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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

CERTIFIED QUESTION

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

Appellate Case No.: 2022-000094

Lucinda Ruh — PLAINTIFF,

v.

Metal Recycling Services, LLC — DEFENDANT.

DEFENDANT'S BRIEF

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CERTIFIED QUESTION

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

INTRODUCTION

In the more than 140 years since South Carolina first recognized an employer's duty of care in hiring its own employees, this state has never extended that same duty to an employer's selection of an *independent* contractor. *See Gunter v. Graniteville Mfg. Co.*, 15 S.C. 443, 455 (1881) (holding that an employer is "responsible for failure to exercise proper care in the original employment of *his servants* and in ascertaining their qualifications after they are in his service") (emphasis added). Instead, over that entire time, South Carolina law has maintained a general rule that an employer is not liable for an independent contractor's negligence. *Duane v. Presley Constr. Co.*, 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978) ("Generally, an employer is not liable for the torts of an independent contractor committed in the performance of contracted work."). Although South Carolina's appellate courts have recognized certain limited exceptions to this rule, none of those exceptions—which are based primarily upon nondelegable duties—apply here.

Lacking a cognizable claim, Plaintiff/Appellant Lucinda Ruh ("Plaintiff") asks this Court to adopt new law that expands the scope of liability for an independent contractor's negligence to any employer who does not turn every stone to investigate and analyze the independent contractor's background, resources, and qualifications. Plaintiff would make the employer an additional insurer for each independent contractor it hires. Such a change would open the floodgates to new claims—every negligence action involving an independent contractor is likely to include the employer and a negligent selection cause of action, regardless of the context. Furthermore, because negligence claims are so fact-specific, employers are not likely to avoid exposure through motions to dismiss or even at summary judgment. They will be along for a costly ride through trial or other resolution in nearly every case.

Plaintiff fails to cite any South Carolina authority or persuasive rationale to support such a drastic expansion of the scope of potential liability for an independent contractor's negligence. There is good reason that South Carolina courts have never previously done so. Namely, the South Carolina exceptions based on nondelegable duties already establish the circumstances where, in the interest of public policy and proper allocation of risk, the law disregards the traditional rule of non-liability and holds the employer responsible. When an employer selects an independent contractor to perform tasks outside those recognized and accepted circumstances, public policy and overall fairness strongly favor allowing the employer to presume that the independent contractor can sufficiently perform those tasks without effectively being required to guarantee to the public at large that the contractor is competent.

STATEMENT OF THE CASE

On October 9, 2019, Plaintiff commenced a lawsuit by filing a complaint (the "Original Complaint") in the Court of Common Pleas for Lancaster County, South Carolina, Case No. 2019-CP-2901289. Plaintiff alleged she was injured when a truck crashed into her vehicle. Although Plaintiff alleged that the driver's negligence was the immediate cause, she did not name the trucking company, Norris Trucking1 LLC ("Norris Trucking") or the driver as defendants.[1] Instead, Plaintiff sought to impose liability on MRS, along with Nucor Corporation ("Nucor"), based on a theory that it was negligent in hiring or retaining Norris Trucking—an independent contractor—to transport a load of scrap metal on the day of the accident. JA 9-10.[2]

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[1] Prior to bringing this action against MRS, Plaintiff sued Norris Trucking and the driver in a separate state court lawsuit. In that action, Plaintiff alleged that Norris Trucking was vicariously liable for the acts of driver because he was working under the operating authority and in his scope of employment with Norris Trucking.

[2] The Joint Appendix ("JA") submitted to the Fourth Circuit Court of Appeals may be accessed here, and references thereto are provided for the Court's convenience. MRS will also provide a hard copy of the Joint Appendix at the Court's request.

The Original Complaint alleged that MRS "individually or jointly, acted to arrange for transportation of property . . . using [Norris Trucking] as a motor carrier" and that at the time of the accident, Norris Trucking was "transporting goods or property in interstate commerce under a contract of carriage, bill of lading, transportation services agreement or other contract, having been hired by [] MRS and/or Nucor to transport scrap metal from [MRS's] Gastonia, North Carolina facility to Nucor['s facility] in Darlington, South Carolina." JA 7, 9.

According to Plaintiff, Norris Trucking was at all relevant times "an unsafe, unfit, and incompetent motor carrier." JA 7. Plaintiff did not expressly identify a cause of action in the Original Complaint, but she asserted that MRS "breached a duty of care which it owed to the motoring public . . . by hiring and/or retaining Norris Trucking . . . ." JA 12. Plaintiff alleged that Norris Trucking had received a "conditional" safety rating from the Federal Motor Carrier Safety Administration (the "FMCSA"). JA 8. Plaintiff did not allege that Norris Trucking had received an "unsatisfactory" rating, which would have caused the FMCSA to order Norris Trucking to discontinue operations. In fact, despite Plaintiff's litany of aspersions regarding Norris Trucking's perceived fitness as a motor carrier, she never pled that Norris Trucking was unauthorized or unlicensed to operate. (*See* generally JA 6-13, 20.) Instead, Plaintiff alleged that MRS knew or should have known that Norris Trucking had a "long history of violating [regulations] designed to promote safe driving and reduce or prevent wrecks" and "posed a risk of harm to others and was otherwise incompetent and unfit to perform the duties of an interstate carrier . . . ." JA 10, 12.

MRS and Nucor removed the case to the United States District Court for the District of South Carolina and, on November 21, 2019, filed motions to dismiss the Original Complaint. MRS argued that Plaintiff had failed to allege facts necessary to assert a claim for negligent hiring or retention under South Carolina law. MRS further contended that without allegations of an

employment, agency, supervisory, or master-servant relationship between MRS and Norris Trucking, the Original Complaint failed to state a claim for negligent hiring or retention.

On January 30, 2020, the District Court granted the motions to dismiss. The District Court held that Plaintiff failed to state a claim, regardless of whether her theory was based on (1) an employment or similar relationship, or (2) the circumstances in which South Carolina law imposes liability on a contracting party for the actions of an independent contractor. In so holding, the District Court reiterated that South Carolina generally does not impose liability on an employer for the actions of its independent contractor. Although the District Court granted the motions to dismiss, it nevertheless afforded Plaintiff an opportunity to move to amend her complaint.

