This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1796

Pedro Alonzo, et al.,
Appellants,

vs.

Richard Menholt, et al.,
Respondents.

Filed September 25, 2023
Affirmed
Johnson, Judge
Concurring specially, Gaïtas, Judge

Clay County District Court
File No. 14-CV-21-1126

James R. Hoy, Kellen B. Bubach, Maring Williams Law Office, P.C., Fargo, North Dakota (for appellants)

Michael J. Tomsche, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Johnson, Presiding Judge; Gaïtas, Judge; and Kirk, Judge.[*]

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[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Pedro Alonzo was injured when the truck he was driving collided with a truck driven by Alberto Lopez, an employee of Braaten Farms, which was hired by Menholt Farms to haul sugar beets. Alonzo and his wife sued Richard Menholt and Menholt Farms, alleging a claim of negligent selection of an independent contractor. The district court granted the defendants' motion for summary judgment. We conclude that the district court did not err by granting the motion because the plaintiffs' theory is not recognized by Minnesota law and, furthermore, because there is no genuine issue of material fact as to whether Menholt Farms negligently selected Braaten Farms to be an independent contractor. Therefore, we affirm.

FACTS

Richard Menholt is the president of Menholt Farms Inc. and Menholt Farms LLC (collectively Menholt Farms). Menholt Farms grows several types of crops, including sugar beets. Harvesting and hauling sugar beets is a time-sensitive endeavor because sugar beets will spoil if they are exposed to low temperatures for too long. For decades, Menholt Farms has hired Braaten Farms, which is owned and operated by Darcy Braaten, to haul Menholt Farms's harvested sugar beets to a buyer, which processes the sugar beets into crystal sugar. Menholt and Braaten have been personal friends for most of their lives.

In 2013 or 2014, Braaten Farms hired Lopez to drive one of its trucks to haul Menholt Farms's sugar beets. Lopez worked for Braaten Farms only during the fall harvest

season of each year, and his principal assignment was hauling Menholt Farms's sugar beets. In October 2018, Lopez was Braaten Farms's only employee.

On October 19, 2018, at 6:17 a.m., Lopez was driving a large truck owned by Braaten Farms, hauling Menholt Farms's sugar beets, in the east-bound lane of Clay County highway 34, near the city of Felton. Meanwhile, Alonzo was driving a semi-truck and trailer in the west-bound lane of the same highway, hauling sugar beets for another farm. The two trucks crashed head-on. A subsequent investigation revealed that Lopez crossed over the center line before the crash. Both Alonzo and Lopez sustained serious injuries and were taken to a nearby hospital.

Shortly after the collision, a law-enforcement officer learned that Lopez's driver's license had been suspended. Later it was revealed that Lopez had been convicted of driving while impaired on four occasions: once in 1997, twice in 2000, and once in 2008. Lopez also had been convicted of driving after a license revocation in 2008 and had committed petty-misdemeanor speeding violations on two occasions in 2017.

In March 2021, Alonzo and his wife commenced this action against Richard Menholt and Menholt Farms LLC. The Alonzos alleged two claims: first, negligent selection of an independent contractor and, second, vicarious liability for Lopez's negligence. Alonzo requested damages for his pain and suffering and for past and future medical expenses. His wife requested damages for loss of services, care, comfort, consortium, society, and companionship. The Alonzos later amended their complaint by adding Menholt Farms Inc. as a defendant.

During the discovery phase of the lawsuit, the Alonzos sought to learn what information Menholt Farms possessed concerning Braaten Farms and Lopez before the collision. It is undisputed that Menholt Farms did not seek to determine whether Lopez had a valid driver's license, did not check Lopez's driving record, did not check his criminal history, and did not search the internet for any information about him. It also is undisputed that Menholt Farms did not ask Braaten Farms for any of that information and did not ask Braaten Farms whether it had made any of those inquiries. It is further undisputed that Menholt Farms did not undertake any such actions or inquiries in prior years, when Braaten Farms employed other drivers to haul sugar beets for Menholt Farms.

