No. A22-1796

STATE OF MINNESOTA
IN SUPREME COURT

Pedro Alonzo and Aida Alonzo,

Petitioners,

v.

Richard Menholt, Menholt Farms, LLC, and
Menholt Farms, Inc.,

Respondents.

BRIEF OF AMICI CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE MINNESOTA CHAMBER OF COMMERCE

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Gonzales v. McDow, 1:07-CV-54 MCA/WDS,
2008 WL 11320097 (D.N.M. Mar. 30, 2008) 21

Jones v. Schneider Nat., Inc.,
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Liss v. TMS Int'l, LLC, 3:19-CV-00810-GCS,
2022 WL 2037681 (S.D. Ill. June 6, 2022) 21

Ortiz v. Ben Strong Trucking, Inc.,
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Perry v. Asphalt & Concrete Services, Inc.,
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Reeves v. Kmart Corp.,
582 N.W.2d 841 (Mich. Ct. App. 1998) 19

Other Authorities

Abdulaziz Mohamed, *Meeting Minutes: Attorney General's Advisory Task Force on Worker Misclassification*, The Office of Minnesota Attorney General Keith Ellison (Nov. 20, 2023)
https://www.ag.state.mn.us/Taskforce/Misclassification/Meetings/20231120/Minutes.pdf. 7

Brandon Downs, *New Study Shows U.S. is Facing Truck Driver Shortage*, CBS News Sacramento (Oct. 26, 2023)
https://www.cbsnews.com/sacramento/news/new-study-shows-u-s-is-facing-truck-driver-shortage/. 8

Contingent and Alternative Employment Arrangements News Release, U.S. Bureau of Labor Statistics (Jun. 7, 2018),
https://www.bls.gov/news.release/archives/conemp_06072018.htm. 6

Corporate Verdicts Go Thermonuclear, MARATHON STRATEGIES, Apr. 4, 2023, https://marathonstrategies.com/wp-content/uploads/2023/03/Corporate-Verdicts-Go-Thermonuclear.pdf 14

David McKnight & Paul Hinton, *Tort Costs for Small Businesses*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, Dec. 5, 2023 https://instituteforlegalreform.com/research/tort-costs-for-small-businesses/.......... 5, 10

David McKnight & Paul Hinton, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, Nov. 22, 2022, https://instituteforlegalreform.com/research/tort-costs-in-america-an-empirical-analysis-of-costs-and-compensation-of-the-u-s-tort-system/........ 12

Independent Contractor Classification Survey Findings, Global Strategy Group (Aug. 19, 2020) https://assets.morningconsult.com/wp-uploads/2020/08/23134151/Global-Strategy-Group-Memo-Independent-Contractor-Attitudes-on-Classification-08.19.20.pdf. 7

Jackson G. O'Brien, *Your Shipment Has Been Delayed: Liability of Shippers and Carriers for Loading and Securing Cargo in Iowa*, 67 Drake L. Rev. 283 (2019) 8

Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, AMERICAN ENTERPRISE INSTITUTE, Dec. 1, 2010, https://www.aei.org/wp-content/uploads/2012/08/-the-role-of-independent-contractors-in-the-us-economy_123302207143.pdf?x91208. 6

Prasad Sharma, *Roadblock: The Trucking Litigation Problem and How to Fix It*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, Jul. 14, 2023, https://instituteforlegalreform.com/wp-content/uploads/2023/07/Roadblock-The-Trucking-Litigation-Problem-and-How-to-Fix-It-FINAL-WEB.pdf............ passim

Robert Shapiro & Luke Stuttgen, *The Many Ways Americans Work and the Costs of Treating Independent Contractors As Employees*, CHAMBER OF PROGRESS, Apr. 6, 2022, https://progresschamber.org/wp-content/uploads/2022/04/The-Many-Ways-Americans-Work-Chamber-of-Progress-Shapiro-Sonecon.pdf 6, 7

State of Independence in America 2023, MBO Partners (2023), https://www.mbopartners.com/state-of-independence/#........ 5

Steven F. Befort, 17 Minn. Prac., Employment Law & Practice § 3:2 (4th ed. 2023)........ 4

Understanding the Impact of Nuclear Verdicts on the Trucking Industry, AMERICAN TRANSPORTATION RESEARCH INSTITUTE, June 2020,

https://truckingresearch.org/wp-content/uploads/2022/01/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020.pdf............... 12, 14

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STATEMENT OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("U.S. Chamber") and the Minnesota Chamber of Commerce ("Minnesota Chamber") (collectively, "Chambers") urge the Supreme Court to affirm the Court of Appeals' decision declining to adopt Section 411 of the Restatement (Second) of Torts, which is known as a "negligent selection of independent contractor" (or "NSIC") claim, as part of Minnesota law.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Minnesota Chamber is the largest organization representing businesses in Minnesota, comprised of approximately 6,300 members across diverse industries located throughout all of Minnesota.

