STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

CERTIFIED QUESTION

Hon. Paul V. Niemeyer; Hon. Roger L. Gregory; and Hon. Henry Floyd, Judge; Chief Judge; and Senior Judge, respectively, of the United States Court of Appeals for the Fourth Circuit

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Appellate Case No.: 2022-000094

Lucinda Ruh, Plaintiff,

v.

Metal Recycling Services, LLC, Defendant.

BRIEF OF THE SOUTH CAROLINA CHAMBER OF COMMERCE AND THE SOUTH CAROLINA TRUCKING ASSOCIATION, INC. AS *AMICI CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

CERTIFIED QUESTION

Under South Carolina law, can an employer be subject to liability for harm caused by the negligent selection of an independent contractor?

INTERESTS OF *AMICI CURIAE*[1]

The South Carolina Chamber of Commerce (the "Chamber") is a statewide organization that promotes pro-job and pro-business policies at the state and federal level. The Chamber's vision is to make South Carolina the best place in the nation to live, work, and do business. The Chamber brings together businesses across multiple industry sectors and geographically from across the State of South Carolina with coordinated strategies, trainings, committees, events, and advocacy. Its mission is to strategically create and advance a thriving, free-market environment where South Carolina businesses can prosper. One of many of the Chamber's stated initiatives for 2022 is improving South Carolina's legal climate for businesses, which according to one study currently ranks 37th in the nation. Whether South Carolina courts will recognize a new cause of action potentially creating unlimited liability upon any shipper who transports goods to or through the State of South Carolina, has the potential to drastically, and detrimentally, impact the business environment within the State of South Carolina. In the interests of the Chamber's members, the Chamber believes it is necessary to weigh in and advocate against such a rule that could have a direct impact upon its members and South Carolina's economy generally.

The South Carolina Trucking Association ("SCTA") is a non-profit trade association. SCTA has served as the voice of the trucking industry in South Carolina since 1933. Currently, SCTA boasts a current membership of approximately 600 active members. SCTA's membership ranges from small, family-owned businesses headquartered in South Carolina to large, national companies with terminal facilities in South Carolina, the southeast, and nationwide. SCTA's

[1] No party or any counsel for a party in this appeal authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. No person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

mission is to "advocate, educate, and collaborate for successful trucking operations in South Carolina." One objective of SCTA is to strengthen the South Carolina trucking industry and the economy of the State of South Carolina for future generations. The potential judicial recognition of a new cause of action under Restatement (Second) of Torts § 416 that would subject any shipper, who contracts with a motor carrier to transport goods within the geographical boundaries of the State of South Carolina, to unlimited liability has a direct impact upon SCTA's membership. Adopting such a rule could have a detrimental impact upon South Carolina trucking companies, particularly the smaller companies, which form a majority of SCTA's membership. As such, SCTA believes it is consistent with SCTA's stated mission to advocate against recognizing this new cause of action.

INTRODUCTION

The District Court's decision to not recognize a shipper liability cause of action under these facts is wholly consistent with longstanding South Carolina law. The Court does not need to rewrite years of existing South Carolina jurisprudence in the interest of creating a judicial remedy because one already exists. Adopting the Plaintiff's proposed new cause of action would have detrimental effects to the citizens and businesses of the State of South Carolina, would only serve to exacerbate and prolong the existing supply chain disruptions and inflationary pressures on goods within the boundaries of the State of South Carolina, and put South Carolina businesses at a competitive disadvantage. For each of these reasons, the Court should reject the adoption of Restatement (Second) of Torts § 411 to create a "shipper liability" cause of action.

ARGUMENT

I. *The Court need only consider the narrower question of whether South Carolina would adopt the Restatement (Second) of Torts § 411 to judicially create a shipper liability cause of action.*

This Court is free to reframe the Certified Question presented, and in this situation, it should do so. There is precedent for the Court narrowly construing whether to apply an exception, under the Restatement (Second) of Torts, to the traditional common law rule that hiring an independent contractor does not subject one to liability for the negligence of the independent contractor in performing the work. For example, in *Simmons v. Tuomey Regional Medical Center*, this Court addressed whether to adopt the exception provided for under § 429. 341 S.C. 32, 533 S.E.2d 312 (2005). Section 429 was broadly worded and not limited to the fact pattern before the Court. *See id.* at 51, 533 S.E.2d at 322. However, in adopting § 429, the Court limited its application to the hospital/emergency room setting rather than in all situations generally, despite there being no such limiting language in the text of § 429. *See id.* at 52, 533 S.E.2d at 323. Therefore, in *Simmons*, this Court adopted § 429 as an exception to the traditional common law rule under § 409 but limited its application to the specific scenario before the Court—the hospital/emergency room setting.