On February 10, 2020, Plaintiff timely filed a motion to amend along with her Proposed Amended Complaint (the "Amended Complaint"). Plaintiff's first cause of action—which is the claim at issue—was expressly re-branded as a claim of "Negligent Selection of an Incompetent or Unfit Motor Carrier" against MRS and Nucor. The Amended Complaint included a slew of repetitive and conclusory allegations asserting a purported duty of care owed by shippers and brokers who hire motor carriers. JA 44-49.

MRS and Nucor filed responses to Plaintiff's motion to amend on February 24, 2020. (*See* generally JA 5.) MRS argued that the motion improperly attempted to relitigate matters previously ruled upon by the District Court. In addition, MRS asserted substantively that South Carolina does not recognize a cause of action for negligent selection of an incompetent or unfit motor carrier as alleged in the Proposed Amended Complaint. Plaintiff did not file a Reply.

On March 19, 2020, the District Court denied Plaintiff's Motion to Amend and dismissed Plaintiff's action with prejudice. JA 60-67. The District Court held that (1) Plaintiff's negligent selection claim was futile, and (2) Plaintiff's arguments advanced in support of her Motion to

Amend were "improper argument[s] for reconsideration of the order dismissing the Original Complaint" and would otherwise fail because they did not address South Carolina law. JA 64. On April 15, 2020, Plaintiff filed a notice of appeal to the Fourth Circuit Court of Appeals regarding the orders granting the Motion to Dismiss and denying the Motion to Amend. JA 68.

On January 13, 2022, after the parties fully briefed Plaintiff's appeal, the Fourth Circuit Court of Appeals issued an order and opinion certifying the following question of law to the Supreme Court of South Carolina: Under South Carolina law, can an employer be subject to liability for harm caused by the negligent selection of an independent contractor?

STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, the 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 this state and the Court's sense of law, justice, and right." *Miller v. Aiken*, 364 S.C. 303, 306, 613 S.E.2d 364, 365 (2005) (citing *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000)).

ARGUMENT

I. The Court Should Reject Plaintiff's Attempt to Expand South Carolina Tort Law in Derogation of the General Rule of Non-Liability for the Acts of an Independent Contractor.

A. The Liability of a Principal for the Torts of an Independent Contractor Is Limited to Nondelegable Duties.

Plaintiff asserts that expanding South Carolina tort law to include a separate claim for negligent selection of an independent contractor is the "sensible method for affording the Plaintiff in this case and others injured by the negligence of [an] independent contractor complete relief." (Pl.'s Br. at p. 17.) South Carolina, however, already recognizes that there are certain situations in which it is inequitable to exclude an employer from liability for an independent contractor's negligence. Those situations generally arise when the employer owes a "nondelegable" duty, and courts will hold the employer liable despite the independent contractor relationship. The South Carolina Supreme Court and Court of Appeals have recognized such nondelegable duties in the following circumstances:[3]

(1) an employer's duty to provide a safe workplace and suitable tools, *Bellamy v. Hardee*, 242 S.C. 71, 78, 129 S.E.2d 905, 909 (1963);

(2) a landowner's duty when creating a nuisance, *Conlin v. City Council of Charleston*, 15 Rich. 201, 211 (S.C. Ct. App. 1868) and *Duane v. Presley Constr. Co., Inc.*, 270 S.C. 682, 684, 244 S.E.2d 509-510 (1978);

(3) a landlord's duty to safely perform repairs, *Durkin v. Hansen*, 313 S.C. 343, 346-47, 437 S.E.2d 550, 552 (Ct. App. 1993);

(4) a principal's duty where the work involves inherent or intrinsic danger or abnormally dangerous activities, *Allison v. Ideal Laundry & Cleaners*, 215 S.C. 344, 350, 55 S.E.2d 281, 282 (1949) and *Alexander v. Seaboard Air Line R.R. Co.*, 221 S.C. 477, 486-89, 71 S.E.2d 299, 303-04 (1952);

[3] *See also Rock Hill Tel. Co. v. Globe Commc'ns., Inc.*, 363 S.C. 385, 391-92, 611 S.E.2d 235, 238-39 (2005) (identifying the nondelegable duties that South Carolina has recognized and declining to impose a nondelegable duty on a utility company to perform its work safely, in response to a certified question from the South Carolina federal district court).

(5) a municipality's duty to provide safe streets even when maintenance is undertaken, *Dolan v. City of Camden*, 233 S.C. 1, 4, 103 S.E.2d 328, 330 (1958);

(6) a common carrier's duty to ensure that cargo is properly loaded and secured, *Jenkins v. E.L. Long Motor Lines, Inc.*, 233 S.C. 87, 95-99, 103 S.E.2d 523, 527-29 (1958);

(7) a bail bondsman's duty to supervise the work of his employees, *Carson v. Vance,* 326 S.C. 543, 550-51, 485 S.E.2d 126, 129-30 (Ct. App. 1997); and

(8) a hospital's duty when a physician who reasonably appears to be a hospital employee provides treatment, *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 52-53, 533 S.E.2d 312, 322-23 (2000).

These cases demonstrate that South Carolina's courts have cautiously, selectively, and intentionally carved out limited instances in which employers can be held liable for an independent contractor's negligence, despite the general rule of non-liability, because "the responsibility is so important to the community that the employer should not be permitted to transfer [liability] to another." *Simmons v. Tuomey Reg'l Med. Ctr.*, 330 S.C. 115, 120, 498 S.E.2d 408, 410 (Ct. App. 1998) (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71, at 511 (5th ed. 1984)). Plaintiff, in contrast, proposes the creation of an effectively unlimited claim whereby an employer may have liability for an independent contractor's negligence regardless of whether a nondelegable duty applies. Given the existing exceptions, however, such a claim risks "subver[ting] . . . the settled principles affecting the liability of an owner for the negligence of an independent contractor," as Justice Cothran warned nearly a century ago. *Caldwell v. Carroll*, 139 S.C. 163, 187, 137 S.E. 444, 451 (1927).

It is unnecessary to overrule a century of independent contractor jurisprudence in South Carolina in order to create a new cause of action, especially considering the generous exceptions that our courts already recognize. In the absence of a nondelegable duty, South Carolina courts have consistently held that an employer is not liable for an independent contractor's negligence.