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[1] In accordance with Minnesota Rule of Civil Appellate Procedure 129.03, no party authored this brief in whole or in part, and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

As such, the Chambers are qualified to provide businesses' perspectives on the issue presented in this case. The Chambers and the *millions* of businesses—especially small businesses—they represent will be adversely affected by the new liability Appellants seek to impose. Adopting Section 411 would eliminate the customary benefits and efficiencies achieved by the independent-contractor relationship, under which third-party hirers are responsible neither for the negligence of their independent contractors, nor for the negligence of those independent contractors' sub-contractors. This arm's-length relationship provides many economic benefits to society. Businesses and their customers benefit from the efficiencies and reduced transaction costs of this kind of relationship with independent contractors who often provide specialized services; and independent contractors overwhelmingly favor the freedom that such an arrangement provides them in self-directing the who, what, when, where, or how of their work. Adopting Section 411 would undermine the benefits of this relationship by imposing new legal risks on hirers—especially small businesses—that will either increase transactional costs or dissuade them from hiring independent contractors. And in either case, the ramifications will ultimately increase costs to consumers.

The Court should not adopt Section 411 for these reasons. But if it were to do so, the Court must provide clear guidance and guardrails limiting such a claim to reasonably set expectations and minimize the negative effects such potential liability would have. Businesses need clear and predictable legal rules to make safe decisions. Appellants advocate for an ambiguous multi-factored "it depends"-type standard for potential liability that creates uncertainty and enables plaintiffs to extort settlements. This uncertainty will

result in higher costs, including increased insurance premiums and larger litigation claims, with the net result being increased costs to consumers.

The Chambers urge the Court to consider the need to temper the adverse economic ramifications of adopting Section 411 by fashioning rules that would wisely reduce these harms, including: (1) limiting potential liability to only those cases in which there is actual knowledge of an independent contractor's negligence; (2) focusing only on the contractor's practices directly relevant to the engaged task at the time the independent contractor is engaged and not thereafter; (3) not requiring investigation beyond hiring procedures, such as evaluating operational matters ranging from the type of equipment used, to maintenance and service practices, to the kinds of materials used by these independent contractors, etc.; and (4) not requiring investigation beyond the first level of the engaged independent contractor, such as secondary subcontractors, vendors, or materialmen down the line.

I. The Court Should Not Adopt Section 411 Because It Erodes the Benefits to Society at Large That Independent-Contractor Relationships Provide.

Adopting Section 411 would unwisely and unnecessarily erode the long-standing general principle, on which businesses have relied for decades, that "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." *Anderson v. State, Dept. of Nat. Res.*, 693 N.W.2d 181, 189 (Minn. 2005). This principle enables businesses and their customers to benefit from hiring independent contractors who can perform work that these businesses do not know how to do, need only do on occasion, or cannot do as effectively or safely.

Our country's economy has benefited under this paradigm, providing businesses with efficient access to outsource services while minimizing legal risk.[2] By comparison, a business that needs to hire employees (rather than engage independent contractors) to transport products needs to front the full amount of the transactional costs of hiring these employees, such as interviews and background checks, paying their wages and benefits, supervising and managing their activities, and much more. An independent contractor often can provide the same services at only a fraction of the overall cost because the independent contractor can spread its costs around to multiple customers. And the independent contractors can do so without sacrificing safety and quality assurance, because they themselves are subject to the laws and regulatory authorities that apply to their services and products, incentivized to follow best practices, and expected to be properly capitalized and insured. Independent contractors provide these efficiencies at reduced costs because they are not controlled by their customers. Their independent status also affords them increased job flexibility and greater opportunities in the workforce.

Adoption of Section 411 would erode these benefits of hiring independent contractors and, ultimately, increase costs to consumers.