The Court need not consider the Certified Question in the abstract, but can, consistent with precedent, determine whether the exception should be applied to the fact pattern presented to the Court. Such an approach is also consistent with the principle against advisory opinions. *See, e.g. Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992) (refusing to address whether South Carolina would adopt Restatement (Second) Conflict of Laws § 193 because the facts were not sufficiently developed in the record before the Court and holding [t]his

Court will not issue advisory opinions and cannot alter precedent based on questions precented in the abstract.").

For these reasons, the more appropriate framing of the Certified Question is as follows:

> Should the courts of the State of South Carolina apply Restatement (Second) of Torts § 411 to judicially recognize a cause of action for shipper liability where a shipper contracts with an independent contractor motor carrier who allegedly acts negligently causing physical harm to a third-party while performing contracted-for motor carrier services?

Within this narrower framework, it becomes clear that this Court should not adopt § 411 because doing so is inconsistent with existing South Carolina authority and against public policy.

II. *South Carolina has typically only adopted the Restatement (Second) of Torts when doing so is consistent with existing South Carolina law or when doing so is favored on public policy grounds.*

South Carolina has not uniformly adopted all provisions of the Restatement (Second) of Torts. Despite being in existence for more than fifty years, South Carolina has rejected adoption of numerous provisions of the Restatement (Second) of Torts. South Carolina courts have traditionally only adopted those provisions that are either consistent with existing South Carolina statutory or common law or where public policy favored adoption.[2] *See Gadson v. ECO Servs. of S.C.*, 374 S.C. 171, 648 S.E.2d 585 (2007) (rejecting adoption of §§ 308 & 390 and applying elements for negligent entrustment under South Carolina common law); *Henson v. Int'l Paper Co.*, 374 S.C. 375, 650 S.E.2d 74 (2007) (adopting § 339 as consistent with South Carolina authorities and favored from a public policy perspective of protecting young children); *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003) (declining to adopt § § 308 & 390 because doing so under the

[2] Of course, the Legislature remains free to create a new statutory cause of action like they did with respect to Restatement (Second) of Tort § 402A. *See, e.g. Barnwell v. Barber-Coleman Co.*, 301 S.C. 534, 393 S.E.2d 162 (1989) (explaining that S.C. Code Ann. §§ 15-73-10 to 30 adopted strict liability based upon "no-negligence" as set forth in § 402A of the Restatement (Second) of Torts and which "effected a profound change in the law of this State").

specific set of facts presented would be contrary to South Carolina public policy); *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000) (adopting § 429 as necessitated by changing public policy resulting from "the fundamental shift in the role that a hospital plays in our health care system, the commercialization of American medicine, and the public perception of the unity of a hospital and its emergency room . . . ."); *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 532 S.E.2d 856 (2000) (rejecting application of § 869 as inconsistent with existing common law and where Legislature had not previously recognized that cause of action); *Miller v. City of Camden*, 329 S.C. 310 at n.2, 494 S.E.2d 813 (1997) (rejecting adoption of § 324A as inconsistent with existing South Carolina common law on the duty to protect third parties); *Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371 (1995) (declining to adopt "the relaxed causation standard" for "loss of chance" under § 323 as being inconsistent with traditional tort principles); *Oulla v. Velazquez*, 427 S.C. 428, 831 S.E.2d 450 (Ct. App. 2019) (affirming rejection of § 324A to create liability upon a shipper despite arguably foreseeable injury to harm to motoring public); *Huff v. Jennings*, 319 S.C. 142, 459 S.E.2d 886 (Ct. App. 1995) (adopting § 623A for slander of title cause of action because "slander of title has long been recognized as a common law cause of action"); *First Federal Sav. Bank v. Knauss*, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988) ("The concept of negligent misrepresentation as described in Restatement (Second) of Torts is not new to South Carolina.").

Accordingly, when faced with the option of adopting a previously unrecognized cause of action under the Restatement (Second) of Torts, the proper inquiry is whether doing so is: (a) consistent with existing South Carolina statutory or common law; or (b) necessitated by public policy interests. The Court should reject Plaintiff's proposed adoption of § 411 to create a shipper liability cause of action not previously recognized in South Carolina because the liability scheme

set forth under that provision is inconsistent with existing South Carolina common law, is not supported by existing South Carolina statutory law, and is not favored on public policy grounds.