Rock Hill Tel. Co., 363 S.C. at 390-91, 611 S.E.2d at 238-239 ; *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 368, 649 S.E.2d 488, 492 (2007). Like other courts have done,[4] this Court should decline Plaintiff's invitation to create a new cause of action because South Carolina jurisprudence already prescribes the circumstances when, in the interests of public policy and proper risk allocation, the subject matter is so important that a principal should remain liable for the conduct of an independent contractor.[5]

B. South Carolina Public Policy Does Not Support Expanding a Principal's Potential Liability for an Independent Contractor's Negligence.

Plaintiff's expansive proposed duty subverts South Carolina public policy because it would strain resources, impose severe economic costs on employers and independent contractors alike, and levy an undue burden on South Carolina business. Furthermore, if adopted, Plaintiff's proposed claim will undoubtedly accompany every negligence action involving an independent

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[4] *See, e.g.*, *Bagley v. Insight Commc'ns. Co., L.P.*, 658 N.E.2d 584 (Ind. 1995).

[5] As the District Court previously (and properly) held, Plaintiff's complaint does not implicate any nondelegable duty. *Ruh v. Metal Recycling Servs., LLC*, 436 F. Supp. 3d 844, 851-52 (D.S.C. 2020). No South Carolina court has ever held that a principal owes a nondelegable duty to safely transport goods across highways. In fact, the South Carolina Supreme Court has held that the transportation of logs is not "so inherently dangerous as to make the owner liable for the negligence of an independent contractor." *Norris v. Bryant*, 217 S.C. 389, 400 60 S.E.2d 844, 848 (1950). Furthermore, the South Carolina Court of Appeals has held that a broker of nonemergency transportation services did not owe a nondelegable duty to its *own passengers* to provide safe transportation. *Gary v. Askew*, 417 S.C. 232, 248-51, 789 S.E.2d 94, 99-105 (Ct. App. 2016), *rev'd on other grounds*, 423 S.C. 47, 813 S.E.2d 717 (2018). The court held that "[n]o controlling authority in South Carolina—or any other jurisdiction—supports the proposition that [the principal] owed [plaintiffs] a nondelegable duty to provide safe transportation and could be held liable for the alleged negligence of an employee of its subcontractor." *Id.* at 251, 789 S.E.2d at 104 (citing *Dixon v. Whitfield*, 654 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1995) (rejecting appellants' nondelegable duty argument and noting the parties cited no controlling authority, and the court could find none, to support "the proposition that the safe transportation of public school students is a nondelegable duty")).

contractor and will effectively require those who hire an independent contractor to be the insurers of such independent contractor's negligence.

The Michigan Court of Appeals discussed the unintended consequences of a claim for negligent hiring of an independent contract at length in *Reeves v. Kmart Corp.*, 229 Mich. App. 466, 582 N.W.2d 841 (1998). The *Reeves* court considered and rejected the same claim that Plaintiff proposes under very similar circumstances. In *Reeves*, several Kmart stores contracted with a waste disposal company to pick up their garbage. *Id.* at 468, 582 N.W.2d at 843. After one pickup, a garbage truck was traveling in excess of the speed limit and struck four cars. *Id.* An inspection of the truck following the accident revealed mechanical defects that should have resulted in the vehicle being taken out of service, including "four of the six brakes on the truck were defective, and a fifth was inoperative; eight of the ten tires were underinflated; the vehicle was both overloaded and improperly loaded; and there was excess free play in the steering mechanism." *Id.* at 469, 582 N.W.2d at 843. "The inspector stated in his report, 'In 35 years of heavy truck inspections I have not experienced [such] disregard for the laws of safe truck operation or contempt for the motoring public.'" *Id.*

Affirming the trial court's dismissal, the Michigan Court of Appeals held that Kmart owed no duty regarding the selection of an independent contractor. *Id.* at 475-76, 582 N.W.2d at 846-47. The court characterized the claim as a "Catch-22 for anyone who hires an independent contractor." *Id.* at 472, 582 N.W.2d at 844. By imposing a duty on Kmart to carefully select its independent contractor, Kmart would have been required to ensure that the trucks were mechanically safe, the trucks were properly loaded, and the drivers were qualified. *Id.* "However, had Kmart taken these actions, plaintiffs could then reasonably claim that it was liable [vicariously] because it had retained control of the enterprise." *Id*. Furthermore, an employer typically hires an

independent contractor because they do not have the resources or know-how to perform the contracted activity. *Id.* at 473, 582 N.W.2d at 844. Simply put, it would be unfair and unreasonable to require every entity that hires an independent contractor to become so intimately and technically knowledgeable of the contracted work as to gauge who is a competent or incompetent independent contractor and to oversee the independent contractor's performance and compliance with various safety measures. *Id.* at 473, 582 N.W.2d at 844-45.

The *Reeves* court also recognized that existing exceptions to non-liability for an independent contractor's negligence—such as where the employer retains control or inherently dangerous activities are involved—set the appropriate boundaries for imposing third-party liability. *Id.* at 475-76, 582 N.W.2d at 845-46. The court warned of the far-reaching implications of imposing duties on a person to inspect independent contractors outside of those limited circumstances:

> To hold otherwise would require one who hires a lawn service to inspect the truck used to transport equipment to insure not only that the truck is capable of transporting the lawn mowers and other related equipment, but also to determine whether it is properly maintained and suitable for use *i.e.* check the tires, brakes, oil, transmission and anything else that may require regular and routine maintenance. That would still not be enough to guard against liability. The would-be employer of the lawn service would have to obtain the driving records of the employees to make sure they can safely operate the truck. Finally, a financial investigation of the lawn service company would be required to make sure it is not under capitalized and likely to neglect the maintenance of its equipment. Similar investigations would be required before hiring any type of laborer as an independent contractor. The economic costs and time constraints associated with such investigations would put many competent laborers out of business.
>
> The implications arising from imposition of the duty advocated by plaintiffs are too far reaching. Michigan courts have recognized that "modern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so." . . . In this case the independent contractor contractually undertook the duty to remove and dispose of trash from Kmart's premises. Kmart ought to be able to rely upon its independent contractor [to be] capable of performing properly this menial and mundane task.

Id. at 476-77, 582 N.W.2d at 846 (internal citations omitted).

