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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.

Plaintiff's Brief

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

INTRODUCTION

This is a case about responsibility. Here, the Plaintiff, Lucinda Ruh, seeks to hold a scrap metal shipper responsible for its negligent selection of a contractor. The Plaintiff was injured after Metal Recycling Services, LLC ("MRS"), a sophisticated entity in the business of buying and selling scrap and other recyclable metals that has its own operating authority, hired a commercial motor carrier with a known and well documented history of unsafe practices and a history of operating while uninsured. The Plaintiff does not argue an agency relationship exists between MRS and the motor carrier but instead seeks to hold MRS liable for its own negligence in the selection of the motor carrier. The Fourth Circuit found South Carolina law is not expressly clear on this issue and seeks guidance from this Court.

The Plaintiff's arguments in favor of holding MRS liable for her damages are predicated on fairness, responsibility, historical South Carolina law, trends in South Carolina law, and the majority view of our neighboring states and other states in the union. Her argument is based on the widely adopted Restatement (Second) of Torts section 411 (hereinafter "Restatement"), which provides:

> An 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 with the employer owes to third persons.

(*See also*, *Infra* § I.D.). Section 411 is one of many enumerated sections to the Restatement that hold employers of independent contractors liable, either for the own torts or the torts of their contractors. This Court has considered and accepted several of those sections. Every other state in the Fourth Circuit has either expressly adopted section 411 or otherwise recognized a duty to hire a competent contractor. While South Carolina courts have never considered section 411, they

have expressed a willingness to recognize such duty and have never rejected a Restatement provision that provides for liability for the employer of an independent contractor.

Therefore, the Plaintiff asks this Court to follow the trend of its neighbors as well as the majority of states and expressly recognize a duty to hire competent independent contractors. Adopting such a rule requires no deviation from existing common law and will hold parties like MRS responsible for their own negligence in selecting an incompetent and unfit contractor.

STATEMENT OF THE CASE

On May 25, 2017, the Plaintiff suffered grievous injuries when a commercial motor vehicle collided with her. That commercial motor vehicle was owned and operated by Norris Trucking1, LLC, an uninsured trucking company with an abysmal—publicly available—safety history and a conditional safety rating.[1] In the six months prior to the collision that is the subject of this action, the Department of Transportation ("DOT") performed eight roadside vehicle inspections of Norris Trucking1, LLC's trucks. On six of those occasions, the DOT placed the vehicle being inspected out of service for being unsafe. In the same period, thirteen driver inspections led to Norris Trucking1, LLC drivers being placed out of service for various violations. Norris Trucking1, LLC owned only three trucks but had been involved in two collisions in the two years prior to the subject collision. Between 2009 and 2016, Norris Trucking1, LLC had its operating authority revoked multiple times for operating while uninsured. It was again operating uninsured on the date of the subject collision. Norris Trucking1, LLC exhibited to the public, repeatedly, that it was unfit as a commercial motor carrier. That unfitness was revealed once again on May 25, 2017, when a transfer truck driven by Cecil Norris of Norris Trucking1, LLC collided with the Plaintiff. The collision resulted in significant injuries.

[1] In this case's current posture, the Court is not asked to make any factual determinations but instead is asked to simply answer a narrow question of law. The facts of the underlying case, or more precisely the allegations from the Plaintiff's complaint, are provided for the Court only for context. An appendix containing the complaint, motions, memoranda, and orders of the district court was prepared for the Fourth Circuit Court of Appeals, is available at https://ecf.ca4.uscourts.gov, under case number 20-1440, and may be requested from the Fourth Circuit per Rule 244(b), SCACR. Given that this case was dismissed on a Rule 12(b)(6), FRCP, motion to dismiss, the only facts are the allegations in the complaint. Since that is the case and the question before the court is a matter only of law, the Plaintiff does not believe any additional materials from the records before the Fourth Circuit are necessary for a determination of this matter. Thus, her references to facts and allegations in the underlying complaint are provided only for context.

