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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION

Paul V. Niemeyer; Roger L. Gregory; and Henry F. 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.

Amicus Brief for South Carolina Association for Justice

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Founded more than six decades ago, the South Carolina Association for Justice (SCAJ) is a statewide organization with over 1,200 members. In addition to providing education to and promoting a supportive network for its members, the organization seeks to preserve the rule of law. Specifically, SCAJ advocates for those who are harmed by negligence and wrongful acts by others.

Introduction

Actions have consequences. This school-aged lesson applies whether we find ourselves in a classroom or a courtroom. It is universally recognized that consequences establish parameters and shape our conduct—whether it's good or bad. This principle forms our most basic notion of negligence and serves as this Court's guiding principle in considering Restatement (Second) of Torts section 411.

Restatement section 411 recognizes that an employer is responsible to a third-party for the selection of its independent contractor. Specifically, section 411 provides that an employer is liable if he or she failed to exercise reasonable care in the selection or hiring of an independent contractor. Practically, liability attaches to the acts or decisions controlled by an employer, not to the independent contractor's acts. Thereby, drawing a distinction between the independent forms of liability.

While this Court has been provided lengthy discussions surrounding section 411, there is significant disagreement about its state-by-state adoption. Such disagreement is without merit.

A state-by-state survey demonstrates that thirty-nine states have adopted Restatement section 411 and/or its reasoning through common law negligence principles. Underlying each of these decisions is the substantive appreciation that certain circumstances warrant an employer to be responsible for the hiring selection for the safety and concern of a third-party. When the spirit of such reasoning is taken to fruition, it leaves only one conclusion: section 411 aligns with South Carolina tort law and should be adopted.

Argument

Restatement section 411 is a natural extension of well-settled tort law not only in South Carolina, but throughout the country. A national survey of other states reveals three key trends.

First, Restatement section 411 has been adopted by a majority of states.[1] In total, thirty-nine states have adopted the Restatement or its underlying reasoning.[2] In so doing, courts have distinctly recognized that certain circumstances warrant accountability for the hiring of an independent contractor.

Second, the Restatement does not cause commerce to collapse. Defendant Metal Recycling Services, LLC, Amici South Carolina Chamber of Commerce, and Amici South Carolina Trucking Association argue that the adoption of this Restatement will wreak havoc on commerce in this State. *See generally* MRS's brief and Amici brief. Practically, suggesting that recognition of the Restatement will prohibit commerce, and significantly impact shipping and transportation.

Such assertions are undermined by the fact that other states have operated within the Restatement's framework for decades without issue to commerce. *See Dexter v. Town of Norway*, 1998 M.E. 195, 195, 715 A.2d 169, 172 (1998) (adopting the Restatement section 411); *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1339 (D.C. 1997) (noting that Restatement section 411 holds an employer liable for its own negligence in hiring or retaining an independent contractor); *Arthur v. Holy Rosary Credit Union*, 139 N.H. 463, 468, 656 A.2d 830, 834 (1995) ("[A]n employer of an independent contractor may be liable to one injured as a result of the contractor's fault where it is shown that the employer was negligent in selecting a careless or incompetent

[1] Alabama, Hawaii, Idaho, Mississippi, Oklahoma, Oregon, Rhode Island, South Carolina, and South Dakota have not considered Restatement section 411.

[2] Of those, seven have adopted the underlying reasoning without adopting the Restatement outright. *See* e.g. *Bagley v. Insight Commc'ns Co., L.P.*, 658 N.E.2d 584, 587 (Ind. 1995) (finding the concepts of section 411 are "subsumed in the existing exceptions to the rule of non-liability for the conduct of independent contractors").

person with whom to contract."); *McDonnell v. The Music Stand, Inc.,* 20 Kan.App.2d 287, 293, 886 P.2d 895 (1994)(adopting Restatement section 411); *W. Stock Ctr., Inc. v. Sevit, Inc.,* 195 Colo. 372, 376, 578 P.2d 1045, 1048 (1978) (recognizing Restatement section 411 and the implicit duty to inquire about a contractor's ability to do the work in a competent and careful manner); *Mooney v. Stainless, Inc.,* 338 F.2d 127, 131 (6th Cir.1964) ("For an employer to be held liable for negligence in selecting an incompetent contractor, the employer must have known, or through reasonable care been able to ascertain, that the contractor was not qualified for the work at issue."); *Skelton v. Fekete,* 120 Cal. App. 2d 401, 415, 261 P.2d 339 (1953) (acknowledging an employer of an independent contractor is liable for bodily harm caused by failing to exercise reasonable care to employ a competent contractor).

