with a specific wrongful intent." *Id.*

[266] *Id.* at 20.

[267] *Id.*

[268] *Id.*

[269] H.B. 2, 2002 Gen. Assemb., 3d Extraordinary Sess., 2002 Miss. Laws 1274, 1277-78 (Medical Malpractice Tort Reform).

extent necessary for the plaintiff to recover 50% of the plaintiff's recoverable damages.[270] House Bill 2 also clarified that fault could be allocated to absent tortfeasors, including immune parties.[271]

Later in 2002, the Mississippi Legislature passed the Civil Justice Reform Act, Senate Bill 19, that limited joint and several liability in all cases to defendants who are at least 30% at fault and only to the extent necessary for the plaintiff to recover 50% of the plaintiff's recoverable economic damages.[272]

In 2004, the Legislature passed another tort reform measure, House Bill 13, and completely eliminated joint and several liability for all joint tortfeasors except those acting in accordance with a common plan.[273] The 2004 act also provided that fault shall be allocated to immune tort-feasors and that fault allocated to an immune tort-feasor shall not be reallocated to other tortfeasors.[274]

As amended, Miss. Code Ann. § 85-5-7: (i) defines "fault" to include the negligence of any person if that negligence caused the plaintiff's damages;[275] (ii) limits a joint tortfeasor's several liability to "the amount of damages allocated to him in direct proportion to his percentage of fault;"[276] and (iii) requires the factfinder to "determine the percentage of fault for each party alleged to be at fault."[277] The statute continues to provide that when the employer's liability is "caused by the wrongful or negligent act or omission of the employee," rather than the employer's direct negligence, the factfinder shall allocate fault to the employee and employer as one.[278] As the Mississippi Supreme Court has noted, this provision indicates that employers continue to be jointly and severally liable for the fault of their employees pursuant to the doctrine of respondeat superior.[279] Although a

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[270] *Id.*
[271] *Id.*
[272] H.B. 18, 2002 Gen. Assemb., 3d Extraordinary Sess., 2002 Miss. Laws. 1289, 1291 (Civil Justice Reform).
[273] H.B. 13, 2004 Gen. Assemb., 1st Extraordinary Sess., 2004 Miss. Laws. 1387, 1394 (Civil Procedure, Tort Reform, and Venue; Damages; Juries).
[274] *Id.*
[275] MISS. CODE ANN. § 85-5-7(1) (2019).
[276] *Id.* § 85-5-7(2).
[277] *Id.* § 85-5-7(5).
[278] *Id.* § 85-5-7(2).
[279] Methodist Healthcare-Olive Branch Hosp. v. McNutt, 323 So. 3d 1051, 1056 n.2 (Miss. 2021).

plaintiff would typically recover from the employer on the plaintiff's claim for vicarious liability, nothing prevents a plaintiff from fully recovering damages from the employee that correspond to the percentage of fault allocated to the employee.[280]

Given that the statute specifies that the employer and employee shall be treated as one for purposes of allocation when the employer's liability arises from the employee's negligence, it necessarily means that when the employer's liability arises from the employer's own negligence, the factfinder should allocate fault to the employer separately.[281] When considered in its entirety, it is clear that Mississippi's current statutory scheme is one based on the pure comparative fault principle that no person who causes an injury should be required to pay more than the proportion of the plaintiff's damages that corresponds to that person's fault. Excluding a negligent employer from the allocation of fault not only directly contradicts Miss. Code Ann. § 85-5-7's mandate that the factfinder allocate fault to each party alleged to be at fault, but it is also inconsistent with the goal of several liability—which is to limit "the liability of any tortfeasor to that party's comparative share of plaintiff's damages."[282]

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[280] Reed v. Walmart, Inc., No. 4:24-CV-77-SA-JMV, 2025 WL 540449, at *4 (N.D. Miss. Feb. 18, 2025).

[281] *See* Sw. Drug Co. v. Howard Bros. Pharm. of Jackson, Inc., 320 So. 2d 776, 779 (Miss. 1975) (citing the Latin legal maxim, "Inclusio unius est exclusio alterius," which basically means the inclusion of one thing specifically mentioned is the exclusion of another not mentioned). Because the statute provides that the employee and employer shall be treated as one *when the employer's liability arises from the employee's fault*, the requirement that the employer and employee be treated as one does not apply when the employer's liability arises from the employer's fault. *See* MISS. CODE ANN. § 85-5-7(2) (2025).

[282] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. d (A.L.I. 2000); *see also* Est. of Hunter v. Gen. Motors Corp., 729 So. 2d 1264, 1273 (Miss. 1999) (observing that the comparative fault doctrine would "best be served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit"); Kelly v. Int'l Games Tech., 874 So. 2d 977, 979 (Miss. 2004) (quoting Sec'y of State v. Wiesenberg, 633 So. 2d 983, 990 (Miss. 1994)) (demonstrating that courts consider legislative intent when interpreting a statute).

2. The Mississippi Supreme Court's Interpretation of Miss. Code Ann. § 85-5-7

In *Estate of Hunter v. General Motors Corporation*, the Mississippi Supreme Court determined whether Miss. Code Ann. § 85-5-7 authorized allocation of fault to a settling defendant who was no longer a party to the case.[283] Although the version of the statute applicable to the case authorized the factfinder to allocate fault only to "each ***party*** alleged to be at fault,"[284] the court agreed with commentators that "policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of ***all participants*** to a particular incident which gives rise to a lawsuit."[285] The court further held:

> This State's system of civil justice is based upon the premise that all parties to a lawsuit should be given an opportunity to present their versions of a case to a jury . . . .
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> . . . [C]onsideration of the basic effect of § 85–5–7 does not support the construction urged by the plaintiffs in the present case. The principal effect of § 85–5–7 is that it [partially] abolishes joint and several liability . . . and replaces it with a several liability up to this amount. Thus, the statute serves to reduce the extent to which one defendant may be held liable for the negligence of another. It would be contrary to the basic purpose of the statute for the Legislature to set forth within this very same statute a provision which denies defendants the right to present their allegations of fault on the part of another to a jury.[286]