The Plaintiff sought recovery from MRS, the company responsible for putting Cecil Norris and Norris Trucking1, LLC on the road the day of the collision. MRS is a buyer and seller of scrap metal that operates as a private motor carrier, registered with the Federal Motor Carrier Safety Administration; it can transport its own goods, but it cannot transport goods for hire. MRS is not a registered broker and did not have authority to broker the transportation of scrap metal. On the day of the subject collision, MRS hired Norris Trucking1, LLC to transport scrap metal from the MRS facility to a Nucor Corporation facility.[2] The Plaintiff's argument and allegations were that MRS was a sophisticated, nationwide entity, which negligently choose to ignore the abysmal safety history of Norris Trucking1, LLC or that MRS failed in any meaningful way to consider if Norris Trucking1, LLC was competent and capable of safely transporting the load. Nonetheless, MRS selected Norris Trucking1, LLC.

The Plaintiff asserted various claims against MRS and Nucor in the Lancaster County Court of Common Pleas on October 9, 2019. The case was subsequently removed by the defendants to the South Carolina District Court on November 15, 2019. There, both Nucor and MRS moved to dismiss the case for failure to state a claim, arguing the Plaintiff's claims were predicated upon the existence of an employer-employee relationship and no such relationship existed. The district court agreed with the defendants, finding no employment relationship existed and finding such a relationship was a predicate for liability absent exceptions that the court construed as narrow. The district court specifically rejected the Plaintiff's argument regarding section 411 of the Restatement (Second) of Torts. The court, however, held dismissal in abeyance,

[2] MRS is a subsidiary of Nucor Corporation and sells all of its scrap metal, by contract, to Nucor Corporation.

providing the Plaintiff leave to move to amend. The Plaintiff moved to amend, but the district court found the amendments futile and dismissed the action.

Thereafter, the Plaintiff appealed to the Fourth Circuit Court of Appeals. The Plaintiff dismissed Nucor Corporation as a defendant, and pursued her claims against MRS on only two issues: (1) Whether South Carolina recognizes or would recognize a direct cause of action against a shipper for the negligent selection of an incompetent independent contractor, and (2) Whether South Carolina would adopt Restatement (Second) of Torts section 411 (1965).[3] After briefing, but without oral arguments, the Fourth Circuit decided there is no controlling precedent on this issue and was unable to predict how this Court would rule. The Fourth Circuit then certified to this Court the following question: "Under South Carolina law, can an employer be subject to liability for harm caused by the negligent selection of an independent contractor?" This Court accepted the certified question on February 23, 2022.

[3] The Plaintiff presented these issues as two distinct arguments. The first was presented as a theory of direct negligence against MRS. The second was presented as an exception to the general rule of no vicarious liability for the acts of an independent contractor. The Fourth Circuit rejected this distinction finding either theory is predicated upon a showing of negligence by the employer. *Ruh v. Metal Recycling Services, LLC*, No. 20-1440, 2022 WL 203744, at 6 n.3 (4th Cir. 2022). The Plaintiff agrees the merging of these issues is logical.

STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Shaw v. Psychemedics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019) (citing *Drury Dev. Corp. v. Found Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)).

ARGUMENT

I. South Carolina Should Hold Employers Liable for their own Negligence in the Selection of an Independent Contractor.

A. The logical extension of the historical underpinnings of *respondeat superior* supports liability for negligent selection of an independent contractor.

Holding an employer liable for its own negligence in the selection of an independent contractor is consistent with South Carolina law and policy.[4] At its core, South Carolina tort law is premised upon that idea that "even where there is no duty to act but an act is voluntarily undertaken, the actor assumes a duty to use due care." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). This central idea that one who acts must use due care while acting is consistent with the general goals of tort law: "compensation of innocent parties, shifting the loss to responsible parties . . . , the deterrence of wrongful conduct or conduct that creates an unreasonable risk of injury to others, and providing an incentive to prevent future harm through the payment of damages." 74 Am.Jur.2d *Torts* § 2 (2014); *See also* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 Hofstra L. Rev. 435, 445-52 (2006) (the "purposes [of tort law] are: (a) to give compensation for harms; (b) to determine rights; (c) to punish wrongdoers . . .; and (d) to vindicate parties."). As the Court stated summarily in *Sapp v. Ford Motor Co.*, 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." 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009).

[4] Various resources, including the Restatement (Second) of Torts, use the terms "employer" or "principal" when referring to one who hires an independent contractor. The Plaintiff likewise uses these terms in her briefing. The Plaintiff's use of these terms is not intended to imply the existence of any form of an agency relationship. When those terms are used to discuss an agency relationship, the Plaintiff will clarify with context the existence of such agency relationship.