Discovery also revealed that, before hiring Lopez in 2013 or 2014, Braaten Farms did not check his driving record, did not check his criminal history, and did not search the internet for information about him. Braaten Farms did make an effort on one occasion to determine whether Lopez was a licensed driver. In 2018, the year of the collision, Braaten asked Lopez whether he had a driver's license. Lopez responded in the affirmative and showed Braaten his driver's license, which Braaten viewed from one foot or a couple of feet away.

In July 2022, the defendants moved for summary judgment, arguing that Minnesota does not recognize a claim of negligent selection of an independent contractor and, in the alternative, that Menholt Farms had no information to suggest that Braaten Farms and Lopez were not qualified to haul sugar beets and no duty to inquire into the matter. In their responsive memorandum, the Alonzos argued that the tort of negligent selection of an independent contractor is a recognized cause of action in Minnesota and that Menholt

Farms was negligent in not exercising reasonable care to select a careful and competent independent contractor. The Alonzos abandoned their vicarious-liability claim.

In November 2022, the district court granted the summary-judgment motion on the sole remaining claim of negligent selection of an independent contractor. The district court reasoned first that the supreme court either has recognized the claim of negligent selection of an independent contractor or "will do so when confronted with the issue on appeal." The district court then reasoned that there are no "material fact issues suggesting negligence by Menholt Farms in hiring Braaten Farms as an independent contractor."

The Alonzos appeal.

DECISION

The Alonzos argue that the district court erred by granting the defendants' motion for summary judgment on their claim of negligent selection of an independent contractor. Specifically, the Alonzos argue that there is a genuine issue of material fact as to whether Menholt Farms failed to exercise reasonable care in selecting Braaten Farms as an independent contractor. In response, Menholt Farms argues that the theory of negligent selection of an independent contractor is not recognized in Minnesota and, alternatively, that it exercised reasonable care in selecting Braaten Farms as an independent contractor.

A district court must grant a motion for summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies

a *de novo* standard of review to a district court's legal conclusions and views the evidence in the light most favorable to the nonmoving party. *Staub as Trustee of Weeks v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021).

"Negligence is the failure to exercise the level of care that a person of ordinary prudence would exercise under the same or similar circumstances." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). "To recover on a claim of negligence, a plaintiff must prove: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) that the breach of the duty was a proximate cause of the injury." *Id.*

A.

We begin by considering whether the supreme court's opinion in *Fenrich v. Blake School*, 920 N.W.2d 195 (Minn. 2018), applies to this case.

In their respective principal briefs, the parties focus on the Alonzos' chosen theory of negligent selection of an independent contractor. Neither party's principal brief cites *Fenrich*, in which the supreme court analyzed a negligence claim arising from a vehicle collision caused by a third party. *See id.* at 201-06. The *Fenrich* opinion states, "As a general rule, 'a person does not owe a duty of care to another . . . if the harm is caused by a third party's conduct.'" *Id.* at 201 (quoting *Doe 169*, 845 N.W.2d at 177-78). But this general rule is subject to two exceptions. First, the law may impose a duty of care if "there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable." *Id.* at 201-02 (quotation omitted). Second, the law may impose a duty of care if "'the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.'" *Id.* at 202 (quoting *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011)).

If either exception applies, "a negligent defendant may be held liable to a plaintiff for harm caused by a third party." *Id.*

At oral argument, this court asked counsel whether and how *Fenrich* applies to this case. After oral argument, we asked for supplemental briefing on that issue. The Alonzos argue in their supplemental brief that "Menholt Farms owed a duty to exercise reasonable care to employ a competent and careful contractor under the Restatement (Second) of Torts § 411" and that "the Restatement provides the most appropriate framework under which to evaluate their claims." The Alonzos note that *Fenrich* and similar opinions "establish a more general framework for when a defendant may be liable for its own negligence for harm caused by a third party" and provide for "exceptions to the general rule of nonliability for harm to another caused by a third party." The Alonzos argue in the alternative that "*Fenrich* is consistent with the Restatement framework" and that, under the *Fenrich* framework, their claim is viable under the second exception to the general rule of non-liability. Their supplemental brief concludes by stating that section 411 of the Restatement provides "[t]he most applicable framework under which to analyze this case" because it "specifically addresses the claim of negligent selection of an independent contractor." Similarly, Menholt Farms's supplemental brief urges the court to analyze the Alonzos' claim under section 411 of the Restatement.

