



2011

# Midwest State Survey

Construction Tort Law Issues

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## I. Negligence

### A. Modified Comparative Fault

The following Midwestern states have adopted a modified comparative fault system, under which the plaintiff’s negligence is not a complete bar to recovery if her contribution is below a legislatively set threshold (usually 50% or less) of the proximate cause of the injury. In such cases, the defendant’s damages are reduced by the amount of fault attributable to the plaintiff:

1. **Illinois** – See 735 ILCS 5/2-1116(c), (stating [t]he plaintiff shall not be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is not more than 50% of the proximate cause of the injury or damage for which recovery is sought’).
2. **Indiana** – See IC § 34-51-2-6 (stating “the claimant is barred from recovery if the claimant’s contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant’s damages”).
3. **Iowa** – See Iowa Code Ann. § 668.3 (stating “contributory fault shall not bar recovery in an action by a claimant to recover damages for fault ... unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants”).
4. **Kansas** – See K.S.A. 60-258(a) (stating “contributory negligence ... does not bar [a] party from recovering ... if that party’s negligence was less than the causal negligence of the party or parties against whom a claim is made).
5. **Minnesota** – See Minn. Stat. Ann. § 604.01. See also *Great West Cas. Co. v. State Farm Mut. Auto. Ins. Co.*, 590 N.W.2d 675 (Minn. App. 1999) (plaintiff’s fault cannot be greater than 50%).
6. **Nebraska** – See Neb. Rev. Stat. § 25-21,185.09; *Shipler v. Gen. Motors Corp.*, 271 Neb. 194, 209-10, (Neb. 2006) (stating that comparative negligence applies as long as the claimant's negligence is less than 50%).

7. **North Dakota** – See NDCC § 32-03.2-02 (stating “[c]ontributory fault does not bar recovery in an action by any person to recover damages . . . unless the fault was as great as the combined fault of all other persons who contribute to the injury”).
8. **Ohio** – See RC 2315.33 (stating “[t]he contributory fault of a person does not bar [a plaintiff] from recovering damages . . . if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons”).
9. **South Dakota** – See SDCL § 20-9-2 (stating that comparative negligence applies when the negligence of the plaintiff was slight in comparison with the negligence of the defendant”).
10. **Wisconsin** – See W.S.A. § 895.045 (stating “[c]ontributory negligence does not bar recovery in an action by any person . . . if that negligence was not greater than the negligence of the person against whom recovery is sought”).

## **B. Pure Comparative Fault**

The following Midwestern states have adopted a pure comparative fault system, under which negligence attributable to the plaintiff reduces the amount of damages in proportion to the plaintiff’s negligence.

1. **Michigan** – See MCLS § 600.2959; *Kalamazoo Oil Co. V. Boerman*, 242 Mich. App. 75, 80 (Mich. Ct. App. 2000) (stating “our Supreme Court adopted a pure form of comparative negligence, under which a plaintiff’s recovery of damages is reduced to the extent that plaintiff’s negligence contributed to the injury.”); *Laier v. Kitchen*, 266 Mich. App. 482, 496, (Mich. Ct. App. 2005).
2. **Missouri** – See *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 120-21 (Mo. Ct. App. 2006) (stating ““In 1983, the Missouri Supreme Court abolished contributory negligence as a complete bar to a plaintiff’s recovery in negligence cases, and adopted the doctrine of comparative fault as found in the Uniform Comparative Fault Act).<sup>1</sup>

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<sup>1</sup> The Uniform Comparative Fault Act provide: In an action based on fault seeking to recover damages . . . any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault. See *Gustafson v. Benda*, 661 S.W. 2d 11, 10 (Mo. 1983).

## II. Joint and Several Liability

### A. Joint and Several

In cases with multiple defendants, the following Midwestern states have adopted a system of joint and several liability in some form. Some states have exceptions based on the amount of fault, the type of damages (economic versus non economic damages), or the type of case (gross negligence, medical malpractice):

