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McQueen v. Green: The Illinois Supreme Court Weighs in on Alternate Theory Claims of Vicarious and Direct Liability for Employers

On April 21, 2022, the Illinois Supreme Court issued its opinion in *McQueen v. Green*.[1] *McQueen* dramatically overturned longstanding Illinois case law addressing an employer's admission of vicarious liability for its employee's misconduct—which previously precluded direct negligence claims against the employer.

Legal Landscape Before *McQueen*

Because the *McQueen* decision addressed prior Illinois caselaw and changing national attitudes on this issue, an appreciation of its impact requires an understanding of the pre-*McQueen* status quo.

Neff v. Davenport Packing Co.

The status quo was established in 1971 when the Appellate Court of Illinois, Third District issued its opinion in *Neff v. Davenport Packing Co*.[2] In *Neff*, the plaintiff was in an accident with an employee driving a vehicle for his employer. The plaintiff sued the employer alleging two theories of liability: (1) vicarious liability under *respondeat superior* for the negligence of the driver-employee and (2) direct liability against the employer for negligent entrustment of the vehicle to the allegedly unqualified driver-employee.[3]

As a case of first impression in Illinois, *Neff* explored treatment of the issue in other jurisdictions for guidance.[4] The majority view at that time was that direct negligence actions were improper when *respondeat superior* liability was admitted because direct negligence claims against an employer become irrelevant when the employer admits vicarious liability for the negligence of its employee.[5] The *Neff* court adopted the majority view and held that the plaintiff could not maintain both theories of liability—resulting in the dismissal of the direct negligence claim.[6]

The McHaffie Rule

The Supreme Court of Missouri's opinion in *McHaffie v. Bunch* heavily influenced the development of case law on this issue, both in Illinois and nationally.[7] This opinion framed and articulated the issue so clearly that its holding became widely known as the "*McHaffie* Rule."

In *McHaffie*, the plaintiff was involved in a motor vehicle accident with a tractor-trailer driver.[8] Plaintiff filed suit alleging both (1) vicarious liability of the tractor-trailer driver's employer for the driver-employee's negligence and (2) direct liability against the employer for negligent hiring and supervision of the driver-employee.[9] The *McHaffie* Court adopted the majority view, ruling that direct negligence claims against an employer are barred once *respondeat superior* liability is admitted.[10] The *McHaffie* opinion reasoned that if liability is admitted, then the court and litigants need not expend the time, energy, or money necessary to establish alternate theories of liability.[11] The *McHaffie* decision also noted that allowing mixed direct and vicarious liability claims in the same action would result in the presentation and admission of evidence which is irrelevant or inflammatory at trial, and would likely result in double recovery for the plaintiff.[12] The *McHaffie* decision remains highly influential in the national discussion of this issue.

Gant v. L.U. Transport, Inc.

In 2002, the Appellate Court of Illinois, First District, issued its opinion in *Gant v. L.U. Transport, Inc.*[13] In *Gant*, the plaintiff, a tractor-trailer driver, was rear-ended by the defendant, also a tractor-trailer driver, resulting in a seven-vehicle pileup on the Dan Ryan Expressway in Chicago.[14] The plaintiff alleged vicarious liability claims against the defendant's employer under a *respondeat superior* theory and direct liability claims under a negligent hiring theory.[15] The direct negligence theory claims were dismissed pursuant to *Neff*.[16] The plaintiff's counsel on appeal argued that *Neff* and its progeny were no longer applicable following the adoption of comparative negligence by the Illinois Supreme Court in 1981.[17] The *Gant* court reaffirmed *Neff,* ruling that an employer's liability is completely derivative and cannot exceed that of the employee.[18] They went on to make clear that this was true regardless of whether the employer was actually directly negligent.[19]

The *Gant* opinion relied heavily on the reasoning in the *McHaffie* opinion—particularly with respect to multiple liability theories wasting litigants' time and energy and potentially introducing irrelevant, inflammatory evidence.[20] It also referenced *McHaffie*'s reasoning that allowing direct negligence claims in addition to *respondeat superior* liability could result in a greater percentage of fault attributed to the employer than to the employee, something the *McHaffie* Court found to be "plainly illogical."[21] The *Gant* decision reaffirmed the Third District's holding in *Neff*, using the reasoning in *McHaffie*.[22]