III. *South Carolina adheres to the traditional common law rule that an employer is not liable for the negligent acts of an independent contractor.*

South Carolina adheres to the traditional or common law rule, which holds that generally, an employer is not liable for the torts of an independent contractor committed in the performance of contracted-for work. *See Duane v. Presley Constr. Co.*, 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978); *Cherry v. Myers Timber Co.*, 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013); *Creighton v. Coligny Plaza Ltd. Pshp.*, 334 S.C. 96, 116, 512 S.E.2d 510, 520 (Ct. App. 1998); Restatement (Second) of Torts § 409; *see also Loudermilk Enters v. Hurtig*, 449 S.E.2d 141, 142 (Ga. Ct. App. 1994) (referring to this as "[t]he original common law rule"). The impetus for this rule is that the employer lacks the necessary control over the manner and method of the work performed by the independent contractor. *See, e.g. Conlin v. City Council of Charleston*, 15 Rich 201, 211 (S.C. Ct. App. 1868) ("It is generally held that the owner of property for whose benefit a work about such property is to be accomplished, is not held answerable for the negligence of an independent contractor to whom he has committed the work, to be done, *without his control in its progress.*") (internal quotations omitted; emphasis added)*; Stander v. Dispoz-O-Products, Inc.*, 973 So.2d 603, 604 (Fl. Dist. Ct. App. 2008) ("Generally, the employer of an independent contractor is not liable for the negligence of the independent contractor *because* the employer has no control over the manner in which the work is done." (citations omitted; emphasis added). In the absence of such a level of control, there is no culpability for the employer, and therefore no basis of liability when the hired independent contractor acts negligently in performing the work. Accordingly, applying § 411 to create shipper liability for the hiring of an independent contractor motor carrier is inconsistent with existing South Carolina common law and would represent "a

profound change in the law of this State." *Barnwell v. Barber-Coleman Co.*, 301 S.C. at 536, 393 S.E.2d at 163.

Moreover, the Legislature has not previously recognized a shipper liability cause of action such as the one Plaintiff proposes this Court to adopt. Even more broadly, the Legislature has not enacted any statutory provision that is contrary to the traditional common law rule of non-liability when one hires an independent contractor. There is no existing statutory basis or support for Plaintiff's proposed cause of action.

Without question, the Plaintiff is asking for this Court to depart from this longstanding common law rule and judicially create a new form of recovery not previously recognized by any South Carolina court or by the Legislature. For the reasons discussed hereinafter, the Court should reject Plaintiff's invitation to expand existing South Carolina law to recognize this new cause of action.

IV. *South Carolina has a history of declining to recognize shipper liability causes of action.*

South Carolina courts have previously addressed whether to impose liability upon a shipper for the negligence of an independent contractor motor carrier, albeit not under the rubric of § 411. Therefore, existing precedent supports rejecting this opportunity to adopt § 411 as a mechanism for recognizing a shipper liability cause of action under South Carolina law.

In *Norris v. Bryant*, this court affirmed summary judgment in favor of a lumber company who had contracted with a motor carrier to transport harvested logs to a mill. 217 S.C. 389, 60 S.E.2d 844 (1950). In so ruling, the court noted "hauling contracts" such as the one at issue created an independent contractor relationship, which under the traditional common law rule was insufficient to create liability for the lumber company/shipper. The court specifically rejected the

plaintiff's argument that the lumber company had a nondelegable duty because the nature of the work was "inherently or intrinsically dangerous." *Id.* at 400, 60 S.E.2d at 848.

Similarly, in *Cherry v. Myers Timber Co.*, the Court of Appeals affirmed summary judgment in favor of a timber owner who contracted with a motor carrier to haul harvested timber to the mill on behalf of the timber owner. 404 S.C. 596, 745 S.E.2d 405 (2013). The motor carrier was involved in a traffic accident while transporting the logs to the mill. Citing the lack of control by the timber owner over the motor carrier's operations, including the operation of the tractor-trailer, the Court of Appeals held there was no basis for liability against the timber owner. *Id.* at 603, 745 S.E.2d at 409; *accord Fulton v. Westvaco Corp.*, 930 F. Supp. 1115 (D.S.C. 1995) (interpreting the long line of South Carolina timber hauling cases refusing to hold timber owners liable for motor vehicle accidents involving independent contractor timber haulers).

In the recent case of *Oulla v. Velazques*, the Court of Appeals rejected the plaintiff's attempts to hold the shipper liable for a motor vehicle accident involving the contracted-for independent contractor motor carrier. 427 S.C. 428, 831 S.E.2d 450 (Ct. App. 2019). In so holding, the court held there was no recognized duty, either statutory or under common law, upon the shipper to act for the protection of the motoring public generally. *Id.* at 439–45, 831 S.E.2d at 456–60.

While each of these cases were determined under the traditional common law rule and the plaintiff did not raise § 411, they represent a general unwillingness of the South Carolina courts to recognize a "shipper liability" cause of action like Plaintiff asks this Court to now adopt.