Thus, the court held that omitting a settling defendant from the allocation of fault was inconsistent with the statute's purpose.[287]

In *Mack Trucks, Inc. v. Tackett*,[288] the Mississippi Supreme Court addressed whether Miss. Code Ann. § 85-5-7 authorized the

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[283] 729 So. 2d 1264, 1272-73 (Miss. 1999).
[284] *Id.* at 1272 (emphasis added) (quoting MISS. CODE ANN. § 85-5-7 (2019)).
[285] *Id.* at 1272-73 (emphasis added) (citing Cheri D. Green & Michael K. Graves, *Allocation of Fault: Joint Tort-Feasors in Court and the Ones Who Should Be*, 63 MISS. L.J. 647, 654-57 (1994)).
[286] *Id.* at 1274.
[287] *Id.* at 1276-80.
[288] 841 So. 2d 1107 (Miss. 2003).

fact finder to allocate fault to an immune employer in a case in which the employee asserted personal injury claims against several defendants.[289] The version of the statute applicable to that case authorized allocation of fault to "each ***party*** alleged to be at fault" and predated the 2002 amendments that clarified that fault could be allocated to immune tortfeasors.[290] The court noted the statute's broad language requiring the trier of fact to "determine the percentage of fault for each"[291] "party alleged to be at fault"[292] and acknowledged that barring an allocation of fault to an immune employer would force "third parties [to] pick up the tab for the [immune] employer's fault" and could result in some defendants "paying more than their share in order to make up for the excluded employer."[293] Noting that Mississippi's civil justice system is "based upon the premise that all parties to a lawsuit should be given an opportunity to present their versions of a case to a jury,"[294] the court reasoned that prohibiting allocation of fault to immune non-parties would seriously interfere with the defendant's right to present its version of the case.[295] The court concluded that its determination that a non-party immune employer was a "party" to whom fault must be allocated was consistent with legislative intent.[296]

In *Coho Resources, Inc. v. Chapman*,[297] the Mississippi Supreme Court held that it was an error to refuse a jury instruction allowing allocation of fault to the plaintiff's immune employer.[298] The court cited Miss. Code Ann. § 85-5-7, *Estate of Hunter* and *Mack Trucks, Inc.*, and concluded that the jury must

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[289] *Id.* at 1113-14.

[290] The 2002 amendments contained in H.B. 2 and H.B. 19 (that clarified that fault could be allocated to non-parties, including immune parties), apply to cases filed on or after January 1, 2019.

[291] *Mack Trucks, Inc.*, 841 So. 2d at 1114 n.1.

[292] *Id.* at 1114.

[293] *Id.* at 1114-15. The court rejected the argument that the 2002 amendment authorizing allocation of fault to immune employers demonstrates that the original version applicable to the case at hand did not authorize such allocation, thus necessitating the amendment. *Id.* at 1114 n.1. Instead, the court agreed with "the counter-argument that the Legislature acted only to emphasize its original intent." *Id.*

[294] *Id.* at 1113.

[295] *Id.*

[296] *Id.* at 1114.

[297] 913 So. 2d 899 (Miss. 2005).

[298] *Id.* at 912-13.

be permitted to allocate fault to all tortfeasors.[299] The court reasoned that to rule otherwise would infringe upon a party's right to present its version of the case to the jury.[300] In later cases, the Mississippi Supreme Court held that Miss. Code Ann. § 85-5-7 requires the fact finder to "allocate fault to each party alleged to be at fault,"[301] and that the trial court's refusal to grant a party's request for a verdict form allowing allocation of fault to all parties was reversible error.[302]

As demonstrated above, every time the Mississippi Supreme Court has addressed the allocation of fault pursuant to Miss. Code Ann. § 85-5-7, it has held that the factfinder must be permitted to allocate fault to *all tortfeasors*, including settling parties, non-parties, and immune parties. Allocating fault to all persons responsible is not only required by the language of the statute, but is also most consistent with the legislative intent and principles of comparative fault and several liability.[303] Adoption of the preemption rule would directly contradict the statute and Mississippi Supreme Court precedent because the rule prohibits the jury from considering evidence of the employer's fault and thereby results in a distorted allocation of fault—the very result the statute was intended to prevent.

Just as exclusion of a settling defendant or an immune employer from the allocation of fault would result in a skewed

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[299] *Id.* (quoting Est. of Hunter v. General Motors Corp., 729 So. 2d 1264, 1273 (Miss. 1999) ("[S]ection 85–5–7 requires that the fault of all participants to the occurrence, including any absent tortfeasors, must be considered in the apportionment of fault.")) (citing *Mack Trucks, Inc.*, 841 So. 2d at 1115).

[300] *Id.* at 913.

[301] Beverly Enters., Inc. v. Reed, 961 So. 2d 40, 43-44 (Miss. 2007) (citing *Mack Trucks, Inc.*, 841 So. 2d. at 1116-17).

[302] Baker & McKenzie, LLP v. Evans, 123 So. 3d 387, 411 (Miss. 2013) ("[Where] the evidence at trial support[s] an allocation of fault to [several persons,] . . . Mississippi's comparative fault law [is triggered] and require[s] a verdict form permitting allocation of fault to each.").

[303] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 cmt. j (A.L.I. 2000) (noting that in jurisdictions which have determined to impose several liability, rather than joint and several liability, it is important to allow allocation of the fault to the employer, even though the employer may also be vicariously liable for fault allocated to the employee); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 475-76 (5th ed. 1984) ("[T]he failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than attributable to their fault.").

allocation causing other parties to "pay[] more than their share in order to make up for the excluded [person],"[304] so too would exclusion of a negligent defendant employer. The *McHaffie* case itself demonstrates how the preemption rule distorts the allocation of fault. There, on remand, the jury was required to reallocate the 10% of fault that it had allocated to the employer based on direct negligence to other parties.[305] Thus, the jury's final allocation of fault did not accurately reflect each tortfeasor's fault. As was the case in *McHaffie* and many other tort cases, there may be multiple "but for" actual causes of the plaintiff's damages.[306] Juries are routinely called upon to allocate fault to negligent plaintiffs and multiple tortfeasors. Appellate courts defer to the jury's allocation of fault and will only disturb it when it is against the overwhelming weight of the evidence.[307] Adoption of the preemption rule allows the jury to ignore the fault of employers, thereby compromising comparative fault principles by shifting the employers' fault to others.[308]

The inequity of the preemption rule becomes even more apparent when considering two scenarios made possible by the operation of the rule. One scenario involves a plaintiff who chooses to fully recover from the employee who is held jointly and severally liable. Although unlikely, the plaintiff would be entitled to do so. The other scenario involves an employer who pays the judgment but then asserts a common law claim for indemnity against the employee for the total amount paid by the employer.[309] In both scenarios, the employee would bear the entire financial burden, and the employer would not be out a penny.