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[2] *See, e.g.*, Steven F. Befort, 17 Minn. Prac., Employment Law & Practice § 3:2 (4th ed. 2023) (discussing relative merits of employment relationships).

A. The Public, Contractors, and Businesses All Benefit from Independent-Contractor Relationships in Several Ways.

Independent contractors play an increasingly integral role in the American economy. A 2023 report found that 72.1 million Americans, about 45% of the workforce, are occasional, part-time, and full-time independent contractors.[3] Small businesses, in particular, rely on independent contractors to perform discrete tasks; as of 2023, there were 35.4 million small businesses, accounting for 99.1 % of all firms, who were responsible for 44% of all private sector employment.[4] Thus, the ramifications of any decision adversely affecting the ubiquitous independent-contractor relationship cannot be overstated, and the harm will predominantly affect small businesses that do not have the resources to micro-manage, monitor, and investigate each independent contractor they engage.

Independent contractors achieve efficiencies and provide benefits *because* they operate independently. They have their own management, and their management focuses on maximizing their efficiencies and reducing the costs of the specialized services or products they provide in accordance with regulations. In fact, a 2015 study by the Institute for Research on Labor and Employment found that independent-contractor relationships reduced company costs by $0.29-0.39 for every $1.00 in pay and resulted in total labor cost

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[3] *State of Independence in America 2023*, MBO Partners (2023), https://www.mbopartners.com/state-of-independence/.

[4] David McKnight & Paul Hinton, *Tort Costs for Small Businesses*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, Dec. 5, 2023, at 2, https://instituteforlegalreform.com/research/tort-costs-for-small-businesses/.

savings of 22-28%.[5] The proposal to implement an *additional* layer of oversight by each customer is unnecessary, unproductive, and expensive.

The benefits of independent contracting to workers and businesses inure to the larger economy. There is a strong relationship between independent contracting and small-business creation; for example, a 2005 survey found that nearly a quarter of all independent contractors have at least one—but less than five—employees of their own.[6] These small business are nimble and provide niche services at affordable prices that can be readily and efficiently provided to other businesses.

Many independent contractors have been attracted by the increased flexibility and lifestyle benefits that these relationships provide. A 2017 Bureau of Labor Statistics report shows that 79.1% of independent contractors prefer independent-contract work, rather than traditional employment.[7] And a 2020 study of independent contractors reflects that 71% of independent contractors prefer the freedom of independent contracting to regular

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[5] Robert Shapiro & Luke Stuttgen, *The Many Ways Americans Work and the Costs of Treating Independent Contractors As Employees*, CHAMBER OF PROGRESS, Apr. 6, 2022, at 18-19, https://progresschamber.org/wp-content/uploads/2022/04/The-Many-Ways-Americans-Work-Chamber-of-Progress-Shapiro-Sonecon.pdf.

[6] Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, AMERICAN ENTERPRISE INSTITUTE, Dec. 1, 2010, at 36, https://www.aei.org/wp-content/uploads/2012/08/-the-role-of-independent-contractors-in-the-us-economy_123302207143.pdf?x91208.

[7] *Contingent and Alternative Employment Arrangements News Release*, U.S. Bureau of Labor Statistics (Jun. 7, 2018), https://www.bls.gov/news.release/archives/conemp_06072018.htm.

employment, with 90% agreeing that independent contracting is a "good arrangement for me and my lifestyle."[8]

These nationwide statistics are representative of Minnesotans who are independent contractors, such as those who recently testified to a task force led by Minnesota Attorney General Keith Ellison about the benefits they have experienced from independent contracting.[9] Minnesotans Amy R. (freelance writer), Matt C. (content creator), and Ingrid C. (foreign language translator small business owner) all testified about the increased flexibility, financial stability, and autonomy that they have derived from independent contracting.[10]

In addition, the independent-contractor relationship enables many workers who cannot obtain or hold regular employment to earn wages and be productive, tax-paying members of society. Indeed, many independent contractors cannot hold employment for reasons that range from disabilities to special family situations.[11] Among those threatened

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[8] *Independent Contractor Classification Survey Findings*, Global Strategy Group (Aug. 19, 2020) https://assets.morningconsult.com/wp-uploads/2020/08/23134151/Global-Strategy-Group-Memo-Independent-Contractor-Attitudes-on-Classification-08.19.20.pdf.