V. *South Carolina has only recognized limited exceptions to the traditional common law rule where there already existed a statutory duty, the work was inherently or abnormally dangerous, or public policy considerations supported deviating from the common law rule.*

Amici Curiae acknowledge South Carolina courts have, in limited circumstances, recognized an exception to the traditional common law rule. However, those decisions were heavily influenced by public policy considerations weighing in favor of recognizing such exceptions. No such public policy considerations exist with respect to Plaintiff's purported shipper liability cause of action. Accordingly, the South Carolina cases previously recognizing the limited exceptions to the traditional common law rule against liability of the employer of an independent contractor are distinguishable. Accordingly, they do not support deviating from the common law rule by adopting § 411 to create a shipper liability cause of action.

For example, in *Durkin v. Hansen*, this Court held that the property owner and its agent were bound by the duties of the South Carolina Residential Landlord and Tenant Act and those duties could not be delegated to an independent contractor. 313 S.C. 343, 437 S.E.2d 550 (1993). The Court of Appeals has applied *Durkin* in another case involving nondelegable duties a landlord owed to its tenant. *Nedrow v. Pruitt*, 336 S.C. 668, 521 S.E.2d 755 (Ct. App. 1999). Thus, for both of those cases there existed a statutory duty upon the landlord, which the courts held could not be delegated.

In this instance, there is no equivalent statutory duty at issue. Plaintiff does not argue the Legislature has created any statutory obligation or duty upon shippers, which could become nondelegable. Moreover, no such statutory duty exists. In fact, at least one South Carolina decision expressly rejects such a duty exists. In *Oulla v. Velazques*, the Court of Appeals held a shipper did not have a duty to the motoring public generally, despite there being a statute governing load securement. 427 S.C. 428, 831 S.E.3d 450 (Ct. App. 2019) ("We find the mere fact it was

foreseeable an unsecured load could be a danger to the [plaintiffs] and other drivers is insufficient to impose liability on [the shipper] under the common law."). Accordingly, the reasoning underlying the *Durkin* and *Nedrow* decisions recognizing the exception does not translate to the instant dispute. Absent some statutory duty upon shippers that they cannot delegate to motor carriers on public policy grounds, *Durkin* and *Nedrow* are wholly distinguishable from the instant dispute.

The exception to the traditional common law rule recognized in *Simmons* relied on the theory of nondelegable duty and was influenced by public policy considerations.[3] Stated differently, the Court utilized the nondelegable duty recognized by Restatement (Second) § 429 to create a cause of action where public policy favored doing so. The rule created in *Simmons* was one born out of policy considerations based on the public's reliance upon hospitals, the public's perception that a hospital and its providers are one-in-the-same, and the commercialization of American medicine. *See Simmons*, 341 S.C. at 50, 533 S.E.2d at 322 ("We conclude the Court of Appeals properly outlined and applied the public policy consideration in question. Our decision, like those made by other courts that have considered this issue and held hospitals liable under one or more theories, is grounded primarily in those considerations."). The nondelegable duty was merely the framework by which to accomplish those policy goals.

Critically, to date, no South Carolina authority has recognized the duty, delegable or otherwise, which Plaintiff attempts to impose upon shippers. *See Oulla*, 427 S.C. at 443–45, 831 S.E.3d at 458–59. In fact, other courts that have addressed the issue have held a shipper does not

[3] The *Simmons* decision also relied upon the doctrine of apparent agency. *Simmons*, 341 S.C. at 53, 533 S.E.2d at 322 ("[T]he analyses of apparent agency and nondelegable duty are so closely intertwined in this instance. Although closely related, each is a viable theory an injured patient may assert."). However, it does not appear apparent agency is an issue currently before the Court.

owe the motoring public generally a nondelegable duty to ensure the motor carrier operates safely while transporting the shipper's goods. *See Harris v. Velichkov*, 860 F.Supp.2d 970, 978–981 (D. Neb. 2012) (expressly rejecting plaintiff's argument that a shipper owes a nondelegable duty to protect public for negligent operation of tractor-trailer by motor carrier transporting shipper's goods); *Fike v. Peace*, 964 So.2d 561 (Ala. 2007) (expressly rejecting plaintiff's argument that a shipper owes the motoring public a nondelegable duty to ensure the motor carrier operates the tractor-trailer safely while transporting cargo belonging to the shipper); *Kime v. Hobbs*, 562 N.W. 2d 705 (Neb. 1997) (rejecting plaintiff's argument that transporting cattle by tractor-trailer created nondelegable duty upon shipper to ensure safe transportation); *Estate of Fields v. Shaw*, 954 N.W.2d 451, 462 & n.16 (Iowa Ct. App. 2020) ("Using the Restatements as guidance, we see no basis for imposing a duty on [Shipper] to measure Troy's fitness to operate a semi-trailer truck" and specifically noting that the idea of nondelegable duty is tied to vicarious liability); *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1384–85 (Ind. Ct. App. 1993) (rejecting plaintiffs' argument that shipper of steel had nondelegable duty to ensure safe transportation of steel by independent contractor motor carrier).