In fact, and third, in many of those states, the courts have noted that the recognition of liability required no additional effort for employers. *Sievers v. McClure,* 746 P.2d 885, 891 (Alaska 1987) (explaining Restatement section 411 is not unduly burdensome and requires no additional effort and furthers the goal of industrial safety by discouraging the employment of contractors notorious for cutting costs at the expense of their employees' health and safety). Such a finding is not a surprise. When independent contractors are hired with intentional care and concern the proper inquiries are undertaken. *Perkins v. Gregory Mfg. Co.,* 671 So.2d 1036, 1040 (La. App. 3 Cir. 1996) ("To determine whether a principal is negligent for hiring an irresponsible independent contractor, the court must consider the principal's knowledge at the time of the hiring"); *W. Stock Ctr.,* 195 Colo. at 376, 578 P.2d at 1048 (noting that a contractor must possess the "knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others"). This ensures that contractors with the requisite experience

and credentialing are being retained—whether it's reviewing a background check, calling references, or confirming the contractor is bonded. *See Mills v. Angel*, 995 S.W.2d 262, 274 (Tex. App. 1999) (recognizing that an employer "must exercise reasonable care in the selection of a competent and careful independent contractor"). Simply put, the Restatement acknowledges a best practice that should have long been part of an employer's efforts for the care of all involved.

Section 411 not only conforms with South Carolina's tort law, it fulfills our State's aims of protecting harmed individuals. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) ("Tort law . . . seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property."). As set forth herein, a review of the state-by-state survey supports this Court's adoption of section 411.

State-by-State Survey of Restatement (Second) of Torts Section 411

Breakdown:

- **39 have adopted section 411 or adopted without explicitly citing section 411**
- **2 possibly adopted**
- **3 rejected**
- **7 not considered**

State	Case	Action	Comment
Alabama		Not considered	While Alabama courts have never directly cited to section 411 of the Restatement or considered that section, Alabama may recognize the general principals therein. *Knight v. Insulspan, Inc.*, No. 7:05-CV-02461-LSC, 2008 WL 11422535, at *14, n. 30, (N.D. Ala. Jan. 17, 2008) ("Alabama law is unclear as to whether it recognizes a tort for negligent hiring, training, or supervision under which an employer can be held directly liable for the incompetency or negligence of an independent contractor. However, based on *McGinnis v. Jim Walter Homes, Inc.*, this Court will assume that Alabama law recognizes such a tort."). *McGinnis v. Jim Walter Homes, Inc.*, 800 So.2d 140, 148 (Ala. 2001) (rejecting a negligent hiring of an independent contractor claim for lack of evidence, but seemingly accepting that the claim may be viable if supported by evidence).
Alaska	*Sievers v. McClure*, 746 P.2d 885, 891 (Alaska 1987).	Adopted	"The rule of section 411 of the Restatement is a rule of personal negligence. . . . Such a rule is not unduly burdensome, as in most cases it requires no additional effort from an employer who must act reasonably in the selection process in any event in order to protect third parties from harm. Moreover, the rule may tend to further the goal of industrial safety by discouraging the employment of contractors notorious for cutting costs at the expense of their employees' health and safety." *Sievers v. McClure*, 746 P.2d 885, 891 (Alaska 1987).
Arizona	*Ft. Lowell-NSS Ltd. P'ship v. Kelly*, 166	Adopted	The Restatement section has been incorporated by reference, although the Arizona courts have never