It is from this backdrop, this focus on protecting society, that the doctrine of *respondeat superior* emerged. *See e.g.*, Hubbard & Felix, *The South Carolina Law of Torts* 726 (4th ed. 2011). This Court in 1926 emphasized the reasoning for *respondeat superior* is based upon the public policy that "the principal, selecting his agent and directing the manner in which he shall execute the agency, should, in justice to third persons with whom the agent may deal, and who are not responsible either for his selection or conduct, be held liable for his torts." *Id.* (citing *Sams v. Arthur*, 135 S.C. 123, 130, 133 S.E. 203, 208 (1926) (emphasis added)). While the Court has never expressly elucidated upon those public policies in great detail "there is a desire to allocate the costs of accidents fairly." *Id.*

Hubbard and Felix note that concerns of fairness underpin the doctrine of *respondeat superior*, citing an 1824 opinion of an English court that states "*respondeat superior* is bottomed on this principle that he who expects to derive advantage from an act that is done by another for him must answer for any injury that a third person may sustain from it." *Id.* at 736-27 (citing *Hall v. Smith*, 2 Bing. 156, 130 Eng. Rep. 265, 267 (Common Pleas 1824)). Further, Hubbard and Felix identify the second policy consideration as focused on preventing accidents. *Id.* at 727 (citing *Falconer v. Beard-Laney, Inc.*, 215 S.C. 321, 54 S.E.2d 904 (1949) ("[*respondeat superior*] has its foundation or origin in the consideration of public policy, convenience, and justice. It was designed to *protect* innocent third parties from the acts of agents to whom the principal has entrusted the means of committing an injury.")).

The question before the Court is not one based upon *respondeat superior*, but the doctrine is nonetheless instructive. *Respondeat superior* is derivative liability; an innocent master who has done no wrong, is responsible for the torts of another. While *respondeat superior* is a staple of South Carolina tort law and has been for decades, the significance of the doctrine, particularly its

derivative nature, cannot be understated. As the Court stated in *Fitzer v. Greater Greenville YMCA*, "there is no tenet more fundamental in our law than [that] liability follows the tortious wrongdoer," and yet this Court still imposes derivative liability on an innocent master for the torts of her servant. 277 S.C. 1, 3, 202 S.E.2d 230, 231 (1981). This derivative or vicarious liability is imposed for the protection of the public and under the premise that the master has the ability or right to control the conduct of the servant. *See Sams*, 135 S.C. at 130, 133 S.E. at 203.

With this context, the argument relied upon by the Defendant against the imposition of liability in this case, summarily codified at Restatement (Second) of Torts section 409, can be more clearly viewed. *See generally Rock Hill Tel. Co., Inc. v. Globe Commc'ns., Inc.*, 363 S.C. 385, 611 S.E.2d 235 (2005). Restatement (Second) of Torts section 409 provides "Except as stated in [sections] 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Viewed in light of the doctrine of *respondeat superior*, section 409 is a by-product of the doctrine of *respondeat superior*, not a distinct rule. *See* Restatement (Second) of Torts § 409 cmt. b (section 409 is only applied "where no good reason is found for departing from it."). However, section 409 has no direct relevance to this certified question. The Fourth Circuit is not asking if MRS is liable for the torts of its contractor, but whether it can be liable for its own negligent acts.

Further, Restatement section 409, to the extent it stands to limit the imposition of derivative liability for the torts of an independent contractor, has been weakened "to the extent the exceptions are now so numerous . . . that it can now be said to be [a general rule] only in the sense that it is applied where no good reason is found for departing from it." *Id.* at cmt. b. The Court of Appeals for Maryland expressly reached the same conclusion stating, "the general rule [of non-liability for the torts of an independent contractor] is riddled with a number of exceptions that have practically

subsumed the rule." *Rowley v. Mayor and City Council of Baltimore*, 505 A.2d 494 (Md. Ct. App. 1986). This Court has likewise eroded the rule, extending derivative liability in various circumstances involving independent contractors. *See Infra* I.B.