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[304] *Mack Trucks, Inc.*, 841 So. 2d at 1115.

[305] *See supra* notes 77-78 and accompanying text.

[306] *See* RESTATEMENT (THIRD) OF TORTS § 26 (A.L.I. 2010).

[307] *See* Anderson v. Salaam, 283 So. 3d 302, 308 (Miss. Ct. App. 2019).

[308] *SEE* RESTATEMENT (THIRD) OF TORTS § B19 (A.L.I. 2000); Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 903 (1984).

[309] Pursuant to Mississippi common law, an employer who pays a plaintiff damages pursuant to a vicarious liability claim has a claim for indemnity against the employee whose conduct gave rise to the claim. J & J Timber Co. v. Broome, 932 So. 2d 1, 7 (Miss. 2006); Granquist v. Crystal Springs Lumber Co., 1 So. 2d 216, 218 (Miss. 1941). One who engages in active negligence, however, is not entitled to indemnity. J.B. Hunt Transp., Inc. v. Forrest Gen. Hosp., 34 So. 3d 1171, 1174 (Miss. 2010).

Even though a few courts have held that the preemption rule is consistent with comparative fault principles,[310] most have recognized the obvious inconsistency.[311] Those courts that found the rule consistent with comparative fault employed faulty reasoning. The Missouri Supreme Court adopted the rule in part because it was concerned that rejection of the rule would permit the jury to allocate more fault to the employer than to the employee, an outcome the court deemed "plainly illogical."[312] Similarly, the California Supreme Court determined that adoption of the rule was necessary to prevent the jury from assigning a greater share of fault to the employer than that assigned to the employee, a result the court characterized as inequitable.[313] An allocation that assigns more fault to the employer than to the employee is not per se inequitable where the evidence supports such an allocation. It is not difficult to imagine a case in which the employer's negligence is more egregious than the employee's.

The California Supreme Court also adopted the rule in part because it determined that rejection of the rule would prejudice employers because they would likely be held liable for more total damages if fault is allocated to the employee and the employer.[314] While rejection of the rule may increase employers' total liability because they will be severally liable for their share of damages and jointly and severally liable for the employee's share, such a result is totally consistent with comparative fault principles.

The Colorado Supreme Court expressed concern that rejection of the rule would incentivize plaintiffs to bring direct negligence claims against employers to reduce the fault allocated to plaintiffs.[315] Plaintiffs' incentive to sue all responsible parties is a byproduct of any comparative fault scheme that imposes several liability. Given that the Mississippi Legislature has adopted pure several liability which is based on "[t]he cornerstone principle . . .

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[310] *See, e.g.*, Bogdanski v. Budzik, 408 P.3d 1156, 1163 (Wyo. 2018); Diaz v. Carcamo, 253 P.3d 535, 543-44 (Cal. 2011).

[311] *See*, *e.g.*, Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 251 (Tenn. 2024); Martin v. Thomas, 346 So. 3d 238, 244-45 (La. 2022); Ramon v. Nebo Sch. Dist., 493 P.3d 613, 620 (Utah 2021); Quynn v. Hulsey, 850 S.E.2d 725 (Ga. 2020).

[312] McHaffie v. Bunch, 891 S.W.2d 822, 827 (Mo. 1995).

[313] Diaz v. Carcamo, 253 P.3d 535, 543-44 (Cal. 2011).

[314] *Id.* at 545.

[315] *See* Ferrer v. Okbamicael, 390 P.3d 836, 847 (Colo. 2017).

that each person [whose fault] contributes to cause an injury must bear the burden of reparation for that injury in exact proportion to his share of the total fault,"[316] a plaintiff's incentive to assert claims against all responsible parties should be viewed as a positive consequence rather than a negative one. Miss. Code Ann. § 85-5-7 also incentivizes defendants to seek an allocation of fault to other tortfeasors, especially non-parties or phantom parties, in an effort to reduce their liability. The Mississippi Supreme Court has not blocked defendants' ability to allocate fault to all responsible parties.[317] Nor should it bar a plaintiff's right to seek an allocation of fault to all responsible parties, including employers.

B. An Employer's Direct Negligence is Not Always Contingent on the Employee's Negligence

As demonstrated by *McQueen v. Green*, there will be cases where the plaintiff sues the employer for vicarious liability and direct negligence, and the factfinder finds the employer negligent but not the employee.[318] As the Illinois Supreme Court held, the jury's verdict that Green was not negligent while Green's employer was directly negligent was not legally inconsistent because a reasonable jury could find that Green acted reasonably, by complying with his supervisor's direction and deferring to his supervisor's expertise, while also finding that Green's employer acted unreasonably because the supervisor ordered Green to drive on the highway with a heavy skid steer without fully understanding the extent of the problem.[319] Similarly, a jury could find that an employer negligently entrusted a defective machine or defective vehicle to a non-negligent employee who had no reason to know of the defect.[320] Application of the preemption rule at the pleading stage in cases of this nature would prevent the plaintiff from recovering on a meritorious direct negligence claim.

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[316] *See* Eilbacher, *supra* note 308, at 903.

[317] *See supra* notes 283-303 and accompanying text.

[318] *See supra* notes 211-231 and accompanying text discussing the *McQueen* case.

[319] McQueen v. Green, 202 N.E.3d 268, 281 (Ill. 2022).

[320] *See*, *e.g.*, *Ferrer*, 390 P. 3d at 845-46; Clooney v. Geeting, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977).