	Ariz. 96, 99, 800 P.2d 962, 965 (1990).		directly expressed such an adoption. *Ft. Lowell-NSS Ltd. P'ship v. Kelly*, 166 Ariz. 96, 99, 800 P.2d 962, 965 (1990) (including Restatement section 411 that provides the duty to exercise reasonable care to employ competent contractors and the duty to inspect the work of contractors). In general, Arizona appears to adopt the restatement position that employers may be liable for their own negligence when independent contractors cause harms. Arizona's intermediate court has likewise recognized the principles stated in section 411. *German v. Mountain States Tel. & Tel. Co.*, 462 P.2d 108, 110 (Ariz. Ct. App. 1969) ("The employer might also be liable to a third party injured by the acts of an employee of a negligently selected independent contractor.").
Arkansas	*Stoltze v. Arkansas Valley Elec. Co-op. Corp.*, 354 Ark. 601, 610, 127 S.W.3d 466, 471 (2003).	Adopted without explicitly citing 411	The Arkansas court explained, "[I]t has generally been held that the duty rests on the employer to select a skilled and competent contractor, and the employer is liable to third persons for the negligent or wrongful acts of an independent contractor employed by him where he knew his character for negligence, recklessness, or incompetency at the time he employed him, or where the employer was negligent in failing to exercise reasonable care in the selection of a competent contractor. " *Stoltze v. Arkansas Valley Elec. Co-op. Corp.*, 354 Ark. 601, 609–10, 127 S.W.3d 466, 471 (2003) (citing *Western Arkansas Telephone Co. v. Cotton*, 259 Ark. 216, 218, 532 S.W.2d 424 (1976)). *See also Ozan Lumber Co. v. McNeely*, 217 S.W.2d 341, 344 (Ark. 1949) ("One of the well recognized qualifications to this rule is that the employer must have used ordinary care to select a contractor of proper skill and prudence.").
California	*Skelton v. Fekete*, 120 Cal. App. 2d 401, 415, 261 P.2d 339, 347 (1953).	Adopted	"It is well settled that "One who employs an independent contractor to (a) do work which involves risk of bodily harm unless it is skillfully and carefully done, . . . is subject to liability for bodily harm caused by the failure to exercise reasonable care to employ a competent contractor." *Skelton v. Fekete*, 120 Cal. App. 2d 401, 415, 261 P.2d 339 (1953) (citing the first Restatement's parallel version of section 411 contained in the second Restatement).

Colorado	*W. Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 375-376, 578 P.2d 1045, 1048-1049 (1978).	Adopted	"The Second Restatement of Torts has appropriately summarized this duty by stating that the employer must choose " * * * a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others * * *." Restatement (Second) of Torts § 411 (Comment a). Implicit in this duty is the requirement that sufficient inquiries must be made concerning the contractor's ability to do the work in a competent and careful manner." *W. Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 376, 578 P.2d 1045, 1048 (1978), *holding modified by Huddleston by Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282 (Colo. 1992).
Connecticut	*Ray v. Schneider*, 16 Conn. App. 660, 671–72, 548 A.2d 461, 467–68 (1988).	Adopted	*Douglass v. Peck & Lines Co.*, 95 A. 22 (Conn. 1915) (recognizing the rule that employer may be liable to others for negligently employing an incompetent or untrustworthy independent contractor). *Ray v. Schneider*, 548 A.2d 461, 467–68 (Conn. App. 1988) (citing section 411 and utilizing its provision in determining to whom a duty is owed by an employer when selecting a contractor) (*superseded by statute on grounds as recognized in Pelletier v. Sordono/Skanska Const. Co.*, 825 A.2d 72 (Conn. 2003) (holding legislative policy includes employees of contractors as third parties to whom the entity hiring the contractor owes duties when selecting said contractor).
Delaware	*Urena v. Capano Homes, Inc.*, 901 A.2d 145, 153 (Del. Super. Ct. 2006), aff'd, 930 A.2d 877 (Del. 2007).	Adopted	"Delaware has adopted the tort of Negligence in Selection of a Contractor, Restatement (Second) of Torts § 411." *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 153 (Del. Super. Ct. 2006), aff'd, 930 A.2d 877 (Del. 2007).
D.C.	*Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1339 (D.C. 1997).	Adopted	Noting that Restatement section 411 holds an employer liable for its own negligence in hiring or retaining an independent contractor. *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1339 (D.C. 1997); *see also Fry v. Diamond Constr., Inc.*, 659 A.2d 241 (D.C. 1995)("[A]n employer has the legal duty to use ordinary care so as not to employ or retain an independent contractor-carrier it knew or should have known [would be]