From Gant *to* McQueen

Until the Illinois Supreme Court's ruling in *McQueen v. Green*[23] on April 21, 2022, once an employer admitted vicarious liability under a plaintiff's *respondeat superior* claim, a plaintiff could not proceed against the employer on a direct liability theory such as negligent hiring, negligent retention, negligent supervision, or negligent entrustment.[24] Under the *Neff* and *Gant* decisions, defendants routinely and successfully moved to dismiss direct negligence claims at the pleading stage. This narrowed the issues and scope of discovery. For over 50 years, *Neff* and *Gant* allowed for more

streamlined litigation, prevented the introduction of irrelevant, inflammatory evidence into the record, and limited intrusive corporate representative depositions.

McQueen v. Green Overturns *Neff* and *Gant* and Rejects the *McHaffie* Rule

In *McQueen v. Green*, the plaintiff, Fletcher McQueen, alleged he was injured in a motor vehicle accident. On August 17, 2012, Pan-Oceanic Engineering Company, Inc. assigned its heavy-haul truck driver employee, Lavonta Green, to pick up a skid steer from shipper Patten Industries, Inc.[25] Patten's employees loaded the skid steer onto Green's trailer. Green asked that the equipment be reloaded after noticing it looked "crooked."[26] Patten's employees refused. Green called his supervisor at Pan-Oceanic, reporting that the load did not look right.[27] Green's supervisor instructed him to transport the load as it was, but to "be safe."[28] Green, fearing he might be terminated for insubordination if he refused, left Patten's property with the skid steer.[29] In transit, Green was initially able to travel safely at low speed due to traffic conditions. However, as traffic eased, he accelerated up to approximately 40 miles per hour on the Eisenhower Expressway. Green then looked in his mirrors and saw the skid steer bouncing on the trailer.[30] Green braked and attempted to change lanes, but lost control of the truck. The trailer swung over and struck McQueen's vehicle.[31]

In his complaint, McQueen alleged two theories of liability against Pan-Oceanic. McQueen first alleged Pan-Oceanic was vicariously liable for Green's negligence in transporting an improperly secured load.[32] McQueen also alleged Pan-Oceanic was directly negligent for "failing to train Green on how to respond to an unsafe load; ordering Green to take the load onto the highway when the company knew, or should have known, that the load was in an unsafe state; and failing to simply reject the load to prevent it from traveling on the highway."[33] Pan-Oceanic admitted Green was its agent and was acting within the scope of his agency at the time of the accident.[34] Pan-Oceanic filed a motion under *Neff* and *Gant*, arguing that the direct negligence claims were barred.[35] The trial court denied the motion, reasoning that the direct negligence claim against Pan-Oceanic was premised on the employer's own conduct—independent of Green's acts—and was, therefore, not a derivative claim.[36] The matter was tried before a Cook County jury, which found the employer Pan-Oceanic was liable, but the employee-driver Green was not.[37] On appeal, the Appellate Court of Illinois, First District reversed, applying *Neff* and *Gant* and holding McQueen could not proceed against Pan-Oceanic under a direct negligence theory.[38] The plaintiff then appealed the case to the Illinois Supreme Court.

The supreme court emphatically rejected the *McHaffie* Rule, holding that "an employer's acknowledgment of vicarious liability for its employee's conduct does not bar a plaintiff from raising a direct negligence claim against the employer."[39] The supreme court noted a split of authority in state courts nationwide, concluding that "although some courts have suggested *McHaffie* represents the majority view, the caselaw throughout the country is more evenly divided."[40] The supreme court further noted that some states adopting *McHaffie* have recently seen legislative responses to abrogate such rulings.[41]

Under *Gant,* "allowing the simultaneous submission of these two separate theories would create the possibility that an employer's negligent entrustment of a vehicle to an employee would result in a greater percentage of fault to the employer than is attributable to the employee."[42] However, in *McQueen*, the supreme court rejected the notion that an employer's liability under theories of negligent entrustment, supervision, or hiring was derivative of the employee's conduct as a matter of law—or even that such theories are predicated on the liability of the employee.[43]