The same public policy considerations apply here. Plaintiff would have this Court burden every employer to conduct a background check and investigate an independent contractor's qualifications, safety records, prior lawsuits, equipment, and financial resources every time they hire an independent contractor. As noted in *Reeves*, "[t]he economic costs and time constraints associated with such investigations would put many competent laborers out of business." *Id.* at 477, 582 N.W.2d at 846. Plaintiff's proposed cause of action also would inefficiently shift liability for an independent contractor's negligence to parties who lack the resources and expertise to determine the contractor's competency. Indeed, that lack of resources and expertise is the very reason that most people hire an independent contractor in the first place. South Carolina already imposes nondelegable duties when the activity is such that public policy demands that the employer retain liability. In the absence of such duties, a person should be able to presume that the contractor is competent.

Plaintiff cites no legitimate policy justification to impose a new duty on employers to investigate independent contractors. The cases that Plaintiff cites discussing general notions of fairness and liability allocation are inapposite. For instance, in *McCracken v. Gov't Emples. Ins. Co.*, the South Carolina Supreme Court held that an innocent spouse could recover under a home insurance policy issued jointly with her husband when her husband intentionally burned the home. 284 S.C. 66, 69, 325 S.E.2d 62, 64 (1985). In *Dorrell v. S.C. Dep't of Transp.*, the South Carolina Supreme Court considered whether a contractor for the South Carolina Department of Transportation could be liable for negligently constructing a highway under the principle that "[a] tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party."

361 S.C. 312, 318, 605 S.E.2d 12, 14 (2004) (citing *Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986)). Likewise, in *Shaw v. Psychemedics Corp.*, the South Carolina Supreme Court held that a drug testing company's contract with an employer and the relationship between the company and the employee gave rise to a duty to employees subject to testing. 426 S.C. 194, 197-99, 826 S.E.2d 281, 283-84 (2019). None of those cases supports expansion of potential liability to *any* employer's hiring of *any* independent contractor.

Plaintiff also asserts—without citing any authority—that "because of the foreseeability of harm, MRS owed the Plaintiff a duty." (Pl. Br. at p. 18.) To the contrary, "South Carolina courts have made it clear that 'foreseeability itself does not give rise to a duty.'" *Shaw*, 426 S.C. at 199, 826 S.E.2d at 283 n.1 (citing *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986)). This Court has instead explained that "[t]he key inquiry is what duty, if any, is owed by the tort-feasor to the third party. It is essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tort-feasor." *Id.* at 198, 826 S.E.2d at 283 (citing *Barker*, 289 S.C. at 122, 345 S.E.2d at 244.) Plaintiff's reliance on foreseeability of harm to establish a duty is misplaced, and she does not and cannot articulate any cognizable relationship under which MRS could owe her a duty.

C. South Carolina Courts Have Not Previously Expressed a Willingness to Recognize the Duty Suggested by Plaintiff.

Despite Plaintiff's sweeping claim that "[t]he logical extension of the historical underpinnings of *respondeat superior* supports liability for negligent selection of an independent contractor," (Pl.'s Br. at p. 8), nothing in Plaintiff's cases suggests that South Carolina should expand its tort scheme to impose a duty on each person employing an independent contractor to conduct background checks and evaluate their skills, abilities, and resources to perform the contracted tasks. Rather, those cases simply confirm that South Carolina's exceptions to the

general rule of non-liability for an independent contractor's negligence arise primarily out of nondelegable duties or other narrow circumstances like apparent agency.[6]

Under South Carolina law, the gravamen of a negligent hiring claim "is whether the employer knew the offending employee was 'in the habit of misconducting [himself] in a manner dangerous to others.'" *Doe v. ATC, Inc.*, 367 S.C. 199, 206, 624 S.E.2d 447, 450-51 (2005). Since first recognizing the claim more than a century ago, South Carolina has continued to apply the claim only in the context of an employer-employee or principal-agent relationship. *See Gunter*, 15 S.C. at 457; *Jackson v. S. Ry.*, 77 S.C. 550, 556, 58 S.E. 605, 606-07 (1907) ("[A]ll that the law imposes upon the master is the exercise of due care in selecting *his servants*.") (emphasis added).

Courts interpreting South Carolina law have not only consistently held that negligent selection claims are limited to the employer-employee relationship, but they have also routinely dismissed claims that fail to allege facts inferring such a relationship. *See, e.g.*, *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 861 (D.S.C. 2015) ("[B]ecause Plaintiff has not alleged facts creating a plausible inference that the . . . Defendants qualify as employers, these defendants cannot be held liable for negligent . . . retention."); *Doe v. Charleston Cnty. Sheriff's Office*, No. 2:18-cv-2196-RMG, 2018 U.S. Dist. LEXIS 150602, at *5 (D.S.C. Sept. 5, 2018) (finding dismissal of "Negligent Hiring/Training/Supervision" claim was proper where the defendant "never employed, supervised or otherwise had a master/servant relationship with" the parties who caused the harm). As these courts have recognized, "[a] claim of negligent hiring and supervision [under South Carolina law] presupposes an employer-employee or agency-agent relationship." *Hawke v.*

[6] Indeed, as conceded by Plaintiff, "[t]his Court has never considered" a Restatement exception to § 409 which provides for direct liability. (Pl.'s Br. at 11.)

Discovery Commc'ns., LLC, No. PX 17-542, 2017 U.S. Dist. LEXIS 107496, at *18 (D. Md. July 12, 2017) (interpreting South Carolina law).

Against those long-standing principles, Plaintiff contends that "South Carolina courts have expressed support for negligent hiring of independent contractor claims . . . ." (Pl.'s Br. at p. 12.) Yet cases cited by Plaintiff are distinguishable on their face because they address duties arising out of the ownership or control of real property. *See Conlin*, 15 Rich. 201 (fatal fall from church under the control of city council); *Caldwell*, 139 S.C. 163, 137 S.E. 444 (damage to adjacent property caused by a fire on a road controlled by county); *Durkin v. Hansen*, 313 S.C. 343, 348, 437 S.E.3d 550, 553 (1993) ("A landlord who makes repairs and improvements . . . owes a duty of reasonable care to the occupying tenants which he cannot escape by placing the work with an independent contractor.").