			negligent in performing the contract. [An employer of an independent contractor is] duty bound to investigate whether [the contractor] in fact was competent and properly equipped to continue in the work and to take steps to avert any existing peril if [the contractor] were not competent, or improperly equipped to carry on the work.").
Florida	*Suarez v. Gonzalez*, 820 So. 2d 342, 344 (Fla. Dist. Ct. App. 2002).	Adopted	Florida "recognize[s] a cause of action for the negligent selection of an independent contractor based on Restatement (Second) of Torts section 411." *Davies v. Com. Metals Co.*, 46 So.3d 71, 73 (Fla. 5th D.C.A. 2010).
Georgia	*Hampton v. McCord*, 141 Ga. App. 97, 100, 232 S.E.2d 582, 586 (1977).	Rejected	The Georgia Court of Appeals rejected section 411 except in the context of a nondelegable duty or exceptionally dangerous work context. "We 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 surrounding and does not ordinarily expose others to peril." *Hampton v. McCord*, 141 Ga. App. 97, 100, 232 S.E.2d 582, 586 (1977). Significantly, an employer is liable for the negligence of an independent contractor in six specific situations which stand as exceptions to the general rule: (1) when the work is wrongful in itself, or, if done in the ordinary manner, would result in a nuisance;(2) when the work to be done is in its nature dangerous to others, however carefully performed;(3) when the wrongful act is the violation of a duty imposed by express contract upon the employer; (4) when the wrongful act is the violation of a duty imposed by statute; (5) when the employer retains the right to direct or control the time and manner of executing the work, or interferes and assumes control, so as to create the relation of master and servant, or so that an injury results which is traceable to his interference; and (6) when the employer ratifies the wrong of the independent contractor.

			Ga.Code Ann. §105-502. *Uniroyal, Inc. v. Hood*, 588 F.2d 454, 465 (5th Cir. 1979).
Hawaii		Not considered	Hawaii has adopted 409, 413 (Duty To Provide For Taking Of Precautions Against Dangers Involved In Work Entrusted To Contractor), 416 (Work Dangerous in Absence of Special Precautions), and 427 (Negligence as to Danger Inherent in the Work). *Bryant v. Pleasant Travel Serv.*, 127 Haw. 412, 279 P.3d 77 (Ct. App. 2012).
Idaho	*Peone v. Regulus Stud Mills, Inc.*, 113 Idaho 374, 375, 744 P.2d 102, 103 (1987).	Has not been squarely addressed	Idaho law currently does not recognize 411, but the Idaho Supreme Court's precedents have left the door open. "We are asked to determine whether §§ 413 or 416 of the Restatement is consistent with Idaho law and creates a duty. We are not asked to decide whether any other facet of the law creates a duty. The dissent suggests the Idaho Minimum Safety Standards & Practices for Logging creates such a duty. This contention may or may not be correct, but it is not for us to decide." *Peone v. Regulus Stud Mills, Inc.*, 113 Idaho 374, 375, 744 P.2d 102, 103 (1987). Notably, the dissent in *Peone* explicitly argued that Idaho has actually already adopted the common law equivalent in the *Joslin v. Idaho Times Publishing Co.*, 60 Idaho 235, 91 P.2d 386 (1939).
Illinois	*Carney v. Union Pac. R. Co.*, 77 N.E.3d 1, 14, 412 Ill.Dec. 833, 846 (2016).	Adopted	Noting that the Court had previously adopted Restatement 411. *Carney v. Union Pac. R. Co.*, 2016 IL 118984, ¶ 65, 77 N.E.3d 1, 14 ("[T]his court recognized that an employer may be liable in tort for failing to exercise reasonable care in selecting a careful and competent contractor. We appl[y] the rule set forth in section 411 of the Restatement.").
Indiana	*Bagley v. Insight Commc'ns Co., L.P.*, 658 N.E.2d 584, 587 (Ind. 1995).	Adopted	"We are in agreement with the basic concepts embodied in Section 411, and we find that these are subsumed in the existing exceptions to the rule of non-liability for the conduct of independent contractors." *Bagley v. Insight Commc'ns Co., L.P.*, 658 N.E.2d 584, 587 (Ind. 1995). In so doing, the Court acknowledged that the principles of section 411 were already part of the Indiana's