[9] Abdulaziz Mohamed, *Meeting Minutes: Attorney General's Advisory Task Force on Worker Misclassification*, The Office of Minnesota Attorney General Keith Ellison (Nov. 20, 2023) https://www.ag.state.mn.us/Taskforce/Misclassification/Meetings/20231120/Minutes.pdf.

[10] *Id.*

[11] Robert Shapiro & Luke Stuttgen, *The Many Ways Americans Work and the Costs of Treating Independent Contractors As Employees*, CHAMBER OF PROGRESS, at 2-3.

by the disincentive to hire independent contractors that Section 411 would cause are those working paycheck to paycheck,[12] and workers over age 45, who make up 61.1% of all independent contractors.[13]

The transportation industry in particular benefits from independent contracting. Whether delivered by a large transportation company, a sole proprietor, or an over-the-road trucker, freight is largely transported by independent contractors.[14] Over 75% of American communities rely *exclusively* on trucks for freight transportation, and 72% of domestic freight tonnage is shipped by trucks.[15] There is already a nationwide trucker shortage: short 80,000 drivers in 2023 and an expected 160,000 by 2030.[16] These circumstances show that recognizing a new tort like Section 411 would continue to destabilize an already highly stressed situation in the trucking industry.

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[12] *Id.* at 18.

[13] *Id.* at 25.

[14] Jackson G. O'Brien, *Your Shipment Has Been Delayed: Liability of Shippers and Carriers for Loading and Securing Cargo in Iowa*, 67 Drake L. Rev. 283, 305-310 (2019) (describing the growth of carriers in freight trucking).

[15] Prasad Sharma, *Roadblock: The Trucking Litigation Problem and How to Fix It*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, Jul. 14, 2023, at 2, https://instituteforlegalreform.com/wp-content/uploads/2023/07/Roadblock-The-Trucking-Litigation-Problem-and-How-to-Fix-It-FINAL-WEB.pdf.

[16] Brandon Downs, *New Study Shows U.S. is Facing Truck Driver Shortage*, CBS News Sacramento (Oct. 26, 2023) https://www.cbsnews.com/sacramento/news/new-study-shows-u-s-is-facing-truck-driver-shortage/.

In summary, the independent-contractor model benefits workers themselves, businesses, and society writ large. Small businesses and the transportation and trucking industries are particularly sensitive to any changes in independent-contractor relationships, given their heavy reliance on independent contractors. But NSIC claims negate these benefits by discouraging and impeding the hiring of independent contractors.

B. Adopting Section 411 Claims Would Undermine the Multi-faceted Benefits of the Independent-Contractor Relationship by Increasing Risks and Costs for Businesses.

Recognizing Section 411 claims will unnecessarily erode the many benefits of the independent-contractor relationship by increasing associated costs and risks in Minnesota. There will be higher transactional costs if a business must conduct due diligence on every contractor it seeks to hire. And even then, the business still faces the risk that its due diligence will be second-guessed by judges and juries. The new burdens and risks of potential liability will invariably dissuade and discourage these businesses, especially small ones, from hiring independent contractors. And there will be increased costs passed on to consumers.

For example, businesses that need to engage independent contractors to ship their goods for a fee should not also have a duty to spend additional time and money investigating the hiring practices of carriers, let alone scrutinize the qualifications and backgrounds of each of their individual drivers. Rather, "[i]t is the federal government that sets the standards and grants the authority to permit a motor carrier to lawfully transport goods for-hire in interstate commerce," *not* the shipper, under the Federal Motor Carrier

Safety Regulations ("FMCSRs").[17] One such federal rule already states that "each motor carrier shall make [certain] investigations and inquiries with respect to each driver it employs…" 49 C.F.R. § 391.23. Expanding this duty under Minnesota law to also apply to shippers is redundant—as well as unnecessarily costly and fraught with risk—since federal law already dictates carriers are responsible for driver due diligence.

The harmful burdens of a new NSIC claim would be felt most acutely by small businesses because they have fewer resources and the least capacity to conduct the duplicative due diligence that potential liability under Section 411 would require. And these small businesses are already particularly vulnerable litigation targets. Indeed, although small businesses (revenues under $10 million) account for only about 20.3% of private-sector revenue, they already shoulder 48% of all commercial tort costs.[18] The smallest of businesses (less than $1 million per year in venue) bear 34% of all commercial tort costs.[19] Simply put, small businesses pay an outsized portion of overall tort liability. This is illustrated in the below chart.