Some states that have recognized the preemption rule have also recognized the need for an exception in cases where the employer may be held directly liable for negligence, absent negligence on the part of the employee.[321] The exception, however, does not fully cure the problem. In cases where the employer's liability on the direct claim is dependent on the employee's negligence, such as in negligent entrustment cases, the exception will not apply, and the allocation of fault will be skewed because the employer will be excluded from the allocation. Such an exception could also be problematic because the trial court will be tasked with determining whether the employer's liability on the direct negligence claim requires a finding of negligence on the part of the employee at the pleadings stage, when differentiating between direct negligence claims that are contingent upon the employee's negligence and those that are not may be difficult.

C. Procedural and Evidentiary Rules Sufficiently Protect Defendants

1. Procedural Rules

a. Pleading

Although members of the bench and bar are conversant with the applicable state and federal procedural and evidentiary rules, a comprehensive review of applicable rules highlights the myriad rules that a defense counsel and trial courts may employ to protect defendant employers who are simultaneously defending claims for vicarious liability and direct negligence from any unfair prejudice. Although many cases involving potential application of the preemption rule will be tried in federal court, this Article focuses on the applicable state procedural and evidentiary rules, which are largely patterned after the federal rules.

Rule 8(a) of the Mississippi Rules of Civil Procedure requires plaintiffs to include "a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for

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[321] *See*, *e.g.*, Elser v. Campbell Cnty. Hosp. Dist., 566 P.3d 894, 912 (Wyo. 2025); McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995); *Clooney*, 352 So. 2d at 1220.

judgment for the relief to which he deems himself entitled."[322] Even though Mississippi has not adopted the heightened pleading standard applicable in federal courts,[323] the rule requires a plaintiff to plead sufficient "allegations from which the elements [of the plaintiff's claim] may be inferred."[324] "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss."[325] Thus, at the outset of litigation and prior to discovery, defendants may move to dismiss a direct negligence claim for failure to state a claim pursuant to Rule 12(b)(6) or move for judgment on the pleadings pursuant to Rule 12(c), which motions should be granted if the complaint rests entirely on conclusory allegations or "lacks an allegation regarding a required element necessary to obtain relief."[326]

Rule 11 puts some "teeth" into Rule 8's pleading requirements by subjecting attorneys to sanctions if they sign pleadings or motions that lack a good-faith basis or that are filed to harass or delay.[327] In addition, the Mississippi Litigation Accountability Act ("MLAA") gives trial and appellate courts authority to sanction lawyers and parties on the same basis.[328] For purposes of Rule 11 and the MLAA, a claim is frivolous if it lacks a factual or legal basis.[329] Thus, both Rule 11 and the act restrain a plaintiff's ability to plead a claim for direct negligence in the

322 MISS. R. CIV. P. 8(a).

323 *See* Doby v. S. Park Vill. Apartments, 415 So. 3d 602, 604 (Miss. 2025) (observing that "Mississippi has been a 'notice pleading' state" since the adoption of Rule 8 in 1982). Rule 8 of the Federal Rules of Civil Procedure requires that "a complaint . . . contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

324 Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc., 521 So. 2d 857, 860 (Miss. 1988).

325 Penn Nat. Gaming, Inc. v. Ratliff, 954 So. 2d 427, 431 (Miss. 2007), *superseded by statute on other grounds as recognized by*, Purdue Pharma L.P. v. State, 256 So. 3d 1, 6 (Miss. 2018).

326 Community Hosp. of Jackson v. Goodlett, 968 So. 2d 391, 396 (Miss. 2007), *overruled on other grounds by* Wimley v. Reid, 991 So. 2d 135 (Miss. 2008); *see also* R.J. Reynolds Tobacco Co. v. King, 921 So. 2d 268, 270 (Miss. 2005) (observing that the standard for granting a Rule 12(c) motion is the same as for granting a Rule 12(b)(6) motion).

327 MISS. R. CIV. P. 11.

328 MISS. CODE ANN. § 11-55-5 (1988).

329 *See In re* Spencer, 985 So. 2d 330, 338 (Miss. 2008).

absence of some evidentiary basis. If a plaintiff files a frivolous direct negligence claim, the defendant employer may move to dismiss it and seek an award of attorneys' fees and expenses incurred as a result of the frivolous claim.[330]

b. Discovery

The procedural rules provide for numerous checks on a plaintiff's ability to use discovery to go on a fishing expedition into a defendant employer's procedures and protocols. First, Rule 26(b)(1) limits discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party."[331] Rule 26(d)(2) specifically authorizes a court to enter a protective order limiting discovery based upon proportionality concerns.[332] Thus, a defendant may move to limit or prohibit discovery that is unreasonably burdensome when considering its likely benefits, the needs of the case, or the amount in controversy.[333] Rule 26(b)(5) gives the court additional discretion to limit and otherwise control the discovery of electronically stored information ("ESI").[334]

Just as Rule 11 restrains a plaintiff's ability to make frivolous complaint allegations, Rule 26(g) restrains a plaintiff's ability to engage in frivolous discovery. Rule 26(g)(1) authorizes a court to impose sanctions if a plaintiff makes discovery requests that: (i) are not "warranted by existing law or by a nonfrivolous argument for [changing the law];" (ii) are "interposed for any improper purpose," such as harassment or delay; or (iii) are "unreasonable" or "unduly burdensome or expensive."[335] Pursuant to Rule 26(g)(3), a trial court has discretion to assess attorneys'

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[330] MISS. R. CIV. P. 11(b).

[331] MISS. R. CIV. P. 26(b)(1).

[332] MISS. R. CIV. P. 26(d)(2).

[333] *Id.* A trial court may conduct a discovery conference and enter appropriate orders, including protective orders that prohibit or limit discovery or require the requesting party to pay for some or all of the costs of production. *See* MISS. R. CIV. P. 26(c), 26(d)(2). Trial courts also have authority to conduct pre-trial conferences for various purposes, including "matters as may aid in the disposition of the action." MISS. R. CIV. P. 16(l).