			common law.
Iowa	*Est. of Fields by Fields v. Shaw*, 954 N.W.2d 451, 457 (Iowa Ct. App. 2020).	Adopted	The Court explained that there was "ample authority" for the adoption of section 411.
Kansas	*Hauptman v. WMC, Inc.*, 43 Kan. App. 2d 276, 285, 224 P.3d 1175, 1182 (2010).	Adopted	Restatement was adopted in 1994 in *McDonnell v. The Music Stand, Inc.*, 20 Kan.App.2d 287, 293, 886 P.2d 895 (1994).
Kentucky	*Hercules Powder Co. v. Hicks*, 453 S.W.2d 583, 588 (Ky. 1970).	Future adoption possible	While the Supreme Court has not cited section 411 since 1970, the Court in *Smith v. Kentucky Growers Ins. Co.*, No. 2001-CA-001624-MR, 2002 WL 35628958, at *2 (Ky. Ct. App. Nov. 1, 2002) has stated that section 411 is not the rule in Kentucky.
Louisiana	*Certified Cleaning & Restoration, Inc. v. Lafayette Ins. Co.*, 67 So. 3d 1277, 1282–83, (La.App. 5 Cir. 2011).	Adopted without explicitly citing 411	"One who hires an irresponsible independent contractor may be independently negligent. *Hemphill v. State Farm Ins. Co.*, 472 So.2d 320, 324 (La.App. 3rd Cir.1985).
Maine	*Dexter v. Town of Norway*, 1998 M.E. 195, 195, 715 A.2d 169, 172 (1998).	Adopted	"We adopt RESTATEMENT (SECOND) OF TORTS § 411 as setting forth a valid claim pursuant to Maine tort law for the negligent selection of a contractor." *Dexter v. Town of Norway*, 1998 ME 195, ¶ 10, 715 A.2d 169, 172 (1998).
Maryland	*Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 51, 133 A.3d 1143, 1155 (2016).	Adopted	"[A]n employer is liable for the acts of an independent contractor under the theory of negligent hiring if the harm is caused by "some quality in the contractor which made it negligent for the employer to entrust the work to him." *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 51, 133 A.3d 1143, 1155 (2016) (citing) RESTATEMENT (SECOND) OF TORTSS § 411 cmt. b (AM. LAW INST. 1965)).
Massachusetts	*Wright v. Kelleher*, No. 021589A, 24 Mass.L.Rptr. 495, 2008 WL 4635860, at *4 (Mass. Super. 2008).	Adopted without explicitly citing 411	"Although there has been little discussion of this cause of action in Massachusetts courts, it has not been rejected. *McNamara v. Mass. Port Auth.*, 30 Mass.App.Ct. 716, 720 n. 5 (1991) (dismissing claim under § 411 due to a lack of evidence and recognizing that "there appears to be no case law in Massachusetts interpreting § 411"); *see also Molinari v. Royal Heights Constr. Co.*, No. 934424, 1998 WL 1181667 at *1 (Mass.Super.Ct. Sept. 8, 1998) (McHugh, J.) [9 Mass. L. Rptr.

			252] (recognizing the tort of negligent selection of a contractor). Importantly, neither *McNamara* nor *Molinari* stand for the proposition that § 411 is not valid in Massachusetts. The two cases cited above demonstrate that although there has been little published discussing section 411, a cause of action based on it is a viable tort in the Commonwealth." *Wright v. Kelleher*, No. 021589A, 24 Mass.L.Rptr. 495, 2008 WL 4635860, at *4 (Mass. Super. 2008).
Michigan	*Reeves v. Kmart Corp.*, 229 Mich. App. 466, 471, 582 N.W.2d 841, 844 (1998).	Rejected	The Court rejected section 411 for independent contractor liability. The Court found "[a] party may be liable for the negligence of an independent contractor where the party retains and exercises control over the contractor or where the work is inherently dangerous." *Funk v. General Motors Corp.*, 392 Mich. 91, 108–110, 220 N.W.2d 641 (1974), overruled in part on other grounds in *Hardy v. Monsanto Enviro–Chem Systems, Inc.*, 414 Mich. 29, 323 N.W.2d 270 (1982).
Minnesota	*Sotoa v. Shealey*, 331 F. Supp. 3d 879 (2018); *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007).	Adopted by reference and common law	"The Court concludes that Minnesota Supreme Court would recognize the tort of negligent selection. First, negligent selection is inherent in, or the natural extension of, a well-established common law right. Negligent selection is the independent-contractor analogue to the tort of negligent hiring in an employee-employer relationship, the latter of which exists under Minnesota law. Second, the overwhelming majority of states recognize the tort of negligent selection. Third, recognition of the tort of negligent selection will not create tension with other applicable laws. In particular, recognizing the tort of negligent selection would not create tension with the baseline absence of liability for those who hire independent contractors. *See Fed. Ins. Co. ex rel. Lecy Const. v. Westurn Cedar Supply, Inc.*, No. 06-0614, 2008 WL 686556, at *2 (D. Minn. Mar. 13, 2008) ("[T]here are so many exceptions to this general rule that seventy years ago the Minnesota Supreme Court was already warning that 'it would be proper to say that the rule is now primarily important as a