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[17] Prasad Sharma, *Roadblock: The Trucking Litigation Problem and How to Fix It*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, at 38.

[18] David McKnight & Paul Hinton, *Tort Costs for Small Businesses*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, at 13.

[19] *Id.*

Table 2: Estimated 2021 Commercial Tort Costs[16]

	2021 Estimates of Number and Size of Businesses			Estimated 2021 Commercial Tort Costs ($ billions)			
Revenue Categories	Number of Businesses	Revenue ($ trillions)	Percent of Revenues	Insured Costs	Self-Insured	Total	% Total Commercial Tort Costs
Small Businesses							
< $1 million	33,404,651	$3.15	7%	$29.3	$82.7	$112.0	34%
$1 to $4.9 million	1,733,685	$3.58	8%	$22.9	$11.0	$33.8	10%
$5 to $9.9 million	259,200	$1.81	4%	$10.7	$3.4	$14.1	4%
< $10 million	35,397,536	$8.54	20%	$62.9	$97.1	$160.0	48%
Mid-Size Businesses							
$10 to $50 million	239,199	$4.95	12%	$26.0	$9.0	$35.0	11%
Large Businesses							
> $50 million	72,739	$28.64	68%	$72.8	$63.2	$136.0	41%
Private Sector Total*	**35,709,474**	**$42.13**	100%	**$161.6**	**$169.3**	**$331.0**	100%

*Any differences in totals are the result of rounding.

Tort liability is already a huge problem for small businesses; they cannot afford yet *more* risk of costs for tort liability under vague assertions of businesses needing to pay "the fair price to do business" when hiring independent contractors.[20]

And liability costs continue to rise. Tort costs are rising across all industries, especially in trucking and transportation. In 2020, tort claims across all industries amounted to $443 billion, or 2.1% of the entire U.S. gross domestic product.[21] Of this,

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[20] (MAJ Br. 1.)

[21] David McKnight & Paul Hinton, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, Nov. 22, 2022, at 2, https://instituteforlegalreform.com/research/tort-

$196.5 billion were related to automobile-accident claims—a whopping 44.4% of all tort liability.[22] From 2016 to 2020, commercial automobile-related insurance costs (which include insurance premiums) rose from $34.7 billion to $47.8 billion, increasing at an annual growth of 8.4% a year, outpacing all other categories of insurance costs.[23] From 2010 to 2020, insurance premiums as a cost per mile increased by 47%, as reflected in the figure below.[24] These insurance costs are even higher for smaller shipping carriers with 25 or fewer trucks.[25]

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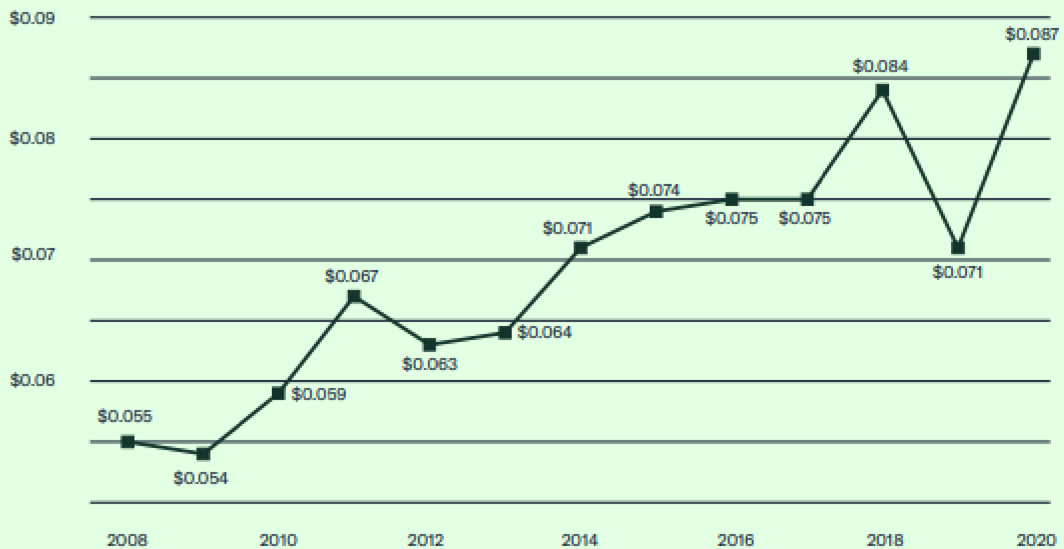
costs-in-america-an-empirical-analysis-of-costs-and-compensation-of-the-u-s-tort-system/.

