

# CO 2021 Legislature Restores Tort Liability

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## *Colorado's part-time legislature finishes session undoing judicial tort reform*

June 11, 2021

Colorado's part-time legislature's 2021 legislative session ended on June 8, 2021. It notably addressed and overturned a four-year-old Colorado Supreme Court decision which represents a step backward for civil litigation defense.

In 2017 the Court issued its opinion in *Ferrer v. Okbam icael*, 390 P.3d 836 (Colo. 2017), holding that an employer's admission of vicarious liability for any negligence of its employees bars a plaintiff's direct negligence claims against the employer. The decision had immediate and practical impact on all manner of civil lawsuits alleging injuries involving retailers, fleet operations, and professional liability, by effectively eliminating the concept of negligent hiring and training by the employer as a separate tort when the employer admitted course and scope such that it would be liable for its own employee's negligence toward a plaintiff. The opinion helped streamline tort litigation and drove some value into case exposure analyses as allowing only one liability theory in a personal injury case. It also effectively disallowed mediation demands scheduling two separate categories of tort damages from the employer and the employee for the same injury.

In 2021 the Colorado legislature adopted an urgency to address this matter similar to the plaintiff's bar's reversal attempts ever since the *Ferrer* opinion issued. On May 17, Colorado Governor Jared Polis signed into law an amendment to Colorado's pro-rata liability statute specifically overturning *Ferrer* and making it statutory law that an employer's admission of course and scope for its employee in a tort case does not bar a plaintiff from articulating and seeking separate damages from the employer.

When the new law goes into effect on September 6, 2021, plaintiffs will once again be able to argue that not only is an employee liable for tort injuries caused in the course and scope of their employment duties, but that the employer is separately liable for failing to screen out bad applicants and/or adequately train its own workforce, causing additional damage to the plaintiff and, presumably, putting the rest of the public in danger as well.

The statutory amendment follows a trend in Colorado toward more plaintiff-friendly law and procedure. Recently TAM secured a landmark decision in the Colorado Supreme Court allowing personal injury defendants to extinguish an entire category of injury damages under certain circumstances, which the local plaintiff's bar has already declared a top priority for the Colorado legislature to address in its 2022 session.

That case, *Delta Air Lines, Inc. v. Scholle*, 484 P.3d 695 (Colo. 2021), held that an injured employee's claim to recover damages for past medical expenses is extinguished when the workers' compensation insurer resolves its subrogation claim with the third-party tortfeasor. As a practical matter, if a plaintiff was acting in the course of their employment at the time of injury, then her or his exclusive remedy for workplace injury is in Colorado's workers' compensation act system. Thereafter, the employee can seek damages from a third-party tortfeasor including past and future medical treatment.

In the third-party lawsuit, if the defendant negotiated a settlement with the plaintiff's employer for the comp-covered damages (typically past and future medical treatment and wages), then those categories of damages are extinguished and cannot be recovered in the third-party case. This is currently the law and presents a value proposition to defendants in personal injury litigation, as the scheduled rates for medical services and injury compensation in workers' comp cases are far below inflated billed rates for services invoiced at private pay rates which are the only admissible damages amounts in civil litigation.

Our expectation is that the interests who were successful overturning *Ferrer* with 2021's state legislature will do the same to *Scholle* in Colorado's 2022 session. It is therefore wise for tort defendants to take advantage of the *Scholle* decision while it remains good law before being overturned by the plaintiff's bar working in concert with the legislative branch. The Colorado legislature will not reconvene until January 12, 2022.

If you have any questions regarding the information in this update, please do not hesitate to contact us!

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