			preamble to the catalog of its exceptions.' " (quoting *Pac. Fire Ins. v. Kenny Boiler & Mfg.*, 201 Minn. 500, 277 N.W. 226, 228 (1937)). Finally, § 411 of the Restatement recognizes the well-established tort of negligent selection of an independent contractor. Restatement (Second) of Torts § 411. Therefore, the Court concludes that the Minnesota Supreme Court would recognize the tort of negligent selection of an independent contractor and incorporate § 411 of the Restatement into its common law." *Sotoa v. Shealey*, 331 F. Supp. 3d 879 (2018).
Mississippi	*Owens v. Thomae*, 759 So. 2d 1117, 1122 (Miss. 1999).	Has not squarely addressed	"The general rule is that the employer of an independent contractor has no vicarious liability for the torts of the independent contractor or for the torts of the independent contractor's employees in the performance of the contract. *Owens v. Thomae*, 759 So. 2d 1117, 1122 (Miss. 1999) (citing *Mississippi Power Co. v. Brooks*, 309 So.2d 863, 866 (Miss. 1975)). "[S]econdary sources in Mississippi . . . state that 'an employer can always be held directly liable for his own negligence in hiring, retaining, or supervising, regardless of whether an employee or independent contractor is involved, since the employer is being held liable for his own negligence and not vicariously liable for the negligence of another.'" *Dinger v. American Zurich Ins. Co.*, No: 3:13-CV-46-MPM-SAA, 2014 WL 580889, at * 2 (N.D. Miss. Feb. 13 (2014).
Missouri	*Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647, 655 (Mo. 2019).	Adopted	In applying Restatement section 411, the Court explained that a court's inquiry must ask "whether the precise manner of a particular injury was a natural and probable consequence of [the employer's] negligent act." *Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647, 657 (Mo. 2019).
Montana	*Brookins v. Mote*, 367 Mont. 193, 212, 292 P.3d 347, 361 (2012).	Adopted	"Negligent selection/hiring of an independent contractor, for example, has long been recognized by this Court. *See Gurnsey v. Conklin Co.*, 230 Mont. 42, 53–54, 751 P.2d 151, 157–58 (1988) (adopting *Restatement (Second) of Torts* § 411)." *Brookins v. Mote*, 2012 MT 283, ¶ 59, 367 Mont. 193, 212, 292 P.3d 347, 361.

Nebraska	*Greening by Greening v. Sch. Dist. of Millard*, 223 Neb. 729, 737, 393 N.W.2d 51, 58 (1986).	Adopted	While the plaintiff was unsuccessful in this matter, the Court set forth the framework that is required to be satisfied under Restatement section 411. *Greening by Greening v. Sch. Dist. of Millard*, 223 Neb. 729, 737, 393 N.W.2d 51, 58 (1986).
Nevada	*San Juan v. PSC Indus. Outsourcing*, 126 Nev. 355, 363, 240 P.3d 1026, 1031 (2010).	Adopted without explicit reference	The Court explained "absent control, negligent hiring, or other basis for direct liability, a person who hires an independent contractor to provide a service is not ordinarily liable for the torts the independent contractor commits." *San Juan v. PSC Indus. Outsourcing*, 126 Nev. 355, 363, 240 P.3d 1026, 1031 (2010). Significantly, the Court noted that the plaintiffs failed to assert a section 411 claim, which could have effectively saved the case from summary judgment.
New Hampshire	*Richmond v. White Mountain Recreation Ass'n, Inc.*, 140 N.H. 755, 758, 674 A.2d 153, 155 (1996).	Adopted	It is well settled that New Hampshire recognizes Restatement section 411. *See Arthur v. Holy Rosary Credit Union*, 139 N.H. 463, 468, 656 A.2d 830, 834 (1995) ("[A]n employer of an independent contractor may be liable to one injured as a result of the contractor's fault where it is shown that the employer was negligent in selecting a careless or incompetent person with whom to contract.").
New Jersey	*Basil v. Wolf*, 193 N.J. 38, 68, 935 A.2d 1154, 1173 (2007).	Adopted	"Imputation of liability for hiring an incompetent contractor is derived from basic negligence principles. Our courts have long recognized this exception." *Basil v. Wolf*, 193 N.J. 38, 68, 935 A.2d 1154, 1173 (2007). "Generally stated, the incompetent contractor exception operates on the principle that [a]n employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons. [*Restatement (Second) of Torts* § 411 (1965)." *Basil v. Wolf*, 193 N.J. 38, 68, 935 A.2d 1154, 1173 (2007).
New Mexico	*Talbott v. Roswell Hosp. Corp.*, 144 N.M. 753,	Adopted	Recognizing that a number of jurisdictions across the country have expressly adopted section 411 as