Plaintiff relies heavily on *Conlin* for the supposed principle that "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." 15 Rich. at 211-12. But, as Plaintiff admits, that statement by the court was in dicta. Furthermore, this Court previously has described *Conlin* as addressing an exception to non-liability for an independent contractor's negligence "where the work involves inherent or intrinsic danger." *Allison*, 215 S.C. at 350, 55 S.E.2d at 282 ("The substance of the exception [for inherent or intrinsic danger] which raises this question was recognized and stated in our old case of *Conlin v. City Council*, 15 Rich. 201.") The *Allison* Court highlighted the key holding in *Conlin*: "If the work involved the creation of a nuisance, owner and contractor become joint wrongdoers, and neither (either?) or both must answer for consequences." *Id.* Plaintiff has not alleged that MRS created a "nuisance" or otherwise engaged in inherently or intrinsically dangerous activity; instead, she urges this Court

to recognize a much broader basis of liability for an independent contractor's negligence than the narrow exception discussed in *Conlin*.

Plaintiff also misconstrues *Caldwell* by suggesting that "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." (Pl. Br. at p. 12.) However, nothing in *Caldwell* suggests that the court permitted the plaintiffs to advance a theory of negligent selection of an independent contractor. To the contrary, the dissent makes clear that, at most, the majority may have incorrectly allowed claims against an owner for an independent contractor's negligence under *respondeat superior* without an applicable exception—not, as Plaintiff suggests, under a novel negligent selection of an independent contractor theory. 139 S.C. at 183-85, 137 S.E.2d at 449-51. As Justice Cothran's advocated in his dissenting opinion on petition for rehearing:

> Here we have a case of a county legally letting a contract for the construction of an improved highway to a contractor, under a written contract for the performance of every act and the supplying of all material and labor in connection with that construction, under a surety company bond to the county for his faithful performance of his contract. If that does not present a case of independent contractor, I do not understand the English language. In every clime, under every judicial sky, it has been the settled law that the proprietor of any kind of property to be constructed or improved is not liable in damages for the negligent act of an independent contractor, and why, at this day, that principle should be departed from, and a county, whose liability is limited to statutory creation, be made an exception to that rule, is beyond my comprehension, and receives my most emphatic disapproval.
>
> As Mr. Dillon says:
>
> "In other words, *the principle of respondeat superior* does not as a rule extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act and has no choice in the selection of workmen and no control over the manner of doing the work."

Id. at 187-188, 137 S.E.2d at 451-52 (quoting 4 Dillon, M. C. (5th Ed), § 1721) (emphasis added) (additional citations omitted).

The dissent's comment about "the unlimited degree to which the opinion in this case has extended the liability of a county" in no way refers to a negligent selection claim, as Plaintiff

suggests. *Id.* at 187, 137 S.E.2d at 451. Instead, it addressed Justice Cothran's concern about expanding the scope of liability for an independent contractor's negligence by a *respondeat superior* theory. *See id.* Therefore, nothing in *Caldwell* suggests that South Carolina has, would, or should recognize direct liability on a claim for negligent selection of an independent contractor.

Similarly, *Durkin* suggests no endorsement by the court of a new claim for negligent hiring of an independent contractor. There, a landlord hired an independent contractor to clean carpets in a condominium that the plaintiff was leasing. 313 S.C. at 345, 437 S.E.2d at 551. The plaintiff subsequently slipped and was injured on a soapy floor that the independent contractor had left behind. *Id.* at 345, 437 S.E.2d at 552. The Court of Appeals first noted the well-established exception to the general rule of non-liability for an independent contractor's negligence that "[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." *Id.* at 347, 437 S.E.2d at 552-53. The court then applied that exception to the landlord-tenant relationship where a landlord undertakes repairs by law and contract. *Id.* at 348, 437 S.E.2d at 553. However, the court did not impose on a principal a new liability for an independent contractor's negligence; instead, it simply held that the landlord's duties to perform repairs with reasonable care were nondelegable and reaffirmed the rule under South Carolina law that an owner remains liable for breaches of nondelegable duties. *Id.*; *see, e.g.*, *Simmons v. Robinson,* 303 S.C. 201, 212, 399 S.E.2d 605, 611 (Ct. App. 1990), *rev'd on other grounds*, 305 S.C. 428, 409 S.E.2d 381 (1991); *Bellamy*, 242 S.C. at 78, 129 S.E.2d at 909 ("[T]he duty of the master to furnish the servant a reasonably safe place to work and reasonably safe and suitable tools and appliances is ordinarily a nondelegable duty.").

Finally, *Simmons v. Tuomey Reg'l Med. Ctr.*, although not a real property case, likewise does not support the new claim that Plaintiff urges this Court to adopt. 341 S.C. 32, 533 S.E.2d 312 (2000). In *Simmons*, the South Carolina Supreme Court considered nondelegable duties and apparent agency—longstanding doctrine in South Carolina[7]—and applied them to "hold hospitals liable when an injured patient proves a physician was the hospital's apparent agent." *Id*. at 45-48, 533 S.E.2d at 319-21.[8] The court further noted that the South Carolina Court of Appeals already "[had] sanctioned the use of the apparent agency doctrine in this setting." *Id.* at 45, 533 S.E.2d at 319. The court's application of nondelegable duties and apparent agency in no way supports Plaintiff's proposal to impose on every person a duty to investigate an independent contractor's background, qualifications, resources, and work history.

D. No Trend Compels South Carolina to Recognize the Duty Suggested by Plaintiff.

Plaintiff asks the Court "to follow the trend of its neighbors" in recognizing a duty to hire competent independent contractors. (Pl.'s Br. at p. 3.) While it is true that a majority of states have recognized such claims, many have not, and nothing about the timing of other states' court decisions suggests any type of recent trend.[9] Furthermore, other states have rejected this new cause

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[7] *See Carr v. Moragne*, 136 S.C. 218, 222-23, 131 S.E.424, 425-26 (1926).

[8] In applying concepts from both nondelegable duties and apparent agency, the *Simmons* court held that a patient need not show reliance, but most prove "that (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee." *Simmons*, 341 S.C. at 51, 533 S.E. 2d at 322.

[9] As discussed herein and in Plaintiff's brief, states that have not adopted Restatement (Second) of Torts Section 411 or have otherwise not recognized a general claim for negligent hiring of an independent contractor include, at minimum, the sixteen (16) states of Alabama; Florida; Georgia; Hawaii; Idaho; Indiana; Kentucky; Michigan; Mississippi; Oklahoma; Oregon; Rhode Island; South Carolina; South Dakota; Utah; and Vermont.

of action, and have done so for compelling reasons. The *Reeves* case, described above, is a prime example. 229 Mich. App. 466, 582 N.W.2d 841.