[334] MISS. R. CIV. P. 26(b)(5); *see also* MISS. R. CIV. P. 34(b)(ii)(D).

[335] MISS. R. CIV. P. 26(g)(1). "Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." MISS. R. CIV. P. 26(g) advisory committee's note.

fees and expenses against a person who engages in frivolous discovery.[336] Rule 37(e) also grants trial courts broad discretionary authority to impose sanctions for discovery abuse.[337]

With respect to depositions of corporate employers, Rule 30(b)(6) directs a plaintiff desiring to depose a corporate employer to designate with "reasonable particularity the matters on which examination is requested."[338] Defendants may move for protective orders if they believe that the plaintiff's designated areas of questioning are beyond the scope of discovery. In addition, Rule 30(d) allows any party to move to terminate a deposition if the deposition is being conducted in bad faith.[339]

c. Summary Judgment Rule

Rule 56 authorizes a defendant employer to move for summary judgment on plaintiff's claim for direct negligence or any other claim lacking sufficient evidentiary support.[340] Such motion shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[341] "[T]he plaintiff must rebut the defendant's claim . . . that no genuine issue of material fact exists . . . by producing supportive evidence of *significant and probative* value . . . show[ing] that the defendant breached the established standard of care and that such breach was the proximate cause of her injury."[342]

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[336] MISS. R. CIV. P. 26(g)(3).

[337] MISS. R. CIV. P. 37(e); *see also* Ashmore v. Miss. Auth. on Educ. Tel., 148 So. 3d 977, 981 (Miss. 2014).

[338] MISS. R. CIV. P. 30(b)(6).

[339] MISS. R. CIV. P. 30(d).

[340] Rule 56(a) and (b) authorize motions for partial summary judgment on a single claim. MISS. R. CIV. P. 56(a)-(b).

[341] MISS. R. CIV. P. 56(c).

[342] Palmer v. Biloxi Reg'l Med. Ctr., Inc., 564 So. 2d 1346, 1355 (Miss. 1990).

d. Severance of Claims for Trial

Pursuant to Rule 20(b), a court may sever claims for trial if doing so is necessary to prevent delay or prejudice.[343] Similarly, Rule 42(b) authorizes a trial court to sever claims for trial to further "convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[344] Courts that have rejected the preemption rule have noted that trial courts' ability to sever claims for trial is one method of protecting an employer from unfair prejudice.[345]

e. Jury Instructions

Rule 51 authorizes parties to submit proposed jury instructions and to object to jury instructions prior to the court's instruction and submission of the case to the jury.[346] In addition, Rule 49 authorizes general verdicts, special verdicts, and a general verdict accompanied by special interrogatories. "Special verdicts are appropriate in complicated cases where their use might assist in focusing the jury's attention on the specific relevant factual issues or cases in which jury bias or prejudice might arise."[347] "[A] special verdict or a general verdict with interrogatories may be useful in a case in which the law authorizes allocation of fault among the parties determined to be at fault."[348] Defendants may submit proposed jury instructions concerning the elements of each distinct claim that the plaintiff must prove, clearly distinguishing the negligence claim against the employee, the vicarious liability claim against the employer, and the direct negligence claim against the employer. In addition, the defendant may draft a proposed form of the verdict that avoids

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343 MISS. R. CIV. P. 20(b).

344 MISS. R. CIV. P. 42(b). Severance may be ordered when necessary to increase judicial efficiency. If the issues that would be tried in the first and second phase of trial are related and involve overlapping evidence or if the increased efficiency from severance is speculative, severance should be denied. *See* Cap. City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 508 (Miss. 2004).

345 *See*, *e.g.*, Smith v. Williams, No. 05C-10-307 PLA, 2007 WL 2677131 at *7 (Del. Super. Ct. Sep. 11, 2007).

346 MISS. R. CIV. P. 51.

347 MISS. R. CIV. P. 49 advisory committee's note (citing Thompson v. Dung Thi Hoang Nguyen, 86 So. 3d 232, 240 (Miss. 2012)).

348 *Id.*

any duplicative allocation of fault to the defendant employer or any award of duplicative damages. Courts that have rejected the preemption rule have noted that proper jury instructions, special interrogatories, and special verdict forms may be used to clarify the claims and avoid any duplicative recovery.[349]

f. Trial and Post-Trial Motions

Rule 50(a) authorizes a defendant employer to move for a directed verdict on the direct negligence claim after the plaintiff has rested before the case is submitted to the jury.[350] If, viewing the evidence in the light most favorable to the plaintiff, no reasonable jury could return a verdict for the plaintiff on the claim for direct negligence, the motion should be granted.[351]

Rule 50(b) authorizes a defendant to move for judgment notwithstanding the verdict ("J.N.O.V.") after entry of the court's order reflecting the jury's verdict.[352] If the plaintiff's evidence fails to establish any single element of the plaintiff's claim for direct negligence, then J.N.O.V. is proper.[353] Thus, Rules 56, 50(a), and 50(b) provide a defendant with three opportunities to challenge the sufficiency of the plaintiff's evidence supporting the claim for direct negligence.

Pursuant to Rule 59, a defendant may file a post-trial motion for new trial based "based upon a prejudicial error by the court in the admission or exclusion of evidence, an error in the jury instructions, prejudicial comments by the judge or attorneys, a finding that the verdict is against the great weight of the evidence, [or] a finding that the jury's verdict is the result of passion, prejudice or bias."[354] In addition, a defendant may move to remit an excessive verdict resulting from "bias, prejudice, or passion" pursuant to Miss. Code Ann. § 11-1-55.[355]

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349 *See* McQueen v. Green, 202 N.E.3d 268, 280 (Ill. 2022); Ramon v. Nebo Sch. Dist., 493 P.3d 613, 619 (Utah 2021).

350 MISS. R. CIV. P. 50(a).

351 *Id.*; *see also* Moreno v. TLSL, Inc., 187 So. 3d 127, 129 (Miss. 2016) (directed verdict is proper when no reasonable juror could return a verdict for the non-moving party).

352 MISS. R. CIV. P. 50(b).

353 *See* Wilson v. Gen. Motors Acceptance Corp., 883 So. 2d 56, 63 (Miss. 2004).