Having considered the parties' supplemental briefs, we conclude that the Alonzos' claim need not be considered under the analytical framework of *Fenrich*. As demonstrated by *Fenrich*, a person may be held liable for harm caused by a third party based on a breach of the general duty of reasonable care. *Id.* at 201-07. A person also may be held liable for

harm caused by a third party based on a breach of a specific recognized duty. For example, in *Domagala*, the supreme court considered whether the plaintiff could prove his claim under section 321 of the Restatement (Second) of Torts. 805 N.W.2d at 24-26. The supreme court noted that section 321 of the Restatement had not been adopted and, furthermore, declined to adopt it in that case. *Id.* The supreme court then stated that, even though the defendant did not owe the plaintiff a duty under Restatement section 321, "a duty can be imposed under other general negligence principles found in common law." *Id.* at 26. The court concluded that the plaintiff owed the defendant a general duty of reasonable care. *Id.* at 26-28.

In this case, the Alonzos consistently have sought to prove a claim based on section 411 of the Restatement. In their complaint, they alleged that Menholt Farms breached a "duty to use reasonable care to select a competent and careful contractor," using language that mirrors section 411 of the Restatement. In opposing Menholt Farms's summary-judgment motion, the Alonzos argued specifically for recognition of the tort of negligent selection of an independent contractor and contended that Menholt Farms was negligent in selecting an competent contractor. In their principal appellate brief, the Alonzos again focus on section 411 of the Restatement and their claim that Menholt Farms should be held liable because it was negligent in selecting an independent contractor.

Accordingly, the Alonzos are seeking to prove a claim based only on a specific duty arising from section 411 of the Restatement. They are *not* seeking to prove a claim based on the general duty to exercise reasonable care, as was true in *Fenrich*. Thus, the

framework under which the supreme court analyzed the parties' arguments in *Fenrich* does not apply to this case.

B.

We continue by considering whether the Alonzos may pursue a claim of negligent selection of an independent contractor.

In considering the defendants' motion for summary judgment, the district court reasoned that "Minnesota recognizes a claim for negligent selection of an independent contractor or . . . will do so when confronted with the issue on appeal." In their principal brief, the Alonzos argue that the district court "appropriately concluded that Menholt Farms had an affirmative duty to exercise reasonable care to employ a competent and careful contractor" pursuant to section 411 of the Restatement but erred by concluding that there is not a genuine issue of material fact as to whether Menholt Farms breached that duty. In response, Menholt Farms argues primarily that the tort of negligent selection of an independent contractor has not been recognized in Minnesota and, alternatively, that even if the Alonzos' theory were recognized, their evidence is insufficient to prove that Menholt Farms breached a duty to select a careful and competent independent contractor.

The district court cited two opinions in support of its *de facto* recognition of the Alonzos' theory of negligent selection of an independent contractor. The first is *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007). The primary issue in *Larson* was a certified question as to whether "the state of Minnesota recognize[s] a common law cause of action of privileging of a physician against a hospital or other review organization." *Id.* at 303. In answering that question, the supreme court did *not* consider whether the tort of negligent

selection of an independent contractor has been or should be recognized in Minnesota. *See id.* at 308-09.