The Indiana Supreme Court faced a similar question in *Bagley v. Insight Communications Co., L.P.*, and declined to recognize a claim for negligent selection of independent contractor. 658 N.E.2d 584, 587 (1995). There, a plaintiff suffered injuries while working for an independent contractor of a cable company. *Id.* at 585. The plaintiff sued the cable company and others under a theory that they were negligent in hiring the independent contractor. *Id.* at 585-86. The court first noted the "long-standing general rule . . . that a principal is not liable for the negligence of an independent contractor." *Id.* at 586. Indiana, like South Carolina, has recognized certain exceptions to that rule. The court further noted that these "five exceptions are considered non-delegable, and an employer will be liable for the negligence of the contractor, because the responsibilities are deemed 'so important to the community' that the employer should not be permitted to transfer these duties to another." *Id.* at 587 (internal citations omitted).

Like Plaintiff here, the *Bagley* plaintiff urged the court to create a new exception for negligent hiring of an independent contractor. *Id.* at 586. In support, the plaintiff relied on *Board of Commissioners of Wabash County v. Pearson*, a 19th century case in which the plaintiff sued a county for injuries caused by an independent contractor's negligence in repairing a bridge. *Id.* at 586-87 (citing 120 Ind. 426, 22 N.E. 134 (1889)). The plaintiff highlighted the court's holding that "[a] corporation charged with the duty of keeping a bridge in repair must select the proper means and persons to do the work, if by the exercise of ordinary care such a selection can be made." *Id.* at 586 (quoting *Pearson*, 120 Ind. at 429, 22 N.E. at 135).

The Indiana Supreme Court, however, held that "*Pearson* did not create a new doctrine of tort liability for the negligent hiring of an independent contractor *but rather permitted an action*

for the breach of a non-delegable duty imposed by law." *Id.* at 586-87 (emphasis added). In other words, *Pearson* "merely reflects the second of the five established exceptions—where the principal is charged with the specific duty by law or contract" and does not establish a new theory of liability. *Id.* at 587 (citing other Indiana cases indicating that a county's responsibility to hire competent contractors arose "not as a separate and discrete common-law duty . . . but rather as an obligation arising from specific governmental duties with respect to public travel").

Notably, the *Bagley* court agreed "with the basic concepts embodied in Section 411 [of the Restatement (Second) of Torts]." *Id.* at 587. However, the court held that "the general policies of Section 411 [are] already embodied in the existing exceptions to the non-liability rule, and we decline to recognize Section 411 as creating a new, independent cause of action." *Id.* Thus, an employer's duty "to exercise reasonable care to employ a competent and careful contractor [only arises] when one of the five exceptions to the rule on non-liability for the torts of independent contractors is applicable." *Id.*

The State of Georgia has similarly declined to recognize a separate claim for negligent hiring of an independent contractor where a nondelegable duty did not apply.[10] The Georgia Court of Appeals held in *Mason v. Gracey* that "[l]iability for negligent hiring is not one of the exceptions to the general rule of non-liability for the torts of an independent contractor." 189 Ga. App. 150, 154, 375 S.E.2d 283, 287 (1988).[11] The court reaffirmed that the duty to exercise ordinary care in

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[10] Plaintiff incorrectly represents that "[i]t is unclear if Georgia has adopted section 411," despite Georgia case law directly rejecting the claim the Plaintiff seeks to assert here. Pl.'s Brief at p. 16 n. 7.

[11] Georgia recognizes the following exceptions to the traditional rule of non-liability for an independent contractor's negligence: (1) when the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance; (2) if, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed; (3) if the wrongful act is the violation of a duty imposed by express contract
(continued on next page)

hiring applies only to employees: "[t]herefore, where, as here, the facts establish that the one hired was an independent contractor, the plaintiff may not recover on a theory of negligent hiring." *Id*; *see also New Star Realty, Inc. v. Jungang PRI USA, LLC*, 346 Ga. App. 548, 561, 816 S.E.2d 501, 512 (2018) ("[Plaintiff] has failed to identify any Georgia statute or common law principle reflecting that franchisor owes a legal duty to third parties in its selection of its franchise owners. Under Georgia law, an employer has a legal duty to exercise ordinary care in the selection of its own employees."); *Finley v. Lehman*, 218 Ga. App. 789, 791, 463 S.E.2d 709, 710-11 (1995) (tort of negligent hiring generally does not apply to selection of independent contractor).

Plaintiff also inaccurately states that Kentucky is "poised" to adopt section 411, relying on a 52-year-old case in support. Pl.'s Br. at p. 16 n.7 (citing *Hercules Powder Co. v. Hicks*, 453 S.W.2d 583, 588 (Ky. 1970). To the contrary, in *Smith v. Ky. Growers Ins. Co.*, the Kentucky Court of Appeals expressly declined to adopt a claim for negligent hiring of an independent contractor. 2002 Ky. App. Unpub. LEXIS 5, *5 (Ky. Ct. App. Nov. 1, 2002) (distinguishing cases based on employer-employee relationships and noting that "Kentucky has not recognized such a claim [for negligent hiring of an independent contractor]"). More recently, a Kentucky federal court considered allegations against a shipper for negligent hiring of an independent contractor when its carrier collided with a third-party motorist. *Stapleton v. Vicente*, 2020 U.S. Dist. LEXIS 245580 (E.D. Ky. Dec. 29, 2020). In dismissing the claims against the shipper, the court held that (1) a shipper has no duty to ensure that the carrier's compliance with state and federal regulations or the safe operation of the tractor-trailer and (2) Kentucky does not recognize a cause of action

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upon the employer; (4) if the wrongful act is the violation of a duty imposed by statute; (5) if 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; or (6) if the employer ratifies the unauthorized wrong of the independent contractor. Ga. Code Ann. § 51-2-5 (2021).

for negligent hiring of an independent contractor. *Id.*at *7-9 ("[T]he Kentucky Court of Appeals was given the opportunity to extend the application of negligent hiring to include independent contractors but declined to do so.").[12]