354 MISS. R. CIV. P. 59 advisory committee's note.

355 MISS. CODE ANN. § 11-1-55 (2025).

2. Evidentiary Rules

Evidentiary rules contemplate and sufficiently address the concern that evidence of the employee's propensity or other bad acts might unfairly prejudice the employer and employee. Mississippi Rule of Evidence 402 provides that "[i]rrelevant evidence is not admissible."[356] Even if relevant, evidence of a person's propensity or character is generally inadmissible to prove that the person acted in accordance with her character.[357] Thus, in a motor vehicle accident case, evidence that an employee driver has a tendency to speed is inadmissible to prove that the driver was speeding at the time in question. Mississippi Rule of Evidence 404(b)(1) further prohibits "[e]vidence of a crime, wrong[,] or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[358] Thus, evidence that a driver drove negligently on other occasions is not admissible to show that the driver was negligent at the time in question. Rule 404(b)(2), however, permits admission of evidence of other acts for non-propensity purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[359] Evidence of a driver's prior record is relevant to and supports the claim that the driver's employer negligently hired the driver.

The rules contemplate that evidence may be admissible against one person, but not another, or with respect to one claim, but not another. In such cases, Mississippi Rule of Evidence 105 provides that the court shall give a limiting instruction directing the jury to consider the evidence only for the permissible reason.[360] If a court determines that evidence of a driver's poor driving record is admissible to prove the employer negligently hired the employee but inadmissible to prove the employee was negligent, the court may admit the evidence and give the jury a limiting instruction.[361] Mississippi appellate courts have frequently affirmed admission of potentially prejudicial evidence

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[356] MISS. R. EVID. 402.
[357] MISS. R. EVID. 404(a).
[358] MISS. R. EVID. 404(b).
[359] *Id.*
[360] MISS. R. EVID. 105.
[361] *See* Young v. State, 106 So. 3d 775, 780 (Miss. 2012).

when its admission is accompanied by a limiting instruction.[362] The law presumes that the jury follows instructions.[363]

If a trial court determines that a limiting instruction will not cure the potentially unfair prejudice, it has discretion to exclude evidence pursuant to Rule 403(b), "if its probative value is *substantially* outweighed" by its unfair prejudice.[364] Evidence is not unfairly prejudicial simply because it is damaging to a party. Instead, evidence is unfairly prejudicial if it has an undue tendency to cause the jury to reach a decision based upon an improper basis, often an emotional one.[365] Although exclusion of evidence pursuant to Rule 403 is "an extraordinary measure that should be used very sparingly,"[366] a trial court may properly exclude relevant evidence on that basis. Defendants seeking to exclude evidence pursuant to Rule 403 may file pretrial motions in

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[362] In several sexual assault cases, the court has affirmed admission of the defendant's prior acts of sexual assault to prove the defendant's plan, motive or intent even though there is a risk that the jury will improperly use the evidence for propensity purposes and the evidence is of a type likely to play to the jury's emotions. *See*, *e.g.*, Shoemaker v. State, 256 So. 3d 604, 614 (Miss. Ct. App. 2018) (admission of evidence of defendant's prior acts of sexual assault was not error; evidence was admissible to prove defendant's motive, planning and intent and trial court gave jury limiting instruction that it could not consider the evidence to determine that defendant acted in conformity with his previous acts but could consider it to determine defendant's motive and intent); Westbrook v. State, 109 So. 3d 609, 615 (Miss. Ct. App. 2013) (same); Derouen v. State, 994 So. 2d 748, 756 (Miss. 2008) (same); *see also* Sumrall v. Miss. Power Co., 693 So. 2d 359, 365-66 (Miss. 1997) (holding that the trial court erred in excluding evidence of a power company's subsequent remedial measure pursuant to MISS. R. EVID. 407, because, although the evidence could not be used to establish negligence or fault, it was admissible to prove the power company's control and noting that an appropriate limiting instruction may be given).

[363] *See, e.g.*, Cooper Tire and Rubber Co. v. Tucker, 826 So. 2d 679, 688 (Miss. 2002); Fielder v. Magnolia Beverage Co., 757 So. 2d 925, 937 (Miss. 1999); Downtown Grill, Inc. v. Connell, 721 So. 2d 1113, 1118 (Miss. 1998). Although some have questioned whether limiting instructions are effective, such as Sipp v. State, 936 So. 2d 326, 331 (Miss. 2006) (noting that limiting instructions may do more harm than good by focusing the jury's attention on sensitive evidence), it is generally assumed that jurors follow limiting instructions. *See* Samia v. United States, 599 U.S. 635, 646 (2023); United States v. Gomez, 617 F.3d 88, 96 (2d Cir. 2010).

[364] MISS. R. EVID. 403 (emphasis added). Notably, the rule does not require exclusion of unfairly prejudicial evidence. Jenkins v. State, 75 So. 3d 49, 54-55 (Miss. Ct. App. 2011) (noting that the use of "may" indicates that the rule is permissive not mandatory).

[365] James v. Carawan, 995 So. 2d 69, 77 n.23 (Miss. 2008); Abrams v. Marlin Firearms Co., 838 So. 2d 975, 981 (Miss. 2003).

[366] Owens v. Kelly, 191 So. 3d 738, 745 (Miss. Ct. App. 2015).

limine. In rejecting the preemption rule, numerous courts determined that precluding the plaintiff from pursuing the direct negligence claim is overkill because any concern about prejudicial evidence can be handled by trial courts on a case-by-case basis pursuant to Rule 403.[367] Although the concern that evidence that is relevant to prove direct liability may "taint" the jury's deliberation of the employee's negligence and the employer's vicarious liability is not trivial, it does not merit preemption of an entire cause of action.[368]

In light of the numerous procedural and evidentiary rules available to combat concerns about frivolous claims, excessive discovery, "Reptile Theory" tactics,[369] prejudicial evidence, duplicate damages, and excessive verdicts, the preemption rule is not necessary. Moreover, adoption of the rule suggests that appellate courts do not trust trial courts to properly apply existing rules.