The supreme court dismissed concerns raised in *McHaffie* and *Gant* that adoption of this new rule would result in irrelevant and prejudicial evidence being admitted at trial as "not well founded" thanks to safeguards against such admissions under rules of evidence.[44] The supreme court outright dismissed concerns about double recovery, reasoning

that trial courts can prevent double recovery through jury instructions or special interrogatories.[45] The court relied on the commentary for Illinois Pattern Instruction (Civil) 50.01, which provides:

> If by the pleadings and evidence there is an issue of fact as to the liability of the principal for *his own acts independent of acts of the agent*, then a separate instruction appropriate to such independent basis of liability should also be used and the last sentence of this instruction should be modified or stricken accordingly.[46]

Notably, the supreme court narrowed the application of its ruling in *McQueen* by requiring that direct negligence claims against an employer have a "good-faith factual basis" in conduct which is "separate and apart" from the conduct of its employee.[47] The court reasoned that the evidence supported a claim of direct negligence against the employer because Pan-Oceanic's supervisor directed Green to transport the load after Green voiced concerns over its placement.[48]

Criticism and Commentary on *McQueen* It Wasn't Broke—Don't Fix It

The Illinois Supreme Court arguably provided a solution in search of a problem in *McQueen*. Before *McQueen*, long-established precedent held that an employer was liable for harm caused by its employees as long as there is no dispute that the employee or agent was acting within the course and scope of his employment or agency. Prior decisions allowed employers to remain insurable and for their employees to remain employed. It also helped encourage settlements by ensuring that plaintiffs would have a fund of insurance proceeds or other assets from which to recover. Direct versus vicarious liability issues were defined and narrowed in the pleadings stage of a case so that discovery would be reasonable in scope and cost-effective. At trial, the issue of liability was simple, thereby allowing the jury to focus on the more complex issues of proximate causation and the nature, extent, and duration of damages.

After *McQueen*, employers now face a quagmire of ambiguity about what a plaintiff may plead, discover, and present to a jury at trial. *McQueen* will inevitably result in a broader scope of discovery, higher cost to litigants, and confusion of liability issues by the jury at trial. The authors of this article further anticipate the plaintiff's bar will utilize *McQueen* to advance direct negligence claims against employers for conduct which has little or nothing to do with the specific facts of the events giving rise to their actions, and most likely will seek to introduce evidence of unrelated conduct to embarrass employers and/or inflame the passions of juries statewide.

The fact scenario in *McQueen* is analogous to a situation where a vehicle's brakes fail. In such a case, it is not implausible that the driver-employee could be found free of liability and that the employer-principal should be held responsible. But even before *McQueen*, plaintiff could still recover in such a scenario. Under *Neff* and *Gant*, there was no limitation on a plaintiff's ability to pursue an action against a defendant employer for the negligence of its vehicle maintenance or other non-driving employees.[49]

> **Hypothetical #1**: Consider a collision between a vehicles driven by a plaintiff and a vehicle driven by a defendant. There is evidence that the plaintiff was partially responsible for the event. In a trial of this scenario, the jury would be asked to assess each party's degree of fault and assign percentages of blame determining whether the plaintiff will recover in light of their own contributory negligence.

> **Hypothetical #2**: The facts are the same as Hypothetical #1, but the defendant's employer is added to the equation. The plaintiff will ask the jury to assign some percentage of fault to the defendant's employer for failing to terminate the defendant for various minor infractions that occurred over the years of the employee's tenure.

It may seem that assigning a percentage of fault based on who caused a car collision should be only between the drivers. It may also seem illogical to add a percentage of fault to the "liability pie" based on something so far removed from the underlying occurrence.