II. The Specific Facts of Plaintiff's Complaint Do Not Support an Expansion of South Carolina Tort Law.

In the alternative, if this Court were to create a new exception to the traditional rule of non-liability for the acts of an independent contractor, it should do so cautiously. Plaintiff urges the Court to impose an extraordinary burden on *any* employer contracting with *any* independent motor carrier for the transportation of goods. Under Plaintiff's proposed duty, a mere shipper like MRS—whose primary business is purchasing scrap metal—would bear the burden of locating, compiling, monitoring, and subjectively analyzing "[t]he combination and totality of all of the publicly available information regarding [a motor carrier]," including the independent contractor's financial resources, "SMS results, CSA compliance, BASIC ratings, and raw data contained on a motor carrier's 'Company Snapshot'" prior to each shipment it contracts out to an independent carrier. Am. Compl. ¶¶ 56-57. However, as courts in other jurisdictions have recognized, such requirements should only be borne—if at all—by a third-party logistics company or similar entity whose business and expertise focuses specifically on the selection and retention of motor carriers. In contrast, courts have held shippers like MRS to a lower standard and only required them to

[12] Plaintiff inaccurately states that Florida imposes a general duty in the selection of an independent contractor. In reality, Florida also has declined to recognize a generalized duty of care in hiring independent contractors, and did so under facts nearly identical to those alleged here. *See Stander v. Dispoz-O-Products, Inc.*, 973 So. 2d. 603, 604-05 (Fla. 4th DCA 2008) (dismissing a negligent hiring claim against a company that hired an independent trucker who collided with the plaintiff). Utah has as well. *See Castellanos v. Tommy John, LLC*, 2014 Utah App. 48, ¶ 42, 321 P.3d 218, 234 (2014) (noting that the theory of negligent hiring applies to the employer-employee relationship and absence of "authority to support the proposition that an employer of an independent contractor may be held liable for the negligent hiring, supervision, or retention of the contractor's employees").

confirm that the motor carrier is legally permitted to transport the shipper's materials. Here, the Amended Complaint admits that MRS met that duty.

A. A Shipper Should Not Bear a Heavy Burden in Investigating a Common Carrier.

Even when states have imposed a duty of care to select a competent common carrier, they have recognized a material difference between freight brokers or third-party logistics companies on the one hand, and shippers—like MRS—on the other hand. As opposed to an ordinary shipper, which typically has no expertise in the business of hauling goods, a freight broker's core business is the selection of common carriers. Accordingly, states have either allocated the responsibility to carefully select carriers to brokers, rather than shippers, or imposed disparate obligations on brokers and shippers. If South Carolina were to recognize a claim for negligent hiring of an independent contractor, it likewise should recognize that a shipper does not owe the same, if any, duty to investigate that a freight broker does.

For instance, in *Schramm v. Foster*, a Maryland federal court specifically referenced the freight broker's "self-proclaimed status as a 'third party logistic company' providing 'one point of contact' service to its shipper clients." 341 F. Supp. 2d 536, 551 (D. Md. 2004). The court also noted that the freight broker advertised that it "specializes in brokering the shipment of goods via truck, rail, ocean and air . . . [via] brokerage contracts with more than 20,000 licensed motor carriers" and that it "maintains a liability insurance policy" that covers any damages beyond the carrier's insurance limits in the event of an accident. *Id.*at 541-42. The court further noted that the freight broker "actively interjected itself into the relationship between shipper and carrier, and . . . chose[] to do business in a context heavily tinged with public interest." *Id.* at 553. Under those facts, the freight broker's status as a specialized third-party logistics company was "sufficient under Maryland law to require it to use reasonable care in selecting the truckers whom it maintains

in its stable of carriers." *Id.* at 551. Accordingly, the court held that a third-party logistics provider like defendant had a duty "(1) to check the safety statistics and evaluations of the carriers with whom it contracts available on SafeStat database maintained by FMCSA, and (2) to maintain internal records of the person with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings." *Id.*

Similarly, when extending the cause of action for negligent hiring of an independent contractor to claims involving common carriers, Virginia federal courts have limited those claims to "the selection of a carrier by a freight broker or third party logistics company." *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630, 642 (W.D. Va. 2008). In determining the duty of care required in selecting a common carrier, the *Jones* court noted that "[defendant] did hold itself out as a third-party logistics provider in general and with regard to the subject load" and that defendant's own expert identified defendant as a third-party logistics provider. *Id.* at 646. Like *Schramm*, the court found that "[defendant's] active interjection of itself into the relationship between shipper and carrier, and its choice 'to do business in a context heavily tinged with the public interest'" imposed a duty to investigate the fitness of the common carriers it selected. *Id.*[13]

Schramm and *Jones* demonstrate a carefully tailored duty of care for freight brokers based on their expertise in the business of selecting common carriers may include, *at most*, a duty to investigate the carrier's safety ratings and data on the FMCSA website. In contrast, courts have recognized that the scope of a shipper's duty, if any, to investigate is significantly less onerous than a freight broker's duty.

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[13] The *Jones* court was unconvinced that deficient safety scores and data from the FMCSA website were sufficiently reliable to warrant granting summary judgment for either party on the negligent hiring claim. 558 F. Supp. 2d at 647.

Puckrein v. ATI Transport, Inc., 186 N.J. 563, 897 A.2d 1034 (2006), is instructive regarding a shipper's duties. The defendant-shipper was a garbage collector that collected and hauled solid waste for New York City. *Id.* at 569-70, 897 A.2d at 1038. It then used independent contractors to transport the solid waste from New York City to other states and around the world. *Id.* In defining the shipper's duty of care, the court first distinguished between a "casual shipper" and "a company whose core purpose is the collection and transportation of materials on the highways." *Id.* at 579-80, 897 A.2d at 1044. "[A] casual shipper of goods has a right to assume that the carrier is not conducting business in violation of the law." *Id.* If a shipper falls into the latter, non-casual category, then it has "a duty to make an inquiry into that trucker's ability to travel legally on the highways." *Id.* In other words, the non-casual shipper has a duty to make an initial inquiry into the carrier's insurance coverage and registration "because without those items the hauler had no right to be on the road." *Id.* Although the defendant-shipper in *Puckrein* made an initial inquiry, it had actual knowledge that the carrier was not permitted to travel legally because the certificate of insurance on file with the shipper expired two months before the accident. *Id.* at 581, 897 A.2d at 1045. Despite knowing that the carrier's liability insurance had lapsed, the shipper continued to allow the carrier to transport its materials. *Id.*