The second opinion cited by the district court is *Soto v. Shealey*, 331 F. Supp. 3d 879 (Minn. 2018). The federal district court in *Soto* did not conclude that the Minnesota Supreme Court *has* recognized the tort of negligent selection of an independent contractor. *See id.* at 885-86. Rather, the *Soto* court stated merely that the Minnesota Supreme Court "*would* recognize the tort," if the issue were to come before the court. *See id.* at 885 (emphasis added). That determination was, in essence, an attempt to predict the future based on "'all the available data,'" including "the highest state court's recent decisions on similar issues, lower-court decisions, and other jurisdictions' precedents." *See id*. (quoting *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236-37 (1940)). We are not obligated to follow *Soto* because a federal court's interpretation of Minnesota law is not binding on this court. *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 330 (Minn. 2000); *Lamere v. St. Jude Med., Inc.*, 827 N.W.2d 782, 788 n.1 (Minn. App. 2013); *In re Estate of Eckley*, 780 N.W.2d 407, 411 (Minn. App. 2010).

In addition, the interpretative method used in *Soto* is inconsistent with this court's caselaw concerning its role in the Minnesota judicial branch. This court frequently has observed that only the Minnesota Supreme Court has authority to recognize new common-law doctrines for Minnesota. *See, e.g.*, *Wise v. Stonebridge Communities, LLC*, 927 N.W.2d 772, 776 (Minn. App. 2019); *Dukowitz v. Hannon Sec. Servs.*, 815 N.W.2d 848, 851 (Minn. App. 2012), *aff'd*, 841 N.W.2d 147 (Minn. 2014). For that reason, this court consistently has refrained from deciding whether a new cause of action should be

recognized. *See, e.g.*, *Wise*, 927 N.W.2d at 776; *Dukowitz*, 815 N.W.2d at 851; *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 690 (Minn. App. 2010); *Deli v. University of Minnesota*, 578 N.W.2d 779, 783 (Minn. App. 1998), *rev. denied* (Minn. July 16, 1998); *Stubbs v. North Mem'l Med. Ctr.*, 448 N.W.2d 78, 81 (Minn. App. 1989), *rev. denied* (Minn. Jan. 12, 1990).

This court's approach is consistent with *Larson*, in which the supreme court conspicuously stated, "*This court* has the power to recognize and abolish common law doctrines, as well as to define common law torts and their defenses." 738 N.W.2d at 303 (emphasis added) (citation omitted). In exercising that power in *Larson*, the supreme court conducted an extensive, multi-factor analysis, which considered

> (1) whether the tort is inherent in, or the natural extension of, a well-established common law right, (2) whether the tort has been recognized in other common law states, (3) whether recognition of a cause of action will create tension with other applicable laws, and (4) whether such tension is out-weighed by the importance of the additional protections that recognition of the claim would provide to injured persons.

Id. at 304. After discussing each of those factors at length and in depth, the supreme court concluded that "the policy considerations underlying" the novel theory "outweigh[ed]" competing policy considerations, which led the court to recognize the theory. *Id.* at 313.

In light of the above-described Minnesota caselaw and this court's long-standing practice, we decline the invitation to recognize a cause of action for negligent selection of an independent contractor. The absence of such recognition by the supreme court is determinative and is a sufficient basis for the conclusion that the district court did not err by granting Menholt Farms's motion for summary judgment.

C.

In light of the possibility that the supreme court might recognize the tort of negligent selection of an independent contractor, we assume without deciding that such a cause of action, as described in section 411 of the Restatement, is recognized in Minnesota, and we continue by considering whether the Alonzos have submitted evidence that would create a genuine issue of material fact as to whether Menholt Farms breached such a duty.

Section 411 of the Restatement states as follows:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

Restatement (Second) of Torts § 411 (1965). A comment to section 411 defines the phrase "competent and careful contractor" to mean "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary." *Id.*, cmt. a.