A related consideration to the nondelegable duty is activities that are inherently or abnormally dangerous. Courts have recognized that in such situations the dangerous nature of the work being performed creates a nondelegable duty upon the person benefiting from the work such that they are liable to third parties injured by the negligent performance of the work by a contractor. *Amici Curiae* acknowledge South Carolina has recognized such an exception to the traditional common law rule of non-liability for the employer of an independent contractor in such situations. *See Young v. Morrisey*, 285 S.C. 236, 329 S.E.2d 426 (1985) (holding abrogated by statute); *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 487–88, 71 S.E.2d 299, 304 (1952); *Allison*

v. Ideal Laundry & Cleaners, 215 S.C. 344, 55 S.E.2d 281 (1949); *Conlin v. City of Council of Charleston* 15 Rich 201, 211–12 (S.C. Ct. App. 1868). In each of those instances, the court applied an exception to the traditional common law rule because the work involved was inherently dangerous. From a public policy perspective, the courts held that one benefitting from the inherently dangerous work should still be held liable because of the grave risk to the public, generally, such that they could not avoid liability by engaging an independent contractor to perform the work. Thus, these were policy-based decisions driven by the inherently dangerous nature of the work performed. However, these authorities are distinguishable in that merely shipping goods by motor carrier is not inherently or abnormally dangerous.

Like with respect to the nondelegable duty, South Carolina has rejected that merely shipping and/or transporting non-hazardous cargo over the road is inherently or abnormally dangerous. *See Norris v. Bryant*, 217 S.C. 389, 401, 60 S.E.2d 844 (1950) (distinguishing *Allison* and holding "[b]ut we do not think that the work involved in the instant case was of that quality. It is true that a truck negligently operated on the highway is a dangerous instrumentality, but no case has been cited which holds that hauling logs by truck is so inherently dangerous as to make the owner liable for the negligence of an independent contractor."). Other courts have held similarly. *See Puckrein v. ATI Transport, Inc.*, 897 A.2d 1034, 1041 (N.J. 2006) ("Further, trucking is neither a nuisance per se nor has it been held to be an inherently dangerous activity requiring special precautions, thus warranting the imposition of a non-delegable duty on the principal to assure the safe transport of goods on the public highways."); *Kime v. Hobbs*, 562 N.W.2d 705, 712–13 (Ne. 1997) ("These risks attendant to the operation of the [tractor-trailer] are precisely the risk that the employer of an independent contractor is justified in presuming that the contractor will act to avoid. We hold the transportation of cattle in a tractor-trailer under normal

conditions is not an inherently dangerous activity such that it imposes a non-delegable duty on the employer of an independent contractor to ensure that the cattle are transported in a non-negligent manner."); *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1384–85 (Ind. Ct. App. 1993) (rejecting that shipping 48,000 pounds of steel coil is an "ultra-hazardous" or "abnormally dangerous" activity sufficient to impose liability upon a shipper). Therefore, the policy considerations underlying the *Conlin* and *Allison* line of cases that recognized limited exceptions to the general rule based upon inherently or abnormally dangerous work and the corresponding non-delegable duty do not apply in the standard shipper/carrier context.

For each of the foregoing reasons, the limited instances in which South Carolina has deviated from or recognized an exception to the traditional common law rule of non-liability for an employer of an independent contractor do not support adopting § 411 to recognize a shipper liability cause of action under South Carolina law. There is no existing duty upon shippers recognized by South Carolina statutory or common law. Further, South Carolina, as well as other courts presented with the issue, have rejected that merely shipping non-hazardous materials represents an abnormally dangerous activity so as to impose a nondelegable duty upon shippers from a public policy perspective.

VI. *Other similarly situated states have rejected the Restatement (Second) of Torts § 411 as a basis for a shipper liability cause of action.*

Importantly, several states with a similar common law history to that of South Carolina, have expressly rejected application of § 411 in the context of alleged negligent selection/hiring of an independent contractor motor carrier by a shipper. This Court should apply the same reasoning utilized by those courts and decline to adopt § 411 as creating a shipper liability cause of action.