Plaintiff proposes a duty of care that closely parallels—and in some respects exceeds—what courts in *Schramm* and *Jones* considered reasonable for freight brokers. For instance, Plaintiff relies almost exclusively on the safety ratings and data reflected on the FMCSA's website to define the standard of care that MRS's should have exercised. *See* Am. Compl. ¶¶ 43-73. Among other things, Plaintiff alleges that MRS's duty included discovering the carrier's safety

rating and knowing its significance,[14] and further investigating beyond the FMCSA's safety rating into the carrier's financial resources, BASIC scores, SMS results, CSA compliance, and "raw data contained on a motor carrier's 'Company Snapshot'." *Id.* ¶¶ 43-57. The scope of Plaintiff's proposed duty would require the employer to mine "all of the readily and publicly available information about a motor carrier's fitness and competence to determine whether it is reasonable to contract with a particular motor carrier" each time a shipper engaged a motor carrier. *Id.* ¶ 57. Yet Plaintiff also acknowledges that MRS is *not* a freight broker. Am. Compl. ¶¶ 16, 18, 36-37 (alleging that MRS "was not registered as a broker" and simply "transport[ed] or arrange[d] to transport scrap metal it purchased"). At most, Plaintiff alleges that MRS was a shipper more akin to the defendant in *Puckrein*. *Id.* (alleging that MRS "was in the business of purchasing and transporting scrap and other recyclable metals" and that MRS "was not registered as a broker").

If this Court decides to expand tort liability for an independent contractor's negligence, it should reject the duty of care that Plaintiff seeks to impose on MRS and distinguish between a duty of care owed by a freight broker, whose entire business is the selection of common carriers, and a shipper. This distinction would recognize the disparate skills, expertise, and knowledge between brokers and shippers. That outcome also would be consistent with South Carolina jurisprudence, which generally considers a tortfeasor's level of skill, expertise, and knowledge. *See* F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* § 2.A.2.b.(3).(b) (2014); *Jones v. Dague*, 252 S.C. 261, 267, 166 S.E.2d 99, 101 (1969) ("The basic standard of care by which the conduct of the d[efendant] was to be judged was that of a reasonably prudent person in the same or similar circumstances."); *cf. Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 420,

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[14] Here, Plaintiff alleges that Norris Trucking had a "Conditional" safety rating, which permitted it to transport goods in interstate commerce.

171 S.E.2d 486, 490 (1969) ("[T]he respective duties and obligations arising from the relationship of a principal and his agent in the procurement of insurance must be determined in the light of the fact that the agent was an expert dealing in a highly specialized business.").

B. Plaintiff's Amended Complaint Fails to Allege a Breach of Duty Applicable to Shippers.

Plaintiff's Amended Complaint sets out a litany of alleged compliance issues supposedly indicating that the carrier in question, Norris Trucking, had a poor safety record. However, Plaintiff fails to allege that any publicly available data, including all the records available through FMCSA, demonstrated that the carrier was not legally permitted to be transporting MRS's materials on the highway.

As Plaintiff explains in her Amended Complaint, carriers may have one of three safety ratings: satisfactory, conditional, or unsatisfactory. Am. Compl. ¶ 44. Only a rating of "unsatisfactory" prohibits a carrier from transporting good in interstate commerce. *Id.* ¶ 45. A carrier with a "conditional" rating, on the other hand, is permitted to transport goods in interstate commerce, notwithstanding improvements to its safety management controls. *See* Am. Compl. ¶¶ 46-51; 49 C.F.R. §§ 385.3 (definition of "Safety ratings") and 385.13 ("Generally, a motor carrier rated 'unsatisfactory' is prohibited from operating a [commercial motor vehicle].") And nothing in Plaintiff's many aspersions regarding Norris Trucking's perceived fitness as a motor carrier demonstrate that the carrier was unauthorized or unlicensed (or otherwise incompetent) to operate in interstate commerce on the date of the accident. Plaintiff's Amended Complaint therefore demonstrates on its face that MRS hired a carrier with a safety rating sufficient under applicable laws to permit the carrier to haul MRS's materials. Furthermore, under the standard of care applicable to shippers described by *Puckrein*, MRS would have no duty to investigate the myriad

of sources from which Plaintiff draws its supposed compliance issues. 186 N.J. at 579-80, 897 A.2d at 1044.

The only allegations in the Amended Complaint that potentially implicate a shipper's duty of care related to the carrier's liability insurance. The Amended Complaint alleges that, at the time of the accident, "[t]he tractor trailer driven by Cecil Norris . . . had been removed from Norris Trucking1, LLC's insurance." Am. Compl. ¶ 60.b. However, Plaintiff's allegations demonstrate that Norris Trucking *did* maintain liability insurance, as it is only alleged that the specific truck involved in the accident had been removed from the policy. Indeed, Plaintiff even attaches to the Amended Complaint a letter from Norris Trucking's insurer confirming that the carrier had a liability policy. *See* JA 51 at ¶ 70. Plaintiff's allegations starkly contrast with the facts of *Puckrein*, in which the shipper had actual knowledge that its common carrier lacked liability insurance. *See* 186 N.J. at 581, 897 A.2d at 1045 (reasoning that the shipper "should have known that [the carrier] had become incompetent to transport its products" because of the carrier's expired insurance certificate on file with the shipper). Plaintiff fails to assert any facts to support an allegation that MRS knew or should have known that the carrier's singular vehicle involved in the accident had been removed from the carrier's insurance policy.

In summary, if the Court determines to establish a new cause of action for negligent hiring of an independent contractor, it should clarify that in the context of hiring a common carrier, a shipper has a limited duty of care to confirm that the common carrier is legally permitted to transport goods. Therefore, the facts alleged in Plaintiff's Amended Complaint do not rise to a breach of any duty owed by MRS.

CONCLUSION

For the foregoing reasons, MRS respectfully requests that this Court answer the Fourth Circuit Court of Appeal's certified question in the negative that South Carolina does not recognize a claim for negligent hiring of an independent contractor. In the alternative, if this Court determines to create such a cause of action under South Carolina law, MRS requests that this Court clarify that with respect to shippers like MRS, the duty is limited to confirming that the common carrier is legally permitted to transport goods.

Respectfully submitted,

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