Another comment to section 411 states that the degree of care that a company should exercise in selecting an independent contractor depends on multiple factors, including "the character of the work to be done—whether the work lies within the competence of the average man or is work which can be properly done only by persons possessing special

skill and training." *Id.*, cmt. c. As an example, the comment states that if an independent contractor holds himself or herself out as a carpenter or plumber, a company selecting the independent contractor "is entitled to assume that a carpenter or plumber of good reputation is competent to do such work safely," and "there is *no duty to make an elaborate investigation* as to the competence of the carpenter or plumber." *Id.* (emphasis added). "The fact that he is a carpenter or plumber is sufficient, unless the employer knows that the contractor's reputation is bad or knows of facts which should lead him to realize that the contractor is not competent." *Id.*

However, an illustration indicates that if a company selects an independent contractor with knowledge that the independent contractor's employees are likely to engage in negligent conduct that endangers others, the company may be held liable for the negligent conduct of an employee of the independent contractor. The illustration states that, if company A hires independent contractor B "to haul material" with knowledge that independent contractor B "habitually employs inexperienced and inattentive drivers," and if person C "is run over by a truck carrying A's material and driven by one of B's employees," company A "is subject to liability to C if the accident is due . . . to . . . the inexperience or inattention of the driver." *Id.*, cmt. d, illus. 5.

These provisions of the Restatement collectively provide that, if a company hires an independent contractor, the company may be liable for the negligent conduct of an employee of the independent contractor if the company *knew* that the independent contractor's employees were likely to engage in negligent conduct that endangers others. *See id.* A company hiring an independent contractor ordinarily does not have a duty to

conduct an inquiry or investigation into the competence or carefulness of an independent contractor. *Id.*, cmt. c. But a company may have such a duty if the independent contractor's reputation is bad or if the company knows of facts suggesting that the independent contractor is *not* competent and careful. *Id.*, cmt. c. In that situation, the company that hired an independent contractor may be liable for the negligent conduct of an employee of the independent contractor if the company *should have known* that the independent contractor's employees were likely to engage in negligent conduct that endangers others. *Id.*, cmt. c.

In this case, Menholt Farms hired Braaten Farms as an independent contractor to haul its sugar beets.[1] A jury reasonably could infer that, in 2018, Menholt Farms believed that Braaten Farms would hire Lopez to drive a truck to haul Menholt Farms's sugar beets. But the undisputed evidence is that Menholt Farms did not know that Lopez did not have a valid driver's license, did not know that Lopez had prior convictions for driving while impaired, and did not know that Lopez had committed petty-misdemeanor speeding violations.

The Alonzos, however, contend that Menholt Farms "knew or should have known" that Braaten Farms was not a careful and competent contractor, with emphasis on "should

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[1]The parties disagree about *when* Menholt Farms selected Braaten Farms. Menholt Farms argues that it selected Braaten Farms as an independent contractor in the late 1970s or early 1980s. The Alonzos contend that Menholt Farms selected Braaten Farms each year in which Braaten Farms hauled sugar beets for Menholt Farms. We believe that the difference between the parties' two approaches is inconsequential. Accordingly, for purposes of this non-precedential opinion, we assume without deciding that Menholt Farms selected Braaten Farms as an independent contractor in 2018.

have known." In essence, the Alonzos' claim rests on the premise that Menholt Farms had a duty to inquire or investigate before selecting Braaten Farms. The Alonzos argue in their principal brief (as quoted below, verbatim) that Menholt Farms was negligent because it:

> 1. Did not know anything about what Braaten did to vet or screen his employees.
>
> 2. Made no effort or inquiry to learn anything about what Braaten did to screen its employees.
>
> 3. Did not ask Braaten about any background information about any driver.
>
> 4. Did not inquire as to whether Braaten had conducted a background check on Lopez.
>
> 5. Did not inquire as to whether Braaten had conducted a driver's record check on Lopez.
>
> 6. Did not inquire as to whether Braaten had conducted a criminal record check on Lopez.
>
> 7. Did not ask Braaten whether Lopez had a valid driver's license.
>
> 8. Did not itself conduct any background check, criminal record check, driver record check, or driver's license check on Lopez.