[22] *Id.*

[23] *Id.* at 14.

[24] Prasad Sharma, *Roadblock: The Trucking Litigation Problem and How to Fix It*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, at 13.

[25] Understanding the Impact of Nuclear Verdicts on the Trucking Industry, AMERICAN TRANSPORTATION RESEARCH INSTITUTE, June 2020, at 49, https://truckingresearch.org/wp-content/uploads/2022/01/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020.pdf.



Source: American Transportation Research Institute, ***The Impact of Rising Insurance Costs on the Trucking Industry***, p. 8 (Feb. 2022).

These cost increases are not padding insurance companies' bottom lines; in fact, companies offering trucking insurance have produced little to no profit despite continuously increasing premiums.[26] The numbers don't lie: cost increases are due to increasing tort liability.

Jury verdicts in the trucking industry have also soared—and pose particularly severe consequences for small businesses. "Because trucking is by far the most prevalent means by which communities throughout America get their goods, inflated and disproportionate verdicts against trucking companies affect everyone."[27] A 2020 report by the American

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[26] Prasad Sharma, *Roadblock: The Trucking Litigation Problem and How to Fix It*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, at 12.

[27] *Id.*

Transportation Research Institute found that there were around 300 verdicts above $1 million between 2015 and 2019, compared to just 26 from 2006 to 2010.[28] The National Highway Traffic Safety Administration found that the median jury award in shipping cases rose from $10.3 million in 2020 to $65.4 million in 2022.[29] But ironically, though jury verdicts in trucking lawsuits have skyrocketed over the last 10 years, the rate of severe accidents has actually *decreased*—for example, the rate of fatal crashes per 100 million commercial truck miles driven dropped 34% in the past two decades.[30]

This increase in the size of jury verdicts corresponds to more unjustified requests for states to adopt NSIC claims. Because 92% of motor carriers have fewer than ten trucks and have relatively small revenues, plaintiffs' attorneys are targeting the parties who hire the carriers, such as shippers and their brokers.[31] Yet Plaintiffs like Appellants *already have* appropriate available claims they can assert directly against the carrier—the party that is actually responsible for the collision. Plaintiffs are not asserting NSIC claims because

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[28] *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, AMERICAN TRANSPORTATION RESEARCH INSTITUTE, at 15.

[29] *Corporate Verdicts Go Thermonuclear*, MARATHON STRATEGIES, Apr. 4, 2023, at 68, https://marathonstrategies.com/wp-content/uploads/2023/03/Corporate-Verdicts-Go-Thermonuclear.pdf.

[30] Prasad Sharma, *Roadblock: The Trucking Litigation Problem and How to Fix It*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, at 8.

[31] *Id.* at 9.

they cannot obtain compensation for their injuries; rather, they seek to expand the number of pockets from whom they may seek recovery.

Even apart from the increasing risk of a "nuclear verdict," small businesses face increasing risk of nuisance lawsuits used to extort unwarranted settlements. "[T]he fear of outsized nuclear verdicts also results in settlement creep—the inflation of payouts necessary to settle a claim[,]" even where liability is suspect.[32] Businesses also increasingly face fraudulent sham litigation; indeed, a recent Department of Justice crackdown in New Orleans alone found over 150 staged incidents of transportation tort claims.[33] Adopting new theories of liability for the plaintiffs' bar to target at small businesses, especially without clear guardrails, will only fuel this trend.

In summary, the adoption of Section 411 would erode the significant benefits of independent-contractor relationships and instead increase businesses' risk and costs. Companies are already inundated with rising tort costs and insurance premiums; adding liability would only unjustifiably exacerbate these troubling trends. And when incurred, these additional costs are passed on through higher prices to consumers, who ultimately bear the cost of expanding tort liability. Appellants allegedly request a "fair price of business," but they overlook the numerous costs *already facing* businesses for tort liability—and who will ultimately pay.

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[32] *Id.* at 15-16.

[33] *Id.* at 20.

The Court should reject adoption of Section 411 claims and any alternative forms of NSIC liability because of the negative effects these theories would have on independent contractors, businesses, and society—without any actual offsetting benefit.