The *McQueen* decision does not seem to consider the possibility of Hypothetical # 2, or perhaps the supreme court summarily dismissed the possibility of such a scenario. The *McQueen* decision cited a decision by the Utah Supreme Court, *Ramon v. Nebo School District*, to opine that "a court has a myriad of other tools to address a potential double recovery: it can instruct the jury, provide special verdict forms [which Illinois does not permit], or even remove doubly recovered portion through post-trial motions."[50] In *Ramon*, the Utah Supreme Court confronted the situation in Hypothetical # 2, where the plaintiff's direct cause of action against the employer was based on its failure to properly screen, train, discipline, and supervise the driver.[51] The Utah Liability Reform Act allows for a jury to allocate proportionate fault attributable to both the defendant driver and his employer in its failure to supervise its driver.[52] Post-*McQueen*, Illinois law is now not equipped to resolve this situation—whereas the issue was avoided altogether under *Neff* and *Gant*.

McQueen *Does Not Address Valid Concerns about Double Recovery*

Double recovery is a serious issue that the *McQueen* decision gave only a cursory analysis. The *McHaffie* Rule is premised on the notion that allowing a plaintiff to present two claims against the same employer will result in confusion of liability issues for the jury. Defense counsel in Illinois are certainly going to have more to say about the issue after *McQueen*. Nonetheless, more clarity and reasoning from the Illinois Supreme Court would have been useful to both the defense and plaintiffs' bar for litigating mixed direct-vicarious liability claims in the wake of *McQueen*.

McQueen *Discourages Good Record Keeping*

Consider an employer that keeps robust personnel files—complete with written discipline histories and procedural infractions, anonymous hotline complaints which could never otherwise be substantiated, customer complaints for lackluster service or interactions, and documentation of minor remote occurrences that might be vaguely similar to the underlying event. Then consider the smaller company that keeps almost no paperwork other than undecipherable markings on notebooks, no disciplinary records, and no other documents. After *McQueen*, the company that maintains the exemplary employment files will be punished more severely. We know as much because this is what the Reptile Theory is all about. And of course, when the stakes are highest, the plaintiff's attorney will make a mountain out of a mole hill in disciplinary records at trial.

The McQueen *Holding Is Not Supported By Its Own Facts*

The old legal maxim applies here that "hard facts make bad law." To overturn the well-established precedent in *Neff* and *Gant*, it is reasonable to expect that the facts of a watershed case such as this would clearly and unambiguously support its reasoning. However, the claim against Pan-Oceanic was not entirely "separate and apart" from the conduct of the driver, Green. The evidence indicated Green raised concerns about the securement of the load, but then still transported it after discussions with his supervisor. As a commercial driver, Green has a responsibility not to transport

improperly secured loads. While Pan-Oceanic's decision to send Green on the road may have been ill-advised, it is folly to say that it was wholly "separate and apart" from the accident in question. Green's own conduct, in whole or in part, gave rise to the accident. The Pan-Oceanic supervisor's conduct was not "separate" or "apart" from Green's—they were inextricably linked. Indeed, the jury reached two logically incompatible conclusions 1) that Pan-Oceanic's order to transport the load was negligent, but 2) Green's actual transportation of the load was not. This is precisely the sort of discontinuity the *McHaffie* Rule was designed to avoid. The analysis in the *McQueen* decision is all the more challenging to interpret and apply, because it does not appear to follow its own facts.

The McQueen *Ruling is Broad and May Lead to Ambiguity in its Interpretation and Application*

While the application of *McQueen* is expressly limited by the "good faith factual basis" requirement, the supreme court failed to adequately address how to determine whether claims against an employer for direct negligence are truly "separate and apart" from an employee's negligence. In theory, "separate and apart" sounds clear and apparent. In practice, it is much more difficult to determine whether an employer's conduct is "separate and apart" from the acts of its employee. Corporations and employers only act through their officers and employees, so it is logically inconsistent for the supreme court to say that an employer's negligence is "separate and apart" from the acts of its employees. This is even more apparent in transportation cases, where responsibility to safely transport persons or cargo is shared between drivers and motor carriers. Green's conduct in *McQueen* is a prime example of that dilemma. A commercial driver has a responsibility to conduct a pre-trip inspection of the vehicle and load. If the vehicle is not roadworthy or the load is not properly secured, the driver has a duty to put the vehicle out of service until the offending condition is made safe. Even in direct liability claims such as negligent maintenance of a vehicle, the motor carrier's employees are often responsible for maintenance of the vehicle in question. In such instances, the negligence of the employer is still derivative of an employee's negligence. In such cases, the employer's liability is just based on the acts or omissions of its maintenance personnel rather than a driver.