D. The Preemption Rule is Inconsistent with Tort Law's Deterrence Goal

One goal and positive effect of tort law is that it deters misconduct.[370] Employers exposed to direct negligence claims are

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[367] *See*, *e.g.*, Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 252-53 (Tenn. 2024); McQueen v. Green, 202 N.E.3d 268, 280 (Ill. 2022); Ramon v. Nebo Sch. Dist., 493 P.3d 613, 619-20 (Utah 2021).

[368] Wright v. Watkins & Shepard Trucking, Inc., 968 F. Supp. 2d 1092, 1094-96 (D. Nev. 2013).

[369] Although many defense motions seeking to limit discovery or exclude evidence based on the plaintiff's implementation of "Reptile Tactics" are denied because they are too vague, premature or not well-founded, such as Beach v. Costco Wholesale Corp., No. 5:18-cv-00092, 2019 WL 1495296, at *4 (W.D. Va. Apr. 4, 2019) (denying defendant's motion for protective order as vague and premature); Baxter v. Anderson, 277 F. Supp. 3d 860, 864 (M.D. La. 2017) (denying a motion in limine based upon vague "Reptile Theory" arguments); Hensley v. Methodist Healthcare Hosps., No. 13-2436-STA-CGC, 2015 WL 5076982, at *4-5 (W.D. Tenn. Aug. 27, 2015) (denying "Reptile Theory" motion because defendants did not specify the evidence sought to be excluded), defendants may move for protective orders to limit discovery by specifying the specific discovery requests or deposition questions that are irrelevant or disproportionate. Similarly, defendants may file pre-trial motions in limine seeking to exclude specified evidence.

[370] *See* Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181 (2012) (arguing that the tort system causes rational actors to alter their conduct in order to avoid liability by complying with normative standards established in cases imposing tort liability).

motivated to avoid liability for such claims by evaluating their employment practices and safety procedures to ensure they are reasonable.[371] In the wake of court decisions rejecting the preemption rule, lawyers in those jurisdictions have advised their clients to review hiring and safety practices and protocols.[372] This is the exact deterrent effect that tort law is intended to impose. Even though employers are presumably motivated by the threat of vicarious liability to engage in reasonable hiring, retention, training, and supervision of employees, the threat of liability for direct negligence claims gives them an even greater motivation to make sure their employment practices are reasonable.[373] Moreover, allowing plaintiffs to pursue direct negligence claims

[371] *See*, *e.g.*, *Negligent Hiring Risk Less Than Employers Believe*, SHRM FOUND. (Nov. 9, 2023), http://www.shrm.org/topics-tools/news/talent-acquisition/negligent-hiring-risk-less-than-employers-believe [https://perma.cc/9VH9-KLTA] (noting that many believe that "the threat of negligent hiring lawsuits . . . led to the increased practice of criminal background screening among U.S. employers starting in the 1990s").

[372] *See, e.g.*, *What Business Owners Need to Know About Negligence Claims*, MERIDIAN L. (Sep. 16, 2024), http://meridian.law/blog/what-business-owners-need-to-know-about-negligence-claims [https://perma.cc/2PW4-7JQX] (noting that the Tennessee Supreme Court's rejection of the rule in *Binns v. Trader Joe's* "reinforces for all businesses the importance of robust hiring practices and employee training" that "aims to educate employees and prevent harmful conduct"); Taylor E. Brett, William K. Wright IV & Mary Kate Fernandez, *U.S. Fifth Circuit's Holding is Nail in Coffin for Employers' "Written Stipulation Rule*,*"* ADAMS & REESE (Sep. 9, 2022), http://www.adamsandreese.com/insights/u-s-fifth-circuits-holding-is-nail-in-coffin-for-employers-written-stipulation-rule [https://perma.cc/LW29-JSPJ] (urging "employers across all industries [to] be on the offensive for updating policies and procedures" in the wake of the Louisiana Supreme Court's rejection of the preemption rule in *Martin v. Thomas*); *Negligent Supervision: The Importance for Employers and Personal Injury Plaintiffs Alike*, SW&L ATT'YS (Aug. 31, 2022), http://www.swlattorneys.com/negligent-supervision/ [https://perma.cc/KRD4-3AKQ] (advising employers to take "note . . . of the negligent supervision tort and take diligent care in hiring, training and directing employees"); Brett, Wright IV & Fernandez, *supra* note 29 (acknowledging that employers face more exposure to liability in light of Louisiana's rejection of the preemption rule and cautioning employers to "review their hiring, training and supervisory policies"); Mike Parks, *Unfavorable Ruling from Louisiana Supreme Court On Employer Independent Negligence*, MBLB (June 30, 2022), http://mblb.com/trucking-transportation/unfavorable-ruling-from-louisiana-supreme-court-on-employer-independent-negligence/ [https://perma.cc/6EAV-NSJC] ("Companies who are potential defendants in personal injury lawsuits would be well served to review their existing safety programs and policies.").

[373] *See* Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 253 (Tenn. 2024) (adoption of the rule would eliminate some deterrence); Martin v. Thomas, 346 So. 3d 238, 246 (La. 2022) (adoption of the rule would thwart "the deterrent aims of tort law").

against employers will give rise to public scrutiny of employment practices, which should result in improved safety.[374]

Some have argued that this deterrent effect is particularly salutary in the commercial trucking industry.[375] One commentator has effectively argued that the preemption rule is inconsistent with the regulatory scheme established by the Federal Motor Carrier Safety Administration ("FMCSA"), whose stated mission is to "reduce crashes, injuries[,] and fatalities involving large trucks and buses."[376] Pursuant to the regulations:

> Motor carriers [must] maintain[] a driver qualification file for all drivers, ensur[e] new hires possess the necessary qualifications to operate a commercial motor vehicle, receiv[e] and keep[] a driver's application of employment, perform[] an annual review of driving records and job statuses, complet[e] pre-hiring background and character investigation of the driver, and train[] all employees in their duties under the [regulations].[377]

The preemption rule keeps evidence of trucking companies' negligence out of public courtrooms and thereby frustrates the FMCSA's regulatory goal of holding trucking companies accountable for their independent common law and regulatory obligations.[378]

E. The Preemption Rule is Contrary to the Long-Held Precept that the Plaintiff is the Master of the Complaint

Mississippi courts have long adhered to the "precept that plaintiffs are the masters of their complaint."[379] As the master of

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374 *See*, *e.g.*, Hoyer, *supra* note 128, at 560-61 (arguing that the preemption rule shields employer negligence from the public); Ribaudo, *supra* note 28, at 994 (same).