1. **Illinois** – See 735 ILCS 5/21117 (stating that each defendant found liable is jointly and severally liable except that a defendant who is found less than 25% liable is only severally liable i.e. he is only liable for the amount of damages based on his degree of fault).
2. **Iowa** – See ICA 668.4 (stating that each defendant who bears 50% or more of the total fault is jointly and severally liable for economic damages (not noneconomic damages)).
3. **Michigan** – See MCLS § 600.6312 (stating a defendant is jointly and severally liable in specific circumstances, examples include medical malpractice and crimes involving gross negligence. But See MCLS § 600.6304 (stating that, unless otherwise provided, liability is several only and not joint)).
4. **Minnesota** – See MSA § 604.02 (stating that persons are jointly and severally liable if his or her fault is greater than 50%, in cases where persons act with a common scheme or place, or if the person committed an intentional tort).
5. **Missouri** – See VAMS § 537.067 (stating that a defendant who is found to bear 51% or more of the fault is jointly and severally liable for the amount of the judgment rendered against all defendants).
6. **Nebraska** – See Neb. Rev. St. § 25-21-185.10 (providing that liability for each defendant is joint and several for economic damages, but several for noneconomic damages).
7. **Ohio** – See ORC Ann. § 2307.22 (establishing joint and several liability with respect to economic damages for a defendant who alone causes 50% or more of the harm).
8. **South Dakota** – See SDCL § 15-8-15.1 (limiting joint and several liability to not more than twice the percentage of fault allocated to a party who is less than 50% a fault).

9. **Wisconsin** – See Wis. Stat. § 895.045 (stating “[a] person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed”).

## **B. Several Only**

In the case of multiple defendants, the following Midwestern states have adopted several liability, under which each defendant is liable only for the amount of damages in proportion to his fault.

1. **Indiana** – See IC 34-51-2-8 (stating that each defendant is liable for the amount of damages determined by the percentage of fault).
2. **Kansas** – See KSA 60-258(a); See also *Dodge City Implement, Inc. v. Bd. Of County Com’rs of County of Barber*, 288 Kan. 619, 625 (2009) (stating “this state has replaced joint and several liability with comparative liability in which the loss is borne by each tortfeasor in proportion to his or her share of the total fault.”).
3. **North Dakota** – See NDCC § 32-03.3-02; See also *Schneider v. Schaaf*, 1999 ND 235 (1999) (stating the liability of each tortfeasors is separate and several and not joint).

### III. Restatement (Second) of Torts § 414

#### A. Adopted

Virtually all states have crafted some exception to the general rule that a general contractor is not liable for the negligence of an independent contractor's employees. One of the most common exceptions is found in the Restatement (Second) of Torts Section 414, which the following Midwestern States have adopted in some form:

1. **Illinois** – See *Moss v. Rowe Constr. Co.*, 344 Ill. App. 3d 772, 777 (4th Dist. 2003) (stating “[s]ince the abolition of the Structural Work Act ... Section 414 of the Restatement (Second) of Torts has controlled questions of liability in construction-related injury cases.”).
2. **Indiana** – See *Pelak v. Ind. Indus. Servs.*, 831 N.E.2d 765, 770 (Ind. Ct. App. 2005) (applying Section 414 and stating “[t]his court has previously relied on the § 414 analysis of control.”).
3. **Iowa** – See *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 228 (Iowa 1974) (stating “we adopted in Giarratano the principle in Restatement of Torts, Second, § 414”).
4. **Minnesota** – See *Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1997) (stating “[w]e implicitly adopted § 414 of the Restatement (Second) of Torts in Conover, 313 N.W.2d at 401.”).
5. **Nebraska** – See *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 798, 496 N.W.2d 902, 912 (1993) (applying Restatement (Second) Torts Section 414).<sup>2</sup>
6. **North Dakota** – See *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 447 (N.D. 1994) (stating “[w]e have previously recognized a cause of action based upon retained control under Section 414.”).

#### B. Discussed

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<sup>2</sup> Nebraska breaks down its version of the Restatement into three factors: the general contractor must have (1) supervised the work that caused the injury; (2) had actual or constructive knowledge of the danger which ultimately caused the injury; and (3) had the opportunity to prevent the injury, but negligently failed to do so.

The following Midwestern states have not formally adopted RST Section 414 but have discussed it in some capacity:

1. **Kansas** – See *Hauptman v. WMC, Inc.*, 43 Kan. App. 2d 276, 295, 224 P.3d 1175, 1188 (Kan. Ct. App. 2010) (stating “Kansas courts have never expressly adopted Restatement § 414,” but noting a similar doctrine under Restatement § 324A adopted by their Supreme Court).
2. **South Dakota** – See *Clausen v. Aberdeen Grain Inspection, Inc.*, 1999 SD 66, 594 N.W.2d 718, 721 (stating “[i]f the hiring party retains control over the contractor's work and fails to exercise control in a reasonable fashion, it may be liable for damages that result.”). See also *Ashby v. Nw. Pub. Serv. Co.*, 490 N.W.2d 286, 288 (S.D. 1992) (discussing Section 414).
3. **Missouri** – See *Barbera v. Brod-Dugan Co.*, 770 S.W.2d 318, 323 (Mo. Ct. App. 1989) (applying Section 414).