The *McQueen* decision also contained many statements about how courts could limit prejudice. Yet, those portions of the decision unfortunately lacked thorough discussion of the court's analysis and reasoning behind such statements. The supreme court spent little time discussing the downside analysis. As a result, defense counsel should be aware of the potential for unintended consequences in the wake of this decision.

Special Interrogatories are Not the Silver Bullet

In *McQueen*, there was no consideration for how a jury would sort out an allocation of fault when assessing mixed vicarious-direct liability claims to make the "liability pie" equal 100%. Illinois does not have the mechanisms like Utah, as discussed in *Ramon,* where a mixed vicarious-direct liability claim can be considered within the liability pie. Either the employer is at fault or the employee is at fault, but not both.

The supreme court suggested the use of special interrogatories to apportion negligence among multiple parties, particularly in situations where liability of the employer is an either/or proposition. However, in January 2020, the use of special interrogatories was significantly limited in Illinois. The General Assembly revised 735 ILCS 5/2-1108 to give more discretion to the trial courts in either submitting or refusing to submit special interrogatories to a jury.[53] Previously, the trial court's discretion was reviewed *de novo*, but they are now reviewed for abuse of discretion.[54] However, and

more importantly, parties can tell the jury about the impact of answering the special interrogatories, which typically favors the plaintiff and undermines their purpose.[55] It is easily foreseeable that plaintiffs' counsel will simply tell the jury that if they answer a special interrogatory in a way that is favorable to the defense, the plaintiff will not recover—thereby negating the special interrogatory's integral purpose of testing a general verdict against the jury's determination as to one or more specific issues of fact.

Practical Considerations for Defense Counsel Post-*McQueen*

The most obvious practical consequence of the *McQueen* decision is the elimination of one of the most effective tools in the defense's motion-practice toolbox: the ability to admit agency and dismiss direct negligence counts under the *McHaffie* Rule.[56] While *McQueen* certainly undercuts the defense in its rejection of the *McHaffie* Rule,[57] its "good faith factual basis" requirement provides defense counsel with an opportunity to attack direct liability claims both before and after discovery. Plaintiffs must allege specific facts establishing the conduct of the principal-employer which is "separate and apart" from the conduct of its agent-employee.[58] The following recommendations may assist defense counsel.

Remove Hybrid Actions to Federal Court

Removal to federal court is a viable defense strategy, in light of *McQueen*, to position hybrid actions for favorable disposition at the pleadings stage. Apart from the *McQueen* opinion itself, Illinois federal district court opinions constitute the sole authority on its interpretation and appear to limit its utility to plaintiffs' counsel. Where there is diversity of party citizenship, a typical personal injury complaint at law, seeking damages in excess of the applicable state law jurisdictional figure, is generally removable as a matter of course. Therefore, positioning hybrid cases in federal court, should be explored in every case where proper federal jurisdiction exists.[59]

Applicable law regarding removal, where there is diversity of party citizenship, is highly favorable to defense counsel in establishing diversity jurisdiction by meeting the amount in controversy requirement of $75,001.[60] If the plaintiff, "the master of the complaint," provides little information about the value of the claims alleged, a good-faith estimate of the stakes is acceptable if it is plausible and supported by a preponderance of the evidence.[61] "Once the defendant in a removal case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if it appears to a legal certainty that the claim is really for less than the jurisdictional amount."[62] In addition, if a plaintiff does not stipulate to damages of $75,000 or less, "the inference arises that he thinks his claim may be worth more."[63] Pursuant to these removal standards, common complaint allegations such as "serious permanent injuries," "great pain and suffering," the expense of "great sums of money," and/or a prayer for relief in excess of $50,000 will likely satisfy the amount in controversy requirement and secure removability of the case.[64]

Federal District Courts Recognize the "Separate and Apart" Pleadings Requirement

Illinois federal district courts, applying Illinois law in diversity cases, have recognized the requirement to plead specific facts of employer liability which is "separate and apart" from the employee's acts.[65]