	757, 192 P.3d 267, 271 (2008).		a valid cause of action the Court expressly adopted the Restatement. *Talbott v. Roswell Hosp. Corp.*, 2008-NMCA-114, ¶ 11, 144 N.M. 753, 756, 192 P.3d 267, 270. In so doing, the Court noted that the adoption was not a departure from the State's jurisprudence. Rather, it was in line with its prior reliance on the Restatements.
New York	*Kleeman v. Rheingold*, 614 N.E.2d 712 (N.Y. 1993).	Adopted without explicit reference	Adopted without explicit citation. A review of New York jurisprudence highlights that courts are utilizing the restatement's framing and wording. "Despite courts' frequent recitation of the general against vicarious liability [for the torts of independent contractors], the common law has produced a wide variety of so -called 'exceptions.' Indeed, it has been observed that the general rule 'is not primarily important as a preamble to the catalog of its exceptions. . . . These exceptions . . . fall roughly" into three basic categories: ***where the employer is negligent in selecting, instructing or supervising the independent contractor***; where the independent contractor is hired to do work which is "inherently dangerous"; and where the employer bears a specific, nondelegable duty." *Kleeman v. Rheingold*, 614 N.E.2d 712 (N.Y. 1993) (emphasis added). "Notably, although often classified as an 'exception,' this category [for negligence in selection, instruction, or supervision of an independent contractor] may not be a true exception to the general rule, since it concerns the employer's liability for its own acts or omission rather than its vicarious liability for the acts and omission of the contractor." *Kleeman v. Rheingold*, 614 N.E.2d 712, at n. 1 (N.Y. 1993).
North Carolina	*Page v. Sloan*, 190 S.E.2d 189 (1972).	Adopted	"[T]o substantiate a claim of negligent selection, and thus submit it for the jury's consideration, a plaintiff must prove four elements: (1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury

			was the proximate result of this incompetence." *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000) (citing *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990)).
North Dakota	*Johansen v. Anderson*, 555 N.W.2d 588, 592 (N.D. 1996).	Adopted	The Court squarely applied section 411's framework.
Ohio	*Albain v. Flower Hosp.*, 50 Ohio St. 3d 251, 257, 553 N.E.2d 1038, 1045 (1990), overruled on other grounds by *Clark v. Southview Hosp. & Fam. Health Ctr.*, 68 Ohio St. 3d 435, 628 N.E.2d 46 (1994).	Adopted	Ohio has recognized a cause of action through the legal framework of section 411.
Oklahoma	*Hudgens v. Cook Industries, Inc.*, 521 P.2d 813 (1973).	Adopted through common law	By common law, Oklahoma has held one is relieved of vicarious liability for the torts of an independent contractor when the employer exercises due care in selecting a competent contractor. *Hudgens v. Cook Industries, Inc.*, 521 P.2d 813 (1973).
Oregon	*Eitel v. Times, Inc.*, 352 P.2d 485, 487 (1960).	Adopted through common law	"An employer may be liable for his failure to select a careful contractor." *Eitel v. Times, Inc.*, 352 P.2d 485, 487 (1960).
Pennsylvania	*Wilks v. Haus*, 460 A.2d 288 (1983).	Adopted	*Wilks* v. *Haus*, 460 A.2d 288 (1983) (finding a claim based on 411 is "meritorious").
Rhode Island		Not considered	
South Dakota		Not considered	
Tennessee	*Allen v. Sulcer*, 255 S.W.3d 51, 57 n.5 (Tenn. Ct. App. 2007).	Adopted	"[W]e do note that an employer of an independent contractor has a duty to exercise reasonable care in selecting who will perform the work. *Marshalls of Nashville, Tenn., Inc. v. Harding Mall Assoc., Ltd.*, 799 S.W.2d 239, 243 (Tenn.Ct.App.1990). For an employer to be held liable for negligence in selecting an incompetent contractor, the employer must have known, or through reasonable care been able to ascertain, that the contractor was not qualified for the work at issue. *Mooney v. Stainless, Inc.*, 338 F.2d 127, 131 (6th