### C. Comparable Law

The Following states have not adopted Restatement (Second) of Torts Section 414, but have a comparable law:

1. **Ohio** – See *Szotak v. Moraine Country Club, Inc.*, 2007-Ohio-2974, 172 Ohio App. 3d 34, 39, 872 N.E.2d 1270, 1273 (stating “an exception to the rule of nonliability exists where one (1) engages the services of an independent contractor, (2) actually participates in the job operation performed by such contractor and (3) thereby fails to eliminate a hazard which he, in the exercise of ordinary care, could have eliminated).
2. **Wisconsin** – See *Danks v. Stock Bldg. Supply, Inc.*, 298 Wis. 2d 348, 360, 727 N.W.2d 846, 851 (Wis. Ct. App. 2006) (finding that the control test applies only to the initial determination of whether an entity is an employee or general contractor).
3. **Michigan** – See *Ormsby v. Capital Welding, Inc.*, 471 Mich. 45, 57, 684 N.W.2d 320, 327-28 (2004) (stating “[t]o establish the liability of a general contractor . . . a plaintiff must prove: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.”).



#### IV. Restatement (Second) of Torts § 323

##### A. Adopted

The following states have adopted Restatement (Second) Section 323, which covers voluntary undertakings.

1. **Illinois** – See *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 427, 893 N.E.2d 702, 713 (Ill. App. Ct. 2008) (discussing Restatement Section 323 and stating “[t]he Illinois Supreme Court has adopted the Restatement.”).
2. **Indiana** – See *Cahoon v. Cummings*, 734 N.E.2d 535, 539 (Ind. 2000) (stating Indiana has adopted Section 323 of the Restatement of Torts).
3. **Iowa** – See *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 174 (Iowa 2002) (applying the Restatement (Second) of Torts Section 323).
4. **Kansas** – See *S. ex rel. S. v. McCarter*, 280 Kan. 85, 106 (2005) (Stating “[t]his court has adopted § 323 as a correct statement of the law . . .”).
5. **Minnesota** – See *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193, 201 (Minn. Ct. App. 2011) (applying the Restatement (Second) Section 323).
6. **South Dakota** – See *Andrushchenko v. Silchuk*, 2008 SD 8, 744 N.W.2d 850 (applying Section 323 as adopted by the South Dakota Supreme Court).
7. **Ohio** – See *Douglass v. Salem Cmty. Hosp.*, 153 Ohio App. 3d 350, 369, 794 N.E.2d 107, 122 (stating [t]he negligence action described in 2 Restatement of the Law 2d, Torts (1965), Section 323(b) has been recognized in Ohio.”).
8. **Michigan** – See *Myers v. Muffler Man Supply Co.*, 277542, 2008 WL 4330240 (Mich. Ct. App. Sept. 23, 2008) (stating “Michigan has . . . adopted § 323 of the Restatement”).

9. **Wisconsin** – See *Hatleberg v. Norwest Bank Wisconsin*, 2005 WI 109, 283 Wis. 2d 234, 250, 700 N.W.2d 15, 23 (quoting and applying Restatement (Second) of Torts Section 323).
10. **Missouri** – See *Strickland v. Taco Bell Corp.*, 849 S.W.2d 127, 132 (Mo. Ct. App. 1993) (Stating “[i]n 1969, the Missouri Supreme Court adopted section 323 from the Restatement (Second) of Torts . . .”).

## **B. Discussed**

The following Midwestern state has not formally adopted the Restatement (Second) of Torts Section 323, but has discussed it in some capacity:

1. **North Dakota** – See *Anderson v. Kroh*, 301 N.W.2d 359, 362 (N.D. 1980) (briefly discussing the Restatement (Second) of Torts Section 323).

## **C. Not Adopted**

The following Midwestern state has not discussed the Restatement (Second) of Torts Section 323:

1. **Nebraska** – A review of the case law turned up no cases that discussed Restatement (Second) Section 323. However, the court has previously recognized a related doctrine. See *Carroll v. Action Enterprises, Inc.*, 206 Neb. 204, 208, 292 N.W.2d 34, 36 (1980) (finding a common law obligation that every person must do that which he undertakes so as not to injure another).

## V. **Anti-Indemnity Acts**

### A. **Anti-Indemnity Act**

Each state has its own indemnity or anti-indemnity statute, many statutes focus on different areas. The following Midwestern states have generally applicable indemnification statutes or ones that specifically cover construction contracts. Some of these statutes specify that the agreement will be void only if it purports to indemnify for the indemnitee's sole negligence, while others void the agreement regardless of whether the negligence is joint or sole.