The Alonzos' argument fails because it wrongly assumes that Menholt Farms had a duty to inquire. Because driving a large truck does not require more special skill or training than the work of a carpenter or a plumber, Menholt Farms was "entitled to assume that" Braaten Farms was "competent to do such work safely." *See id.*, cmt. c. The exceptions to that general rule do not apply. There is no evidence that Braaten Farms had a bad reputation, and there is no evidence that Menholt Farms knew of facts suggesting that

Braaten Farms is *not* a competent and careful independent contractor. To the contrary, Menholt Farms had hired Braaten Farms to haul beets "for decades," during which time there had been no vehicle collisions or other incidents of concern. More specifically, Braaten Farms had employed Lopez for approximately four or five years for the purpose of driving a truck to haul Menholt Farms's sugar beets, without any issues. Consequently, Menholt Farms did not have a duty to conduct an inquiry or investigation into Braaten Farms's competence or carefulness as an independent contractor. For that reason, there is no genuine issue of material fact as to whether Menholt Farms *should have known* that Lopez was likely to engage in conduct that endangers others.

Thus, the evidence in the summary-judgment record does not create a genuine issue of material fact as to whether Menholt Farms breached a duty to exercise reasonable care to select a competent and careful independent contractor.[2] That determination is an

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[2]Even if Menholt Farms had known or should have known of Lopez's driving record, Menholt Farms might not be liable on the ground that there is no nexus between Lopez's prior driving-while-impaired convictions and speeding violations and the alleged conduct that led to the crash that injured Alonzo. A comment to section 411 notes that, if a company negligently selects an independent contractor that is not competent and careful, the company may be liable to an injured person only if the injury "result[ed] from some quality in the contractor which made it negligent for the employer to entrust the work to him." Restatement (Second) of Torts § 411, cmt. b (1965). In other words, "if the incompetence of the contractor consists in his lack of skill and experience . . . but not in any previous lack of attention or diligence in applying such experience and skill," the company that selected the independent contractor "is subject to liability for any harm caused by the contractor's lack of skill [or] experience, . . . but not for any harm caused solely by the contractor's inattention or negligence." *Id.*; *see also id.*, cmt. b, illus. 4. The Alonzos claim that Menholt Farms was negligent in not knowing of Lopez's prior driving-while-impaired convictions and speeding violations. But it appears that Lopez's negligent driving had nothing to do with alcohol or speeding. The deputy sheriff who completed the crash report did not check a box for "alcohol suspected," which indicates that Lopez was

additional basis for the conclusion that the district court did not err by granting Menholt Farms's motion for summary judgment.

Affirmed.

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not impaired by alcohol at the time of the crash. Similarly, there is no evidence that Lopez was speeding at the time of the crash.

GAÏTAS, Judge (concurring specially)

I agree with the opinion of the court that we must affirm the judgment of the district court because the supreme court alone has authority to recognize new common-law doctrines, and the supreme court has not adopted the tort of negligent selection of an independent contractor. But I write separately because I disagree with the determination that, were the supreme court to recognize this common-law claim, summary judgment would still be proper because the evidence here presents no genuine issues of material fact. Because reasonable persons could draw different conclusions from the evidence as to whether Menholt Farms breached the duty of reasonable care in selecting Braaten Farms as an independent contractor, I believe summary judgment would be inappropriate under a negligent-selection theory.

"[S]ummary judgment is a blunt instrument, and is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotations and citations omitted). "[O]n a motion for summary judgment, the facts *and the reasonable inferences to be drawn from those facts* must be resolved in [the nonmoving party's] favor." *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021). If there is doubt regarding the existence of a genuine issue of material fact, "the doubt must be resolved in favor of finding that the fact issue exists." *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974). As the opinion of the court notes, reviewing courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

"Negligence is the failure to exercise the level of care that a person of ordinary prudence would exercise under the same or similar circumstances." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). A plaintiff in a negligence action must establish four elements: "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). Because these elements generally require factual determinations, "[s]ummary judgment is seldom granted on negligence issues." *Kaczor v. Murrow*, 354 N.W.2d 524, 525 (Minn. App. 1984); *see also Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 633 (Minn. 2017) (reversing grant of summary judgment in a negligence action because, in a "close case," a jury should weigh evidence and make credibility determinations). But "when the record reflects a complete lack of proof on any of the four elements," a defendant is entitled to summary judgment. *Louis*, 636 N.W.2d at 318.