In *Hampton v. McCord*, the Court of Appeals of Georgia expressly rejected adopting § 411 to create a pseudo-shipper liability cause of action. 232 S.E.2d 582 (Ga. Ct. App. 1977). In

McCord, a timber broker served as a middleman between the lumber company and an independent contractor timber cutter, who also served as the motor carrier transporting the harvested timber to the mill. *Id.* at 584. The motor carrier was involved in a vehicle accident while hauling a loader to the log cutting site. *Id.* The plaintiff specifically alleged a negligent hiring cause of action against the timber broker pursuant to § 411. *Id.* at 584, 586. The trial court granted summary judgment against the lumber company[4] and the timber broker. *Id.* at 584. On appeal, the Georgia appellate court rejected the plaintiff's § 411 cause of action. It held, specifically citing § 411, that "[w]e decline to so extend the liability of a person engaging an independent contractor where, as here, the contractor's work does not take place in an inappropriate setting and does not ordinarily expose others to peril." *Id.* at 586. Stated differently, the court refused to adopt § 411 to abrogate the traditional common law rule because the work to be performed (transportation by motor carrier) was not inherently or abnormally dangerous.[5] While *McCord* did not specifically deal with a cause of action against the shipper, it still involved the potential liability of an entity who contracted with an independent contractor motor carrier to perform transportation of goods. As such, its rationale is equally applicable to the traditional shipper liability situation such as is currently presented to this Court. For the same reasons expressed in *McCord*, this Court need not deviate from the traditional common law rule and adopt § 411 to create a new shipper liability cause of action.

Even more recently, in *Stubbs Oil Co. v. Price*, the Court of Appeals of Georgia again refused to hold a shipper liable, under § 411 or otherwise pursuant to federal or state law, for the negligence of the driver of an independent contractor motor carrier. 848 S.E.2d 739 (Ga. Ct. App.

[4] The grant of summary judgment in favor of the lumber company was not appealed. 232 S.E.2d at 584.

[5] *See* Section V, *supra*, generally for other courts, including South Carolina, similarly holding transportation of non-hazardous materials does not constitute an inherently or abnormally dangerous activity.

2020), *cert. denied in Price v. Stubbs Oil Co.*, 2021 Ga. LEXIS 501 (Ga. 2021). In that case, the shipper, Stubbs Oil, hired an independent contractor motor carrier to deliver fuel products to the shipper's retail sales customers. *Id.* at 741. Evidently, however, the motor carrier was only permitted to transport it own goods (fuel) and lacked the necessary operating authority to transport goods belonging to another. *See id.* at 743, 745 (discussing SAFER search presented to trial court showing motor carrier lacked operating authority as motor carrier for hire). Tragically, the driver for the motor carrier was in an accident while en route to pick up oil for delivery to the shipper's retail customer, resulting in three fatalities. *Id.* at 741. The plaintiffs alleged both that the shipper was vicariously liable for the negligence of the driver/motor carrier and that the shipper "owed a duty to ensure [motor carrier's] carrier status. *Id.* at 741–42. The shipper had its own DOT motor carrier authority but contracted with independent contractor motor carriers to perform the fuel deliveries from the terminals to retail locations. *Id.* at 742. The shipper had no control or oversight over how the motor carrier performed the deliveries, which the court described as "typical of any shipper engaging the services of an independent delivery contractor." *Id.* Citing Georgia's statutory code provision, which codified the traditional common law rule of the appellate court rejected that the shipper could be held vicariously liable for the negligence of the driver. The court's ruling was based on the test that the shipper retained no control over the manner and method by which the independent contractor motor carrier and its employee, the driver, performed the contracted-for work. *See id.* at 746. With respect to the separate claim that the shipper owed some duty to verify the motor carrier's status prior to contracting with the motor carrier, the appellate court likewise rejected this as supporting any basis for liability against the shipper. Citing prior precedent, the court roundly rejected that any failure by the shipper to verify credentials of a motor carrier forms any basis of liability under Georgia law. *Id.* at 747 & n.27 (citing *De Bord v. Proctor*

& Gamble Distrib. Co., 58 F.Supp. 157 (N.D. Ga. 1943) as establishing "it has been held that a shipper has no duty to ascertain whether a motor carrier has complied with the State Motor Carrier Act, and consequently the fact that the carrier had failed to comply with the provisions of the Motor Carrier Act before proceeding to haul as an independent contractor would not render the shipper liable."). For each of these reasons, the appellate court reversed the trial court's denial of summary judgment to the shipper.

Stander v. Dispoz-O-Products, Inc. represents an almost identical fact pattern to the instant dispute. 937 So.2d 603 (Fla. Dist. Ct. App. 2008). In that case, a shipper who "sent goods through an independent contractor trucking company" was sued when the tractor-trailer hauling the goods was involved in a motor vehicle accident resulting in the death of a third-party. *Id.* at 604. The plaintiff alleged the shipper was liable for the negligence of the independent contractor motor carrier because the shipper "failed to investigate the background, qualifications, or experience of the driver, and knew or should have known the driver was unfit."[6] *Id.* The trial court granted the shipper's motion to dismiss, accepting the shipper's argument there were no facts alleged that could make someone liable for negligently selecting an independent contractor. *See id.* at 604. On appeal, the Florida appellate court affirmed, holding no exception to the traditional common rule applied under these facts and the Complaint alleged no facts justifying deviating from the traditional common law rule. *See id.* Insofar as the dissent specifically cited § 411 as a basis to allow amendment, clearly the issue of § 411's applicability was before the Florida appellate court, yet the majority rejected it created a basis for shipper liability under the facts. *See id.* at 609 & n.4 (Emas, Jr., dissenting).