1. **Illinois** – See 740 ILCS 23/1: voids indemnification agreements in construction contracts for the indemnitee's sole negligence; carves out insurance agreements.
2. **Indiana** – See Ind. Code Ann. § 26-2-5-1: voids indemnification agreements in construction and design contracts for the indemnitee's sole negligence.
3. **Kansas** –
  - a. See Kan. Stat. Ann. § 16-121: voids (1) indemnification agreements in construction contracts (as well as others types of contracts) for the indemnitee's negligence or intention acts or omissions; and (2) contractual provisions which require a party to provide liability coverage to another party, as an additional insured, for such other party's own negligence or intentional acts or omissions.
  - b. See also Kan. Stat. Ann. § 16-1803: voids subrogation waivers on claims paid by liability or workers' comp. insurance.
4. **Michigan** – See MCLA § 691.991: voids indemnification agreements in construction contracts for the indemnitee's sole negligence.
5. **Minnesota** – See Minn. Stat. Ann. § 337.02: voids indemnification agreements in building and construction contracts that purport to indemnify a party for its own actions.

6. **Missouri** – See Mo. Ann. Stat. § 434.100: voids agreements in construction contracts to indemnify or hold harmless another person from that person's own negligence with exceptions for agreements with state entities; expressly allows additional insured.
7. **Nebraska** – See Neb. Rev. Stat. § 25-21,187: voids agreements in construction contracts to indemnify or hold harmless another person from that person's own negligence, specifically excepts insurance and construction bond contracts.
8. **North Dakota** – See N.D. Cent. Code § 9-08-02.1: voids provisions in a construction contract which shifts liability to the contractor for negligence of the owner or the owner's agents in the plans and specifications.
9. **Ohio** – See Ohio Rev. Code Ann. § 2305.31: voids indemnification agreements in construction contracts for the indemnitee's own negligence regardless of whether the negligence is sole or concurrent.
10. **South Dakota** – See S.D. Codified Law. Ann. § 56-3-18: voids indemnification agreements for the indemnitee's sole negligence contracts for construction, repair or maintenance of structure or equipment.

#### **B. No Anti-indemnity Act**

The following Midwestern States have no anti-indemnification statute:

1. **Wisconsin** – None.
2. **Iowa** – None - But See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 571 (Iowa 2002) (ruling that “indemnification contracts will not be construed to permit an indemnitee to recover for its own negligence unless the intention of the parties is clearly and unambiguously expressed”).

## VI. Recent Cases

The following cases have been written about by different commentators, suggesting they are significant and may represent trends in the practice:

- **Illinois**

- Case name: *Thompson v. Gordon*, 241 Ill. 2d 428, 948 N.E.2d 39 (2011)
- is significant because it clearly defines the scope of a duty owed when the duty is created pursuant to a contract between the parties.
- In *Thompson*, the plaintiff's husband and daughter were killed after an accident where a car went over the traffic median.
- Plaintiff filed suit on behalf of the estates of her deceased against an engineering firm for negligently repairing the median.
- Illinois Supreme court held that the engineering firm had no duty to plaintiff because the contract merely required the firm to replace the median.
- The fact that the contract required the firm to "use a degree of skill and diligence normally employed by professional engineers performing the same or similar services," did not open the firm to a general duty of care on plaintiff's behalf.
- *Thompson's* holding reaffirms the Illinois Supreme Court's holding from over 20 years ago in *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474, 475 N.E.2d 822 (1985), holding that a duty created pursuant to a contract is strictly limited to the terms of the contract.
- This is a trend we expect will continue.

- **Illinois**

- Case name: *O'Connell v. Turner Const. Co.*, 409 Ill. App. 3d 819, 949 N.E.2d 1105 (2011).
- Another case decided this year involving a suit under Restatement (Second) Sections 414 (Retained control exception to independent contractors non liability) and 343 (premises liability).
- Significant because it Limits a construction manager's (CM) liability to subcontractors' employees.