In *Swanson v. Murray Bros*, a rear-end trucking accident case removed to the Central District of Illinois, plaintiffs alleged a hybrid action of *respondeat superior* and direct negligence against the defendant driver and motor carrier.[66]

Plaintiffs' amended complaint alleged, in relevant part, (1) that the defendant driver was in contact with the defendant motor carrier using a non-hands-free device at or near the time of collision, (2) that the motor carrier defectively maintained the brakes of the subject tractor, and (3) that the motor carrier instructed, pressured, or allowed the operation of the tractor "as would necessitate the [tractor] being operated at speeds greater than those prescribed."[67] On these grounds, even prior to the *McQueen* precedent, the Central District permitted plaintiffs' direct liability counts to proceed to discovery.

Post-*McQueen*, at least one court has dismissed direct liability negligent hiring claims.[68] Citing *Swanson*, and again prior to *McQueen*, the Southern District of Illinois dismissed negligent hiring, training, supervision, and retention claims where the plaintiff's complaint failed to plead facts and only contained formulaic recitations of the elements of the cause of action.[69] The *Lewis* third-party complaint alleged that the employer-motor carrier allowed its driver-employees to operate the subject commercial motor vehicle with knowledge that they were team-driving without an adequate sleeper birth and were well beyond their federal hours of service at the time of the accident.[70] Nonetheless, several months after *McQueen* was decided, the Southern District dismissed the third-party plaintiff's negligent hiring claim, finding not enough facts were pled to satisfy the *McQueen* "separate and apart" requirement.[71] While the *Lewis* dismissal was without prejudice and third-party plaintiffs were given leave to replead, it demonstrates the district court's amenability to limiting *McQueen* at the outset of a case. At this time, the *Lewis* court stands as the sole persuasive authority interpreting *McQueen*. Therefore, counsel should consider removing the case to federal court.

If the Case is Non-Removable, Consider § 2-615 Motion Practice

Many cases are not removable to federal court. As such, defense counsel should be prepared to challenge direct negligence actions on grounds of failure to state a claim under § 2-615 of the Illinois Code of Civil Procedure.[72] Illinois is a "fact pleading" state, so plaintiffs cannot rely on conclusions unsupported by specifically alleged facts.[73] The complaint must identify the wrongful actions allegedly committed by the defendant, without relying on factual or legal conclusions as a substitute for specific factual allegations.[74] The courts must disregard conclusions not supported by well pled facts.[75]

At the pleadings stage, plaintiffs are less likely to have sufficient information to plead, in good faith, facts to establish conduct "separate and apart" from the conduct of the negligent employee. Therefore, Illinois defense counsel should strictly scrutinize the specific facts alleged in the complaint and identify any conclusory allegations to attack in a motion. Should the complaint rely, for example, on allegations that the principal-employer negligently hired, trained, monitored, retained, or entrusted the instrument of injury to the agent-employee, this presents an ideal opportunity for defense counsel to seek dismissal of direct negligence counts early in the action.

Ultimately, a favorable interpretation of *McQueen* at the appellate level will inevitably require Illinois defense counsel to challenge its applicability and scope at the trial court level. For this purpose, § 2-615 motions should advocate for a strict, narrow reading of *McQueen*'s "separate and apart" language. Even if such motions are unsuccessful at hearing, consider respectfully asking the trial judge to make a judicial finding as to which specific direct negligence allegations in the complaint, if any, satisfy such qualifying language. In doing so, the trial courts may gradually be more receptive to the reasoning set forth in the *Lewis* case.

(Endnotes)

1 *McQueen v. Green*, 2022 IL 126666.