The tort of negligent selection of an independent contractor recognizes that an employer has a duty of reasonable care "to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons." Restatement (Second) of Torts § 411 (1965). Negligent selection of an independent contractor is a close cousin of the common-law tort of negligent credentialing, a doctrine that our supreme court adopted in 2007. *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007) (observing that the tort of negligent credentialing—which imposes liability on a hospital for negligently granting credentials to a medical professional who harms a patient—is closely

related to the tort of negligent selection of an independent contractor). In recognizing the tort of negligent credentialing, the supreme court determined that a hospital's negligence in credentialing a medical professional "could be shown on the basis of what was actually known or what *should have been known* at the time of the credentialing decision." *Id.* at 310. If the supreme court were to adopt the related tort of negligent selection, presumably, it would recognize this same standard. And, applying this standard to the evidence here, a jury could find that Braaten Farms was not competent or careful in hiring drivers, and that Menholt Farms should have known this fact when it hired Braaten Farms to haul sugar beets.

The undisputed evidence establishes that Menholt Farms hired Braaten Farms to haul sugar beets; sugar beets are transported on public roads via truck; Braaten Farms hired Lopez as a driver several seasons before; Braaten Farms performed no screening of Lopez; Lopez had a history of driving infractions, including driving-while-impaired offenses; Lopez's driver's license was suspended; Lopez had an active arrest warrant; and, while driving on a public road, Lopez caused a traffic accident that seriously injured Alonzo. Additionally, the record shows that Menholt Farms hired Braaten Farms based on a personal relationship, was unaware of what Braaten Farms did to screen drivers, made no inquiries regarding Braaten Farms' practices for hiring drivers, did not request any information about the drivers Braaten Farms used, and asked no questions about Lopez's qualifications. Based on this evidence, and resolving the factual inferences in Alonzo's favor, reasonable persons could draw different conclusions from the evidence as to whether Menholt Farms breached the duty of reasonable care in selecting Braaten Farms as an

independent contractor. A jury could conclude that the work of hauling sugar beets on public roads involves a risk of physical harm unless it is skillfully and carefully performed. Alternatively, a jury could conclude that Menholt Farms owed a duty to the driving public to select a careful and competent hauler. A jury could also conclude that Menholt Farms failed to exercise reasonable care by taking no actions to confirm that Braaten Farms was a careful and competent independent contractor. And a jury could conclude that Braaten Farms was not a careful and competent contractor because it hired Lopez to drive its trucks.

The opinion of the court rejects the proposition that Menholt Farms had a duty to inquire or investigate before selecting Braaten Farms to transport its sugar beets because "driving a large truck does not require more special skill or training than the work of a carpenter or a plumber." Based on this supposition, the opinion deduces that Menholt Farms was "entitled to assume" that Braaten Farms was a safe contractor, and thus, there is no disputed fact issue as to whether Menholt Farms breached a duty of care in hiring Braaten Farms.

I respectfully disagree with this reasoning. As the opinion of the court acknowledges, the Restatement recognizes that the degree of care a person must exercise in selecting an independent contractor depends, in part, on "the character of the work to be done." Restatement (Second) of Torts § 411 cmt. c. In my view, a jury could find that hauling sugar beets in a large truck on a public road involves a risk of physical harm unless it is skillfully and carefully performed or, at minimum, requires more care than selecting an independent contractor to do other types of work. Based on the evidence here,

reasonable persons could conclude that Menholt Farms failed to exercise reasonable care by assuming that Braaten Farms was a safe contractor.

Because reasonable persons could find that Menholt Farms was negligent in hiring Braaten Farms to haul sugar beets, I disagree with the opinion of the court insofar as it concludes that the evidence would not warrant a jury trial if the supreme court were to recognize the tort of negligent selection of an independent contractor. However, because that tort does not presently exist under Minnesota law, I concur in the decision to affirm the district court's grant of summary judgment.