- In *O'Connell* a high school contracted with a CM to manage its construction contracts; the high school had contracts with several GC and subs, however the CM did not have contracts directly with any GCs or subs.
  - One of the sub's employees was injured on the construction site; the employee sued several parties including the CM.
  - The court found no liability on the part of the CM.
  - The court found the lack of contract between the CM and the subcontractor dispositive; in addition the CM did not actually select the GC or Subs, so he did not entrust them with work i.e. 414 is not applicable and whether the CM "retained control" is irrelevant.
  - Likewise, Section 323 was inapplicable, the court distinguished between intent to control the *land* and the activities of *people* on the land.
- **Indiana**
    - A recent case in Indiana re-affirmed the economic loss rule
    - Name: *Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 734 (Ind. 2010),
    - Generally purely economic loss is not recoverable in tort, unless an exception applies:
      - "Damage from a defective product or service may be recoverable under a tort theory if the defect causes (1) personal injury or (2) damage to other property."
    - In this case the structural integrity of the building had been compromised by defective work
    - Trend coming from this case is that the Indiana court was not willing to let the plaintiff skirt around the economic loss rule by claiming there was a high likelihood of personal injury damage or by categorizing the property to argue there was damage to "other property."
    - The court found that the plaintiff purchased a complete refurbishing of its library facility from multiple parties; As a result, the economic loss doctrine applied to preclude plaintiff's negligence theory.
- **Wisconsin**
    - Case name: *Tatera v. FMC Corp.*, 2010 WI 90, 328 Wis. 2d 320, 327, 786 N.W.2d 810, 813-14.
    - The trend emerging from this case is the court's reluctance to define the affirmative act exception to the general rule that "a principal employer is not liable in tort for injuries sustained by an independent contractor's employee while he or she is performing the contracted work."

- The case arose when a worker was diagnosed with malignant mesothelioma, which the worker alleged was caused by his employment which a machine shop where he was tasked with grinding a third-party's asbestos-containing products
  - Plaintiff argued that his case fell under the exception to the general rule i.e. that an affirmative act by the principal employer creates liability because the principal employer supplied the asbestos-containing products.
  - The court rejected plaintiff's argument.
  - Plaintiff's theories were all based on omission and not affirmative acts i.e. its failure to warn, investigate, or test for asbestos.
  - The dissent commented on the trend, stating "it is notable that we have yet to explain what an affirmative act is; rather, we have only explained what an affirmative act is not."
  - A full analysis of the case can be found in the Wisconsin Lawyer. See Vo. 84 No. 5, Mark R. Hinkston, Limited Duty to Independent Contractors' Employees, May 2011, <http://www.wisbar.org/>.
- **Kansas**
    - Legislative Update: House bill 2134
    - Amends Kansas' Workers' Compensation statute
    - Effective as of May 15, 2011
    - Law is considered pro-employer as it provides for new compensability defenses - commentators have noted:
      - New definitions for accident, injury, and repetitive trauma
      - New causation defenses i.e. prevailing factor test which heightens the workers' burden of proof in establishing compensability
      - Easier to establish drug/alcohol impairment defense increasing chance for complete denial of benefits
      - Many more defenses and changes
      - Some changes that are pro-worker i.e. increased benefits caps and change in statute of limitations
    - This law legislatively reverses the holding of 4 recent cases you may have heard of → Casco, Bergstrom, Redd, and Mitchell
      - For example Redd set forth the standard rule regarding the 50,000 functional impairment cap, the new law sets new guidelines.
- **Missouri**
    - Recent case decided this year: *City of Kimberling City v. Leo Journagan Const. Co., Inc.*, 337 S.W.3d 48 (Mo. Ct. App. 2011).
    - Deals with the common issue of whether an architect's decision binds an owner

- In the case, the City sued its contractor under breach of contract and warranty theories.
  - Trial court granted SJ in favor of the contractor, citing the agency relationship between the architect and the city, and finding that the city was precluded from claiming the work was unsatisfactory based on the architect's approval of the work.
  - The court of appeals reversed, finding that whether the architect approved of the work was not dispositive, since there was a legitimate dispute over whether the work was done according to specifications; the court cited another case for the proposition that an agent's apparent authority to approve work does not foreclose liability on the party who contracted to work according to specifications, especially when, under the contract, changes must be in writing.
  - Important case because, according to one source, the contract was based on a standard form contract between the owner and contractor - (AIA A201) so this case may have broad applicability.
- **Michigan**
    - A recent case in Michigan, decided this year, possibly opened the door for more liability due to the court's ruling on the applicable statute of limitations
    - Case name: *Miller-Davis Co. v. Ahrens Const., Inc.*, 489 Mich. 355, 802 N.W.2d 33 (2011)
    - It had previously been thought that the statute of limitations applying in construction cases was the statute that provided it was applicable in "an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property,"
    - However, the court determined that statute did not apply to breach of contract claims, even in the construction context.
    - Both limitations statutes at issue in the case were 6 years however one statute provides.
    - The limitations period runs during "the time of occupancy of the completed improvement, use, or acceptance of the improvement," the other provides,
    - The limitations period runs when the "claim first accrues."
    - Commentators have opined that contractors are open to greater liability as a result of this ruling.



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