The Plaintiff is not asking this Court to further erode that rule and impose vicarious liability on MRS for the torts of its contractor. The Plaintiff only seeks to hold MRS responsible for its own negligence and asks this Court to hold that an employer owes a duty to use due care in the selection of an independent contractor. The Restatement (Second) of Torts contemplates such a duty in section 411: "An 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 . . . to do work which will involve a risk of physical harm unless it is skillfully and carefully done." While the Restatement seemingly observes this rule as an exception to section 409, by its own phraseology and organization it actually is not. Restatement section 409 deals with a limitation on derivative liability.[5] In contrast, Restatement section 411 creates a direct cause of action against the employer. Additionally, the Restatement structures what it calls exceptions to section 409 in two separate topics: the first, "[h]arm caused by the fault of employers of independent contractors" and the second, "harm caused by the negligence of a carefully selected independent contractor." Restatement (Second) of Torts §§ 410-429.

This Court has never considered a section from the first topic, providing for direct liability. However, it has adopted several sections from the second, creating derivative liability for non-tortious employers even in the absence of control. *See Infra* I.B. Such holdings were deviations from common law and the general principle stated in *Fitzer* that "there is no tenet more

[5] "[T]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor." Restatement (Second) of Torts § 409 (emphasis added).

fundamental in our law than [that] liability follows the tortious wrongdoer." 277 S.C. at 3, 202 S.E.2d at 231. The Plaintiff does not ask this Court to go as far as it has in the past and create an additional avenue for the imposition of derivative liability on a faultless employer who lacks the right or ability to control its agent. Instead, she only asks this Court to hold an employer can be liable for harm caused by its own direct negligence in the selection of an independent contractor. Holding such is consistent with the jurisprudence of the state and the policy rationales underpinning tort law.

B. South Carolina courts have expressed support for negligent hiring of independent contractor claims and have adopted all exceptions to Restatement section 409 they have considered.

South Carolina courts have expressed support for negligent hiring of independent contractor claims and other Restatement section 409 exceptions. In 1868, the Court of Appeals stated in dicta, "under suitable allegations, the owner might be made responsible for the misconduct or negligence of a contractor known to be unworthy of trust, to whom a work involving danger to others was entrusted." *Conlin v. City Council of Charleston*, 15 Rich. 201, 211-212 (S.C. Ct. App. 1868). Similarly, the issue of principal liability for the torts of an independent contractor arose again in *Caldwell v. Carroll*, 139 S.C. 163, 137 S.E. 444 (1927). There, the majority of the court permitted the Plaintiffs to proceed under either a theory of agency or on a negligent selection of an independent contractor claim.[6] *Id.* at ___, 137 S.E. at 446. The Plaintiff does not cite *Conlin* or *Caldwell* as binding precedent upon this Court or the Fourth Circuit.

[6] An analysis of *Caldwell* is convoluted, as the majority opinion is bereft of details. The import of the majority decision, with regard to the certified question before this Court, becomes most evident upon review of Justice Cothran's dissent in the denial of a petition for rehearing wherein he states, "I am unwilling to believe that the court fully comprehends the unlimited degree to which the opinion in this case has extended liability . . . it is subversive of the settled principles affecting the liability of an owner for the negligence of an independent contractor." *Caldwell*, at ___, 137 S.E. at 451 (Cothran dissenting).

Instead, the Plaintiff cites them to show this Court's historical willingness to impose liability upon a principal in the absence of an agency relationship.

While South Carolina appellate courts have not expressly held an employer owes a duty when hiring an independent contractor, they have held employers liable for the torts of their contractors in the absence of any malfeasance. In 1993 the court of appeals stated the law of South Carolina is found at Restatement (Second) of Torts section 419, which holds a lessor liable for the torts of her independent contractor when they cause harm to a lessee or a guest of a lessee. *Durkin v. Hansen*, 313 S.C. 343, 349, 437 S.E.2d 550, 554 (Ct. App. 1993). Likewise, this Court further expanded liability for employers of independent contractors with its 2000 opinion in *Simmons v. Toumey Regional Medical Center* when it adopted Restatement (Second) of Torts section 429 for the proposition that a principal is liable for the torts of her contractors when one reasonably believes services will be performed by the principal. 341 S.C. 32, 50, 533 S.E.2d 312, 322-23 (2000). Further informative are the decisions of our district court judges, tasked with predicting or otherwise stating the law of South Carolina, who have relied upon or discussed various exceptions—410, 413, 414, 419, 427A, 427B—in reaching their conclusions. *See, e.g., Evergreen Intern. S.A. v. Marinex Cont. Co., Inc.*, 477 F. Supp. 2d 690, 693 (D.S.C. 2007); *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670, 673 (D.S.C. 1992).