375 *See*, *e.g.*, Hoyer, *supra* note 128, at 543 (arguing that without the accountability imposed by direct claims, trucking companies will be more dangerous); Scott Beal, *Saving Negligent Entrustment Claims*, TRIAL, Feb. 2007, at 34, 37 (arguing that rejection of the rule will reduce danger on the highways).

376 *See* Hoyer, *supra* note 128, at 540-41.

377 *Id.* at 543 (citing the various regulations in footnotes 56-62).

378 *Id.* at 546.

379 *See*, *e.g.*, Adara Networks Inc. v. Langston, 301 So. 3d 618, 622 n.4 (Miss. 2020) (citing Caterpillar, Inc. v. Williams, 482 U.S. 386, 395 (1987)); *see also* Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 35, 38 n.8 (2025) (noting that the plaintiff has the ability to add or remove claims from the complaint as the plaintiff sees fit).

the complaint, the plaintiff "is entitled to control the type of claims asserted in [her] lawsuit."[380] Rule 8 of the Mississippi Rules of Civil Procedure governs pleadings and provides:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligations set forth in Rule 11.[381]

Thus, Rule 8 explicitly authorizes plaintiffs to simultaneously pursue vicarious liability and direct negligence claims.

As recognized by numerous courts that have rejected the preemption rule, these claims are separate and distinct. Vicarious liability focuses on the employee's conduct, while direct negligence focuses on the employer's conduct.

> [I]mportantly, each theory of liability is motivated by different concerns. The doctrine of vicarious liability restricts employer liability to employee conduct that "should be considered as one of the normal risks to be borne by the business." . . . The tort of negligent hiring and supervision creates employer liability when the employer exacerbates the "normal risks to be borne by the business" through the employer's own negligence. Thus, each theory of liability aims at different risky conduct: vicarious liability makes the employer responsible for the normal risks of doing business, while the tort makes the employer responsible for any abnormal risks that she herself creates.[382]

Plaintiffs should not be barred from pursuing both claims at the outset of litigation.

Rule 8 was intended to give the pleader more flexibility at the outset of the case:

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[380] Miss. State Port Auth. at Gulfport v. S. Indus. Contractors LLC, 271 So. 3d 742, 752 (Miss. Ct. App. 2018); *see also* Dollar Gen. Corp. v. Dobbs, 409 So. 3d 569, 575 (Miss. 2025) ("[T]he plaintiff is the master of his complaint . . . ."); Patton Med. of Gulf Coast, Inc. v. Relle, 269 So. 3d 266, 283 (Miss. Ct. App. 2018) (same).

[381] MISS. R. CIV. P. 8(e)(2).

[382] Wright v. Watkins & Shepard Trucking, Inc., 968 F. Supp. 2d 1092, 1095 (D. Nev. 2013).

> Alternative and hypothetical pleading generally was not permitted under common law or code practice. . . . As a result, a party was required to elect a particular set of facts and a legal theory at the pleading stage. Unfortunately, this forced a litigant to set forth his allegations with a degree of certainty that often was not warranted in terms of the state of the pleader's knowledge at that point in the case. If the facts he asserted in the pleadings were not confirmed by later proof, the action or defense would fail even if the proof demonstrated a right to relief or defense on some other theory.[383]

The drafters "realized that in a complex legal environment, flexible pleading was essential to a full presentation of all relevant facts and legal theories at trial and the final settlement of disputes on their merits."[384] Rule 8 was adopted to avoid making the pleader choose between multiple claims at the outset of litigation when the plaintiff may be uncertain as to how the evidence will develop. As explicitly acknowledged by the Mississippi Supreme Court, a plaintiff may invoke Rule 8(e)(2) to preserve and "uphold the [plaintiff's] method of presentation."[385]

The plaintiff's ability to join a vicarious liability claim against an employer with a direct negligence claim against the employer in a single lawsuit is also explicitly authorized by Rule 18(a), which authorizes a plaintiff to join as many claims as the plaintiff has against a single defendant. "[C]onsequently, an election of remedies or theories will not be required at the pleading stage of litigation."[386] Adopting the preemption rule requiring dismissal of a plaintiff's direct negligence claims at the outset of litigation prior to discovery would not only thwart a plaintiff's ability to be the master of her complaint,[387] but it would also run afoul of Rules 8 and 18 of the Mississippi Rules of Civil Procedure. In addition,

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[383] 5 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1282 (4th ed. 2025) (discussing the goal of FED. R. CIV. P. 8 upon which the corresponding Mississippi rule was based).

[384] *Id.*

[385] Harrison v. Chandler-Sampson Ins., Inc., 891 So. 2d 224, 233 (Miss. 2005) (citing 6A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1584 (1990)).

[386] MISS. R. CIV. P. 18 advisory committee's note.

[387] *See* Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 253 (Tenn. 2024); Ramon v. Nebo Sch. Dist., 493 P.3d 613, 618 (Utah 2021).

early dismissal of the plaintiff's direct negligent claim may totally prevent the plaintiff from recovery if the fact finder determines that the employee/agent was not negligent even though the employer/agent was—the very outcome the drafters sought to avoid.

CONCLUSION

Adoption of the preemption rule has immense implications. Rather than blindly follow the Court of Appeals' adoption of the rule, the Mississippi Supreme Court should reject the rule and overrule *Carothers v. City of Water Valley* and *Taylor v. Jenkins*. Not only is the rule inconsistent with Miss. Code Ann. § 85-5-7, which requires allocation of fault to all persons whose fault caused the plaintiff's injuries, but the rule is also contrary to well-established principles of Mississippi jurisprudence and tort law's goal of promoting safety and accountability.