[6] We note the similarities to the alleged acts of "independent negligence" Plaintiff alleges against Defendant in this instance. *See generally* Pl.'s Br. at 4–5.

Similarly, in *Estate of Fields v. Shaw*, the Court of Appeals of Iowa acknowledged Iowa had adopted § 411 generally, but nevertheless held it could not be used to create liability upon a shipper for the alleged negligent operation of a tractor-trailer by an employee of the independent contractor motor carrier. 954 N.W.2d 451 (Iowa Ct. App. 2020). The Iowa appellate court specifically held that the shipper had no duty to evaluate the qualifications of the driver/employee of the motor carrier. *Id.* at 454. Accordingly, the negligent hiring cause of action against the shipper failed as a matter of law and the court remanded the matter with instructions to enter summary judgment in favor of the shipper. *Id.* [7]

The rationale underlying these decisions applies equally with respect to the question pending before this Court. This Court should similarly reject adopting of § 411 to recognize a new shipper liability cause of action under South Carolina law.

VII. *Public policy considerations disfavor adopting the Restatement (Second) of Torts § 411 to recognize a shipper liability cause of action.*

There is no public policy justification for recognizing any exception to the traditional common law rule under these circumstances. For one, federal and state law already create a source of recovery for members of the motoring public injured by negligent motor carriers such that the

[7] Furthermore, in those states who have adopted § 411 to recognize a shipper liability cause of action such as Plaintiff proposes in this instance, almost all hold the proximate causation element cannot be met and the plaintiff is unable to surpass the summary judgment phase. *See McComb v. Bugarin*, 20 F.Supp.3d 676 (N.D. Ill. 2014); *Kime v. Hobbs*, 562 N.W.2d 705 (Neb. 1997); *Davies v. Commercial Metals Co.*, 46 So.3d 71 (Fla. Dist. Ct. App. 2010); *Dixon v. Stone Truck Line, Inc.*, 2020 U.S. Dist. LEXIS 228168, 2020 WL 7079047, C.A. No. 2:19-cv-000945 (D.N.M. Dec. 3, 2020) Nevertheless, in such situations the shipper or its insurer is forced to incur litigation costs in defending the lawsuits through summary judgment, thereby itself creating a source of "liability." *Amici Curiae* acknowledge that North Carolina, to whom this Court has often looked to on novel questions of law, has adopted § 411. *See, e.g. Page v. Sloan*, 190 S.E.2d 189 (N.C. 1972). However, we have identified no North Carolina authority applying § 411 to recognize a shipper liability cause of action such as Plaintiff alleges in this instance.

court need not judicially craft another source of recovery. Second, recognizing such a cause of action would have a significant and detrimental impact upon South Carolina motor carriers, South Carolina small businesses, and South Carolina citizens and residents generally.

a. Federal and state law already provide for a remedy for Plaintiff and similarly situated members of the motoring public.

Plaintiff would have the Court believe absent recognizing this new cause of action, injured members of the motoring public have no other source of recovery. That simply is not the case. Both at the federal level for interstate motor carriers and the state level for intrastate motor carriers, there are already financial responsibility requirements in place that prohibit a motor carrier from obtaining operating authority unless they have sufficient assets to satisfy any judgment or they obtain an insurance policy that contains a surety requirement obligating the insurer to satisfy a judgment obtained against the motor carrier up to the financial responsibility requirements—even where there is otherwise no coverage under the insurance policy. *See* 49 C.F.R. § 387.7 & S.C. Code Ann. § 53-23-910. Accordingly, there is already a mechanism in place to compensate members of the motoring public who are injured by an interstate or intrastate motor carrier. In this instance, Plaintiff's problem is that they do not believe the financial responsibility requirement is enough to compensate them, but that is a matter best taken up with the relevant legislature and should not be addressed by the judicial creation of a new cause of action simply to increase potential recovery to tort plaintiffs.