No South Carolina Court, including the district courts, has declined to follow a listed Restatement exception to section 409, except the district court which heard the case *sub judice*. Underpinning each of these decisions are the same considerations which initially led to the adoption of vicarious liability in employment or agency relationships: fairness, cost allocation, and the protection of innocent third parties. *See, e.g.*, *Simmons*, 341 S.C. at 48-49, 533 S.E.2d at 321.

C. Finding an employer owes a duty to use due care in the selection of an independent contractor is consistent with the Courts' *respondeat superior* and negligent hiring jurisprudence.

While the present action is unequivocally in the arena of a principal-independent contractor relationship, the evolution of South Carolina law regarding *respondeat superior* remains instructive. As explained, *supra*, *respondeat superior* and Restatement sections 410-429 are predicated upon the same public policies justifying the imposition of liability upon an employer for the torts of an employee and liability for the employer's own tortious conduct in hiring, retaining, or supervising the agent. In South Carolina, it is axiomatic that an employer owes duties in hiring, retaining, or supervising an employee. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). Notably, in *James v. Kelly Trucking Co.*, the Court emphasized the distinctness of negligent hiring claims, which are separate claims from the underlying tort claims against the alleged negligent agent and are not derivative of those underlying claims. 377 S.C. 628, 661 S.E.2d 329 (2008). The same reasoning applies to this question. As noted by the Fourth Circuit in presenting the Plaintiff's two arguments as one certified question, either theory requires a showing of negligence on the part of the principal. *See Ruh v. Metal Recycling Services, LLC*, No. 20-1440, 2022 WL 203744, at 6 n.3 (4th Cir. 2022). Therefore, the similarities between a negligent hiring and negligent selection claim are patent, as both require negligence from the employer.

As stated in *Doe v. ATC, Inc.*, negligent hiring claims "generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties." 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005) (citing *Di Casala v. Kay*, 450 A.2d 508, 516 (N.J. 1982)). The standard explicated by the Restatement (Second) of Torts for negligent hiring and retention claims is whether the offending employee was "in the habit of misconducting [herself] in a manner

dangerous to others." Restatement (Second) of Torts § 317 cmt. c. (cited with approval in *Doe*, 367 S.C. at 205, 624 S.E.2d at 450; *Degenhart*, 309 S.C. 116-17, 420 S.E.2d 496-97).

The Plaintiff merely asks this Court to adopt the substantially similar standard provided in section 411 as it did in adopting section 317. Like the standard for negligent hiring in section 317, section 411 requires an employer use reasonable care in the selection of a contractor when the work "will involve a risk of physical harm unless it is skillfully and carefully done." The policy consideration supporting the former are the same as the latter. Neither section is predicated upon control, and neither section results in vicarious or derivative liability. In both situations, the principal simply owes a duty to use due care in the selection of her agent or contractor. Holding employers owe a duty in selecting their employees but not their contractors leads to incongruous results which are contrary to the stated public policy of this state. Therefore, to avoid irrational results in substantially similar situations and to create consistent congruity of law, this Court should adopt section 411 as it adopted section 317 and section 317 comment c.

D. The majority of states in the United States and all other states in the Fourth Circuit impose a duty upon the employer of an independent contractor to use due diligence in the selection of an independent contractor.

The majority of states in the United States and all other states in the Fourth Circuit impose a duty to hire a competent independent contractor. As stated by the Fourth Circuit Court of Appeals in its order certifying this question, every state in the Fourth Circuit "has either expressly adopted [section] 411 or otherwise recognized a duty to hire a competent contractor." *Ruh v. Metal Recycling Services, LLC*, No. 20-1440, 2022 WL 203744, at 2 (4th Cir. 2022) (citing *Perry v. Asphalt & Concrete Servs., Inc.*, 133 A.3d 1143 (Md. 2016); *Little v. Omega Mears I, Inc.*, 615 S.E.2d 45 (N.C. Ct. App. 2005); *King v. Lens Creek Ltd. P'ship*, 483 S.E.2d 265, 269 (W. Va. 1996); *Philip Morris, Inc.*, 368 S.E.2d 268, 278 (Va. 1988)). Moreover, thirty-seven states have