II. If the Court Adopts Section 411, the Court Should Establish Clear Rules to Enable Businesses to Reliably Make Decisions And Manage Risk When Engaging Independent Contractors.

Clarity and predictability allow businesses to take appropriate precautions to ensure regulatory compliance and manage risks of liability. But Section 411 is fundamentally unclear and "depends on the circumstances."[34] If this Court adopts Section 411, the Court must give clear guidance with safe harbors and guardrails so that businesses can safely make decisions when hiring independent contractors.

Appellants and Amicus MAJ advocate for flexible—but inherently unpredictable—standards involving multi-factored tests and an "it depends" mentality.[35] Under their proposal, the meaning of a "reasonable investigation" is always subject to debate, and will vary judge-to-judge and jury-to-jury.[36] This unpredictability is exemplified by the Court of Appeals majority's and concurrence's differing opinions about how multiple factors should be evaluated in the facts and circumstances of this case.[37] Ambiguity in legal rules like

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[34] (MAJ Br. 15.)

[35] (App. Br. 28-29; MAJ Br. 15.)

[36] (App. Br. 23-24; MAJ Br. 18.)

[37] (*See* ADD.042, 044-045.)

Section 411 reduces predictability and increases risk, and the result is higher insurance premiums (increasing costs for all parties and consumers downstream).[38] National carriers have particular difficulty underwriting and assessing liability risk given this ambiguity and the lack of clear standards of care under many states' NSIC common law.[39]

The ambiguity posed by Section 411 in its unbounded form is untenable and unsustainable. It would force businesses to either over-compensate by spending copious resources on duplicative due diligence investigations, or forgo hiring independent contractors altogether. At any rate, consumers ultimately pay the "price" of these costs, which is not "fair" and will not "protect the general public."[40]

To address the inherent ambiguity in Section 411, the Court should impose several guardrails to provide clear guidance that will enable businesses to make decisions that will not only help protect the public, but also avoid the undue costs and risks of NSIC liability.

First, the Court should incorporate an "actual knowledge" requirement, as discussed by the majority of the Court of Appeals.[41] Specifically, potential liability should be limited to where a defendant actually (that is, subjectively) knows of the independent contractor's

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[38] Prasad Sharma, *Roadblock: The Trucking Litigation Problem and How to Fix It*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, at 13, 26.

[39] *Ortiz v. Ben Strong Trucking, Inc.*, 2022 WL 3717217, at *13 (D. Md. Aug. 29, 2022) ("there is no single national standard of care.").

[40] (MAJ Br. 1, 8.)

[41] (*See* ADD.036-038.)

negligence—and business should not be held to a standard that an expert in the independent contractor's field "should have known." Many businesses hire independent contractors to perform tasks with which the business has little to no knowledge or expertise. But Appellants' version of NSIC requires businesses to investigate independent contractors' competency to perform a task *outside the business's expertise*. Mandating that the hirer must have "actual knowledge" of a lack of competency or bad reputation would appropriately cabin NSIC claims to situations in which the hirer actually and knowingly performs a *negligent* selection.

Second, the knowledge factor should be limited to the independent contractor's practices directly relevant to the engaged task—and not require an investigation of all other aspects of the independent contractor's business, such as the quality and maintenance of its equipment, its service or maintenance schedules, the materials it uses, or its financial stability. As the Michigan Court of Appeals explained:

> There should be no need to investigate to determine whether the independent contractor has the resources and abilities to perform properly the assigned tasks. 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.... 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.

Reeves v. Kmart Corp., 582 N.W.2d 841, 846 (Mich. Ct. App. 1998). In this case, this would mean limiting the knowledge factor to transportation competence and reputation.

Third, the obligation to investigate should be limited to the independent contractor—and not extend to any third-parties engaged by the independent contractor. Where multiple layers of hiring exist, investigation should be limited to the company that is hired, and should not extend to every individual sub-contractor—in this particular case, every truck driver (e.g., Lopez). Appellants claim "Menholt Farms did nothing to screen or investigate Braaten's qualifications."[42] But this case is not about Braaten's qualifications; indeed, Appellants argue that the negligence here was in *Braaten hiring Lopez*, not in Menholt Farms hiring Braaten. This highlights the conspicuous absence of Braaten in the case; it is apparent Appellants have settled with Braaten for their "catastrophic injury without recourse" and now seek a second pocket.[43] This again proves that NSIC liability is really about seeking additional parties to sue for sources of recovery—fueling ever-increasing trucking jury verdicts—and not an actual, justifiable basis of liability.[44]

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[42] (App. Br. 12, 22 (items 4-8).)