[2] *Neff v. Davenport Packing Co.*, 131 Ill. App. 2d 791 (3rd Dist. 1971).
[3] *Neff*, 131 Ill. App. 2d at 792.
[4] *Id*.
[5] *Id*. at 793.
[6] *Id*.
[7] *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995).
[8] *McHaffie*, 891 S.W.2d at 824.
[9] *Id.*
[10] *Id.* at 826.
[11] *Id.*
[12] *Id.*
[13] *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924 (1st Dist. 2002).
[14] *Gant*, 331 Ill. App. 3d at 924.
[15] *Id.*
[16] *Id.* at 925-6.
[17] *Id*. at 927.
[18] *Id.* at 928.
[19] *Id.*
[20] *Id.* at 929.
[21] *Id.*
[22] *Id.* at 930.
[23] *McQueen,* 2022 IL 126666.
[24] *Gant*, 331 Ill. App. 3d at 930.
[25] *McQueen,* 2022 IL 126666, ¶ 4.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*. ¶ ¶ 5, 10.
[30] *Id*. ¶ 5.
[31] *Id*.
[32] *Id.* ¶ 6 (emphasis added).
[33] *Id*. ¶ 6.
[34] *Id*. ¶ 7.
[35] *Id*. ¶ 24.
[36] *Id*. ¶ 28.
[37] *Id*. ¶ 22.
[38] *Id*. ¶ 29.
[39] *Id*. ¶ 60.
[40] *Id.* ¶ 41. The supreme court cited to decisions by the Illinois Court of Appeals and Missouri Supreme Court supporting the proposition that plaintiff's claims against an employer are barred where the employer admits vicarious liability. The

court also cited decisions by courts in Kentucky, Utah, and South Carolina, as well as a recent revision to a statute in Colorado, in support of the opposite proposition. *See MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324 (Ky. 2014); *Ramon v. Nebo Sch. Dist.*, 2021 UT 30; *James v. Kelly Trucking Co.*, 377 S.C. 628 (2008); *Brown v. Long Romero*, 2021 CO 67.

[41] *McQueen,* 2022 IL 126666, ¶ 41.

[42] *Gant v. L.U. Transp., Inc.*, 331 Ill. App. 3d 924, 929 (1st Dist. 2002).

[43] *See Gant v. L.U. Transp., Inc.*, 331 Ill. App. 3d at 928 n. 1 (1st Dist. 2002) (noting that the analysis for all three theories of liability is the same).

[44] *McQueen v. Green*, 2022 IL 126666, ¶ 46.

[45] *Id.* ¶47.

[46] *Id.* ¶ 44 (quoting IPI Civil No. 50.01, Notes on Use).

[47] *Id.* ¶ ¶ 43, 45.

[48] *Id*. ¶ 44.

[49] *See Levitt v. Hammonds*, 256 Ill. App. 3d 62, 65-66 (1st Dist. 1993) (issue as to whether principal negligently maintained vehicle brakes and negligence did not depend on outcome finding agent liable).

[50] *McQueen,* 2022 126666, ¶ 47 (citing *Ramon v. Nebo School Dist.,* 2021 UT 30, ¶ 21.

[51] *Ramon*, 2021 UT 30, ¶ 26.

[52] *Id.* ¶ 26.

[53] 735 ILCS 5/2-1108 (as updated on August 2, 2019).

[54] *Id.*

[55] *Id.*

[56] *Thompson v. Ne. Ill. Reg'l Commuter R.R. Corp*., 367 Ill. App. 3d 373 (1st Dist. 2006); *Gant v. L.U. Transp., Inc.*, 331 Ill. App. 3d 924 (1st Dist. 2002); *Neff v. Davenport Packing Co.*, 131 Ill. App. 2d 791 (3rd Dist. 1971).

[57] *McQueen,* 2022 IL 126666,¶ 46.

[58] *Id*. ¶ 45.

[59] *See* 28 U.S.C. §§ 1331-1332, 1441, 1446.

[60] 28 U.S.C. § 1332(a).

[61] *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006).

[62] *Oshana*, 472 F.3d at 511.

[63] *Id.* at 512.

[64] *See, e.g., Kincaid v. Menard, Inc*., No. 13 C 7279, 2014 WL 1715503 (N.D. Ill. Apr. 30, 2014).

[65] *Swanson v. Murray Bros, LLC*, 19-cv-3220, 2021 WL 782273 (C.D. Ill. Mar. 1, 2021); *Lewis v. Hirschbach Motor Lines, Inc. et al.*, No. 3:20-cv-1355-JPG, 2022 WL 672460 (S.D. Ill. Mar. 7, 2022); *Lewis,* 2022 WL 11736543 (S.D. Ill. Oct. 20, 2022).