expressly adopted section 411 or otherwise hold one owes a duty in the selection of an independent contractor.[7] E.*g.*, *Suarez v. Gonzalez*, 820 So.2d 342 (Fla. Dist. Ct. App. 2002); *Certified Cleaning and Restoration, Inc. v. Lafayette Ins. Co.*, 67 So.3d 1277 (La. Ct. App. 2011); *Allen v. Sulcer*, 255 S.W.3d 51, 57 at n.5 (Tenn. Ct. App. 2007); *Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647 (Mo. 2019) (en banc); *Mills v. Angel*, 995 S.W.2d 262 (Tex. App. 1999); *Mentzer v. Ognibene*, 597 A.2d 604 (Pa. Super Ct. 1991); *Jones v. Schneider Nat. Inc.*, 797 N.W.2d 611 (Iowa Ct. App. 2011).

In 2008, the New Mexico Court of Appeals addressed the same question currently pending before this Court. The Court began by noting "A number of jurisdiction across the country have expressly adopted section 411 as a valid cause of action." *Talbott v. Rosewell Hospital Corp.*, 192 P.3d 267, 271 (N.M. Ct. App. 2008). However, New Mexico was not "among the jurisdictions that [had] expressly adopted section 411." *Id.*

The New Mexico court, with the question then squarely before it, took the "opportunity to expressly adoption section 411 as part of New Mexico's tort law." *Id.* The New Mexico court noted adoption of section 411 "does not represent any substantial departure from our tort

[7] Of the remaining thirteen states, two—Oregon and Kentucky—have not expressly adopted section 411 but appear poised to so. *See Golik v. CBS Corp.*, 472 P.3d 778, 796 n.12 (Or. Ct. App. 2020); *Hercules Powder Co. v. Hicks*, 453 S.W.2d 583, 588 (Ky. 1970). Eight states—South Dakota, Rhode Island, Oklahoma, Mississippi, Idaho, Hawaii, Alabama, and South Carolina—have not considered section 411, although some of these states, like Oklahoma, have expressly reserved section 411 for future consideration. *See generally Thornton v. Ford Motor Co*, 297 P.3d 413, 427 at n. 32 (2012). It unclear if Georgia has adopted section 411. *See Hampton v. McCord*, 232 S.E.2d 582, 586 (Ga. Ct. App. 1977) (declining to apply section 411). *But see Stone v. Pinkerton Farms, Inc.*, 741 F.2d 941, 947 (7th Cir. 1984) (interpreting *Hampton* as only declining to apply section 411 to the specific allegations of negligence in that case). Only two states have seemingly declined to apply section 411. *See Kuligoski v. Rapoza*, 183 A.3d 1145 (Vt. 2018) (finding employer-employee test determinative, but not addressing section 411 or a claim for negligent selection of an independent contractor.); *Reeves v. Kmart Corp.*, 582 N.W.2d 841 (Mich. Ct. App. 1998) (rejecting section 411 in favor of its doctrine of retained control).

jurisprudence," finding it had "affirmed the validity of a claim based on the negligent selection of an independent contractor" in at least one older case. *Id*. Finally, the New Mexico court noted it has traditionally been willing to "adopt the view of the Restatement." *Id*. The New Mexico court concluded the "adoption of section 411 comports with both the national trend in tort jurisprudence as well as the natural progressions of [New Mexico's] own tort jurisprudence." *Id.*

The same can be said for South Carolina's consideration of this matter. The question of whether to adopt section 411 sits squarely before this Court, as it did before the New Mexico court. There is no substantial departure from South Carolina's tort jurisprudence in adopting this rule, as this Court has on at least one occasion signaled its approval of a claim for negligent selection. *See, e.g.*, *Caldwell*, 139 S.C. at ___, 137 S.E. at 448. South Carolina courts have historically been willing to adopt Restatement provisions and have specifically been willing to adopt other section 409 exceptions, even when they go as far as extending derivative liability. *See, e.g.*, *Durkin*, 313 S.C. at 349, 437 S.E.2d at 554. Finally, the majority of states, in greater numbers now than when *Talbott* was decided, have adopted section 411.