[43] (App. Br. 20.)

[44] *See supra*, Section I. B.

Requiring investigation beyond the first independent contractor—to extend to every sub-contractor, vendor, materialman, and so on—is an extreme interpretation of NSIC that other courts have cautioned against.[45] This is especially true in the trucking industry; again, the carrier (not the shipper) has a duty to investigate the background of individual drivers.[46]

Consider this rule in two related, well-known contexts: package delivery and rideshare. Imagine a small business sends a customer a package through a delivery service that relies on independent-contractor drivers. Applying appellants' proposed rule, the small business would need to not only investigate the delivery company's safety ratings, but also investigate and request records for *all* of the company's highway freight drivers who could carry the package. This is unreasonable and unjustifiable. The same analysis applies to rideshare. Under Appellants' proposed rule, riders would need to investigate each rideshare company's driver-hiring and -retention practices, as well as ask for background information on *all drivers* that could drive the user *anywhere* in Minnesota, before riding with a rideshare driver.

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[45] *See Jones v. Schneider Nat., Inc.*, 797 N.W.2d 611, 617 (Iowa Ct. App. 2011) ("[W]e decline to interpret section 411 to include protection for employees of an independent contractor.… [W]e cannot expect an employer to obtain a driving record of each driver of such a company."); *see also Est. of Fields by Fields v. Shaw*, 954 N.W.2d 451, 458 (Iowa Ct. App. 2020) (referencing the analysis in *Jones*).

[46] *See* 49 C.F.R. § 391.23 ("each motor carrier shall make the following investigations and inquiries with respect to each driver it employs…").

Appellants rely on multi-layered NSIC claims to target what they perceive to be wealthy hirers, but they ignore the effect of multi-layered tort liability on hiring parties ranging from small businesses to everyday consumers.

Fourth, the Court could also clarify that investigation and diligence is required only at the time the independent contractor is engaged—and does not require an ongoing, perpetual investigation on a continual, rolling basis. Courts have held that, even where an NSIC theory is adopted, there is no "authority establishing that a[n] employer is required to monitor the activities of an independent contractor."[47] Requiring continuing supervision and investigation would eviscerate the differences between arm's-length independent-contractor relationships and close employee relationships. Moreover, requiring due diligence after the point of hiring would only endlessly multiply the risks and burdens that NSIC liability would place on businesses and consumers alike.

The Court should not recognize NSIC tort liability, but if it does, the Court should adopt clear guidance, safe harbors, and guardrails limiting the inevitable erosion of the important benefits that independent-contractor relationships provide to workers, businesses, and society at large.

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[47] *Gonzales v. McDow*, 1:07-CV-54 MCA/WDS, 2008 WL 11320097, at *5 (D.N.M. Mar. 30, 2008); *see, e.g.*, *Est. of Fields by Fields*, 954 N.W.2d at 457 (should have known … "at the time of hiring"); *Perry v. Asphalt & Concrete Services, Inc.*, 133 A.3d 1143, 1158 (Md. 2016) ("at the time of hiring"); *Liss v. TMS Int'l, LLC*, 3:19-CV-00810-GCS, 2022 WL 2037681, at *5 (S.D. Ill. June 6, 2022) ("at the time of hiring or retention").

CONCLUSION

For the above reasons, the Chambers oppose the adoption of Section 411 or any NSIC theory that would significantly erode the public benefits of independent-contractor relationships, and thus urge the Court to affirm. If any NSIC tort is adopted, the Court should follow other courts in adopting clear rules to protect and facilitate businesses' compliance with an otherwise vague, complicated standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Minnesota Rules of Civil Appellate Procedure 132.01, subd. 3, the undersigned hereby certify, as counsel for Amici Curiae Chamber of Commerce of the United States of America and the Minnesota Chamber of Commerce that this Brief was prepared in Microsoft 365, using 13-point Times New Roman proportionally spaced font, and further certify this brief complies with the type-volume limitation as there are 4,699 words in this Brief, excluding the parts of the Brief exempted by Minn. R. Civ. App. P. 132.01, subd. 3, according to Microsoft 365's word count.

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