This issue was specifically addressed in *Harris v. Velichkov*, 860 F.Supp.2d 970 (D. Neb. 2012), *aff'd Harris v. FedEx Nat'l LTL, Inc.*, 760 F.3d 780 (8th Cir. 2014).[8] With respect to the

[8] The decision was affirmed on appeal, with the Eight Circuit Court of Appeals specifically holding that Nebraska had refused to extend liability to an employer who contracts with an independent contractor in any situation other than where a nondelegable duty to protect another from harm exists. *Harris*, 760 F.3d at 783–84. Nebraska, like South Carolina and other states, recognize that

tort plaintiff's argument that absent recognizing shipper liability there would be no recovery for innocent injured members of the motoring public, the court responded as follows:

> Nor does this leave the plaintiffs without a remedy, even if [the motor carrier] might be less capable of satisfying a judgment than a company the size of [the shipper]. Federal law provides that the Secretary of Transportation may register a motor carrier only if the registrant files a bond, insurance policy, or other type of security approved by the Secretary. 49 U.S.C. § 13906. A commercial motor carrier may operate only if registered to do so, and must be willing to comply with minimum financial security requirements. *See* 49 U.S.C. § 13901; *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868 (10th Cir. 2009). This requirement, and the regulations promulgated by the Federal Motor Carrier Safety Administration, require interstate motor carriers to obtain a special endorsement providing that the insurer will pay within policy limits any judgment recovered against the insured motor carrier for liability resulted from the carrier's negligence. *Yeates, supra*. The purpose of requiring such proof of financial responsibility is to ensure that the public is adequately protected from the risks created by a motor carrier's operations and to ensure the collectability of a judgment against the motor carrier. *Great West Cas. Co. v. General Cas. Co. of Wisconsin*, 734 F.Supp.2d 718 (D. Minn. 2010). In sum, this means that [the shipper's] use of an independent contractor did not place the public at a particular risk; [the motor carrier], as a licensed motor carrier, would have been required to provide sufficient proof of financial responsibility to provide a source of recovery for members of the public, such as the plaintiffs, who are injured in a collision."

Id. at 980–81. Accordingly, there is no public policy reason for the Court to recognize a new cause of action under South Carolina law in the interest of ensuring recovery for members of the motoring public because one already exists.

b. Adopting the Restatement (Second) of Torts § 411 to create a shipper liability cause of action under South Carolina law will have a detrimental impact upon South Carolina small businesses, South Carolina trucking companies, and all South Carolina citizens.

Not only is the District Court's decision consistent with traditional South Carolina authority and persuasive authorities from other states, it is wholly consistent with the policy goals

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merely transporting goods over the road is not inherently dangerous. *See generally* Section V *supra*.

of the State of South Carolina. South Carolina, as a state, has a business-centric mindset and adopting the rule proposed by Plaintiff would be directly adverse to such interests. The judicial creation of a new source of potential liability will have drastic and far-reaching ramifications upon South Carolina as a whole, and in particular, small businesses and South Carolina-based trucking companies.

Adopting this proposed cause of action would increase the cost of all shipments of goods coming into or traveling through the State of South Carolina because the shippers will seek to pass along the increased liability exposure in the form of increased product costs. This would have the direct result of causing higher prices for goods for all South Carolinians. At a time where current inflationary pressures are already making it difficult for everyday South Carolinians to obtain life essentials, it would seem such a result would be disfavored.

Furthermore, adopting this proposed cause of action likely will make it more difficult for smaller business to find shippers who are willing to ship goods into the State of South Carolina. If each time a shipper who contracts with an independent contractor motor carrier to transport goods to or through the State of South Carolina faces tort exposure for the negligence of the motor carrier—over whom the shipper has no control—then it logically follows shippers will be more reluctant to ship goods into or through the State of South Carolina. At a time when there are already widespread shortages of goods available for South Carolina consumers, this could be particularly detrimental to the everyday South Carolinian's lives and livelihoods.

Moreover, adopting such an expanded basis for liability would make it far more difficult for smaller motor carriers to obtain loads from shippers, which has a detrimental effect both here in South Carolina and elsewhere in the United States. Were South Carolina to recognize this new cause of action to create shipper liability in the standard shipper/carrier transaction, shippers will

be far more selective in what motor carriers they allow to transport their cargo and goods. It follows that shippers will only go with the biggest names, resulting in smaller motor carriers losing out on loads that they rely upon to stay in business. At a time where there is already a shortage of motor carriers to haul the Nation's goods and dire supply chain issues facing South Carolina and the United States as a whole, such a result would be particularly problematic because it would put additional motor carriers out of business thereby only exacerbating the existing problems.

CONCLUSION

Adopting Restatement (Second) of Torts § 411 to recognize a new cause of action under South Carolina law for shipper liability is inconsistent with existing South Carolina common and statutory law. Furthermore, there is no policy reason justifying deviating from the traditional common law rule, and in fact, public policy disfavors adopting § 411 as suggested by Plaintiff. Accordingly, the Court should answer the Certified Question in the negative and hold § 411 does not apply to provide a cause of action for Plaintiff in this instance and does not otherwise support a shipper liability cause of action under South Carolina law.

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