Therefore, the Plaintiff requests this Court adopt Restatement (Second) of Torts section 411 for the same reasons that New Mexico did given the explicit parallels between both states' jurisprudence when first considering the issue.

E. Holding MRS owed the Plaintiff a duty to select a competent contractor leads to an equitable result.

Holding MRS owed the Plaintiff a duty to select a competent contractor leads to an equitable result. While Plaintiff recognizes this Court is not applying the facts of this case to the law, adopting section 411 or otherwise finding a principal owes a duty in the selection of an independent contractor is the sensible method for affording the Plaintiff in this case and others injured by the negligence of independent contractor complete relief. As stated by the Court

"'[t]here is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.'" *Shaw v. Psychemedics Corp.*, 426 S.C. 194, 198, 826 S.E.2d 281, 283 (2019) (citing *Araujo v. S. Bell Tel & Tel. Co.*, 291 S.C. 54, 57-58, 351 S.E.2d 908, 910 (Ct. App. 1986)). In general, a defendant's duty in tort arises out of the common law obligations to exercise due care to conform one's conduct to reasonable standards so as to prevent injury to those foreseeable persons who may be harmed by the defendant's negligence. *See Dorrell v. S.C. Dept. of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) ("This common law duty to use due care includes the duty to avoid damage or injury to foreseeable Plaintiffs").

Holding that a principal owes a duty to use reasonable care in the selection of a contractor requires no jurisprudential leap from South Carolina's basic framework of duty. The Plaintiff's argument is that MRS could or should have foreseen the risk of harm to third parties, like the Plaintiff, by hiring a known and knowable incompetent contractor like Norris Trucking1, LLC. Because of the foreseeability of harm, MRS owed the Plaintiff a duty. Therefore, the Plaintiff is asking this Court to specify that an employer owes a duty in the selection of an independent contractor, which logically progresses from South Carolina's existing negligence framework.

South Carolina has stated policy goals of fair cost allocation and injury prevention. *See generally* Hubbard, *supra*, at 7, 15, 726-27. Allowing the Plaintiff and others harmed by uninsured and underinsured contractors that lack sufficient assets to satisfy a verdict to pursue claims against those who negligently allow a contractor to commit a tort furthers those policy goals.[8] MRS

[8] Again, the Plaintiff is not advocating for strict liability for the employer of a contractor, nor is she advancing an argument that would abrogate the other elements of a typical tort claim. *See e.g.*, Restatement (Second) of Torts § 411, cmt. b. Instead, she only asks this court to find employers, like MRS, owe a duty to use reasonable care when selecting an independent contractor.

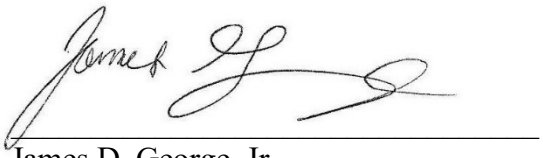
derived a benefit through its employment of Norris Trucking1, LLC; permitting MRS to avoid responsibility for its own negligent acts that caused the damages sustained by the Plaintiff offends basic notions of fairness. *See generally McCracken v. Gov't. Emp. Ins. Co.*, 284 S.C. 66, 68, 325 S.E.2d 62, 64 (1985) ("[W]e feel at liberty, in the absence of contractual provisions and statutes, to chose that rule which appeals to our sense of reason and fairness."). Finding MRS owed no duty in the selection of its contractor amounts to immunity for its wrongful acts and, as stated by the Court, "[i]mmunity fosters neglect and irresponsibility, while liability encourages the exercise of due care." *Simmons*, 341 S.C. at 49, 533 S.E.2 at 321 (citing *Brown v. Anderson County Hosp. Ass'n*, 268 S.C. 479, 487, 234 S.E.2d 873, 877 (1997)).

Therefore, the Plaintiff respectfully requests the Court find employers like MRS cannot avoid liability for their own causatively negligent acts by hiring contractors instead of employees.

CONCLUSION

The Court should answer the certified question "yes" because doing so accords with South Carolina law, is consistent with the natural progressive of tort law, and would join South Carolina with the firm majority of her sister states.

Respectfully submitted,



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