[66] *Swanson*, 2021 WL 782273; Fed. R. Civ. Proc. 12(b)(6).

[67] *Swanson*, 2021 WL 782273, at *7.

[68] *Lewis*, 2022 WL 672460.

[69] *Id.* at *4.

[70] *Id.* at *4. ("The Third-Party Complaint does not adequately allege liability that is separate or apart from [Plaintiffs'] conduct. The above allegations are simply formulaic recitations that *Twombly* cautions against.").

[71] *Lewis*, 2022 WL 11736543, at *3 (McQueen stated that such liability must be "separate and apart from its employee's conduct").

[72] 735 ILCS 5/2-615.

[73] *Weidner v. Midcon Corp*., 328 Ill. App. 3d 1056, 1059 (5th Dist. 2002).

[74] *Nolan v. Hillard*, 309 Ill. App. 3d 129, 142 (1st Dist. 1999); *Gore v. Ind. Ins. Co.*, 376 Ill. App. 3d 282, 285 (1st Dist. 2007).

[75] *Cummings v. City of Waterloo*, 289 Ill. App. 3d 474, 479 (5th Dist. 1997).

About the Authors

David A. Warnick is a shareholder at *Johnson & Bell, Ltd.* handling a wide spectrum of matters in litigation ranging from products liability to commercial transportation litigation and many things in between. Mr. Warnick is the vice chair of IDC's Civil Practice Committee. Mr. Warnick typically represents primary/excess insurers, trucking companies, and a variety of different types of business owners and healthcare providers in all aspects of litigation in both state and federal courts throughout Illinois. Mr. Warnick thoroughly enjoys being a trial lawyer and finding creative ways to fulfill differing client needs.

Adam C. Konopka, Partner with *The Chartwell Law Offices, LLP*, has an active role in the firm's growing regional trucking practice, Mr. Konopka represents transportation/trucking clients in various capacities, from catastrophic losses to commercial and contract disputes. He has extensive experience with catastrophic losses and representing his clients from emergency response through litigation. Licensed in Illinois, he manages the firm's Chicago office. Mr. Konopka currently serves as the vice-chair of the Trucking Industry Defense Association (TIDA) Marketing & Industry Engagement Committee and chair of the Illinois Defense Counsel (IDC) Trucking and Transportation Law Committee. He is also a member of the Defense Research Institute (DRI) and regularly attends various seminars across the country. Mr. Konopka has been invited to present at the American College of Transportation Attorneys (ACTA) conference and conducted speaking engagements across the country as part of the Trucking Claims Boot Camp. In addition to his professional affiliations, Mr. Konopka is also the President of the Chicago Society of the Polish National Alliance, serves as Secretary for the Chicago Society Foundation, and is a member of the Polish Chamber of Commerce and Polish American Police Association.

Devin M. Taseff is an associate in the Peoria office of *The Chartwell Law Offices, LLP*. He handles complex litigation matters throughout the state, and often in other surrounding states such as Missouri, Iowa, and Wisconsin on a pro hac vice basis. As the fifth attorney in his extended family, Mr. Taseff began his journey to becoming a litigator early in his life. Mr. Taseff focuses his practice in trucking and transportation litigation defense, in which he routinely represents motor carriers of all sizes in complex personal injury matters from the moment an accident occurs until final resolution. In addition to his trucking litigation focus, Mr. Taseff has experience handling first-party insurance fraud investigations, estate and probate matters, and commercial litigation.

Brittany P. Warren is an associate in the Edwardsville office of *Heyl, Royster, Voelker & Allen, P.C.* where she focuses her practice in civil litigation. Ms. Warren defends clients in the areas of transportation litigation, as well as general casualty/tort defense and insurance coverage disputes. Ms. Warren represents clients throughout Illinois and Missouri

and has participated in jury trials in both federal and state court. She received her B.S. from the University of Illinois Urbana-Champaign and her J.D., *summa cum laude*, from Valparaiso University Law School.

About the IDC

The Illinois Defense Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.IDC.law or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, admin@IDC.law.