			Cir.1964)." *Allen v. Sulcer*, 255 S.W.3d 51, 58 (Tenn. Ct. App. 2007).
Texas	*Mills v. Angel*, 995 S.W.2d 262, 274 n.43 (Tex. App. 1999).	Adopted	"An employer must exercise reasonable care in the selection of a competent and careful independent contractor." *Mills v. Angel*, 995 S.W.2d 262, 274 (Tex. App. 1999).
Utah	*Castellanos v. Tommy John, LLC*, 321 P.3d 218, 234 (2014).	Adopted without explicit reference	The Court intimated that a negligent hiring claim against the direct employer of the independent contractor may have been viable.
Vermont	*Kuligoski v. Rapoza*, 207 Vt. 43, 49, 183 A.3d 1145, 1150 (2018).	Rejected	The parties did not assert a claim through section 411.
Virginia	*Philip Morris, Inc. v. Emerson*, 235 Va. 380, 399, 368 S.E.2d 268, 278 (1988).	Adopted	The Court had invoked section 411 rationale in a negligent retention context. "Formerly, a charitable hospital was not held vicariously liable for the negligent acts of its agents, but we have held a charitable hospital liable for the negligent selection or retention of its nurse-employees." *See Norfolk Protestant Hospital v. Plunkett*, 162 Va. 151, 155–56, 173 S.E. 363, 365 (1934)." Additionally, the Court acknowledged that it had imposed liability in circumstances upon employers of independent contractors in several prior cases. *Id.* Notably, the Fourth Circuit has cited *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 401, 368 S.E.2d 268, 279 (1988), for Virginia's adoption of section 411. *Jones v. CH Robinson*, 558 F.Supp.2d 630 (2008).
Washington	*Chapman v. Black*, 49 Wash. App. 94, 105, 741 P.2d 998, 1005 (1987) (citing *L.B. Foster Co. v. Hurnblad*, 418 F.2d 727 (9th Cir. 1969).	Adopted	Since 1969, Washington has recognized a duty of care owed to an innocent third-party pursuant to the Restatement. *L.B. Foster Co. v. Hurnblad*, 418 F.2d 727 (9th Cir. 1969).
West Virginia	*Sipple v. Starr*, 205 W. Va. 717, 724, 520 S.E.2d 884, 891 (1999).	Adopted	The Court adopted the Restatement based on its view that "a principal is liable for harm caused by his or her failure to exercise reasonable care to employ a competent and careful contractor." *Sipple v. Starr*, 205 W. Va. 717, 724, 520 S.E.2d 884, 891 (1999).

Wisconsin	*Wagner v. Continental Cas. Co., a Div. of CNA Ins. Companies*, 143 Wis.2d 379, 389–90, 421 N.W.2d 835, 839-840 (1988).	Adopted without express reference to Restatement section 411	
Wyoming	*Basic Energy Servs., L.P. v. Petroleum Res. Mgmt., Corp.*, 343 P.3d 783, 790 (Wyo. 2015).	Adopted	"Because section 411 comports with our [prior decisions], we likewise adopt the Restatement (Second) of Torts 411." *Basic Energy Servs., L.P. v. Petroleum Res. Mgmt., Corp.*, 343 P.3d 783, 790 (Wyo. 2015).

Totals:

- **39 have adopted section 411 or adopted without explicitly citing section 411**
- **2 possibly adopted**
- **3 rejected**
- **7 not considered**

Conclusion

For these reasons, this Court should adopt section 411.

Respectfully submitted,

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