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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Columbia Division

Joseph F. Anderson, Jr., United States District Judge

Appellate Case No. 2015-000901

John William Machin . . . . . Plaintiff,

v.

Carus Corporation . . . . . Defendant.

BRIEF OF PLAINTIFF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA

OTHER JURISDICTIONS

STATUTES

RULES

MISCELLANEOUS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the jury hear an explanation of why the employer is not part of the instant action?

II. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may a defendant argue the empty chair defense and suggest that Plaintiff's employer is the wrongdoer?

III. In connection with Question 2, if a defendant retains the right to argue the empty chair defense against Plaintiff's employer, may a court instruct the jury that an employer's legal responsibility has been determined by another forum, specifically, the South Carolina Workers' Compensation Commission?

IV. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the Court allow the jury to apportion fault against the non-party employer by placing the name of the employer on the verdict form?

STATEMENT OF THE CASE[1]

John William Machin ("Plaintiff") was employed by the Town of Lexington (the "Town"). On April 13, 2010, Plaintiff inhaled a substantial amount of the chemical, Totalox, while at work. Plaintiff filed a workers' compensation claim against the Town, receiving a modest award.

On August 14, 2013, Plaintiff filed suit in Federal District Court for actual and punitive damages against Carus Corporation ("Carus"), The Andersons, Inc. f/k/a Golden Eagle Products, Inc. ("The Andersons"), Fetter & Sons Farms LLC ("Fetter & Sons"), and Terry J. Weiser. The District Court had diversity jurisdiction over the action because all defendants – Carus, The Andersons, Fetter & Sons and Weiser – were residents of states other than South Carolina.

Fetter & Sons and Weiser settled with Plaintiff on February 6, 2013. Carus and The Andersons proceeded to trial on January 26, 2015. During pre-trial conferences, the parties and the Court discussed extensively what, if anything, the Court would tell the jury regarding Plaintiff's workers' compensation recovery. Ultimately, the Court held that Carus and The Andersons retained the right to make the so-called "empty chair" defense – asserting the Town's negligence was the sole proximate cause of Plaintiff's injuries; however, the parties were not allowed to mention workers' compensation and the Court did not instruct the jury regarding workers' compensation.

Shortly after deliberations began, the jury sent out a question: "Why is the Town

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[1] In the absence of a record or appendix, Plaintiff sets forth the Statement of the Case and the Facts from the recitals in the District Court's Order of Certification.

of Lexington not included in the lawsuit?" In response, and again after a lengthy discussion with the parties, the Court told the jury they were to consider only the evidence presented and the instructions on the applicable law. Specifically, the Court stated:

> I am somewhat constrained in how I respond to that, and I have to say this, and you may not be satisfied with this answer, but this is the answer I'm required to give. You have heard the evidence pertinent to this case. You have heard my instructions on the law applicable to this case. We have given you a verdict form that walks you through the questions that would will (sic) need to answer to properly decide this case. That is all of your concern in this case. That is your – that is your mission in this case is to answer those questions on the verdict form unanimously under the law that I have given you and the evidence that I have allowed you to hear. And that is the length – that is the extent of my response to your question.

The verdict form was another point of disagreement between the parties. Carus and The Andersons requested the Court to place the Town on the verdict form, thereby allowing the jury to apportion fault to the Town. After reviewing S.C. Code Ann. § 15-38-15 (2005), the Court denied the request and only placed the actual defendants on the form, omitting any non-party or dismissed parties. While the jury continued deliberations, Plaintiff took a voluntary nonsuit as to The Andersons. In turn, the Court amended its verdict form for the jury showing only defendant Carus. On February 9, 2015, the jury returned a verdict for Carus.

Plaintiff moved for a new trial upon the grounds that the Court erred in refusing any argument or jury instructions about workers' compensation, and allowing Carus to argue its "empty chair" defense placing responsibility for Plaintiff's injuries on the Town. The District Court held that motion in abeyance pending this Court's rulings on these certified questions.

FACTS

Carus is an international company engaged in the creation and manufacture of chemical products for the municipal and industrial markets with a majority of those chemicals used in environmental applications. Carus uses varieties of the chemical, permanganate, to develop deodorizers that are marketed under a variety of trade names including "Totalox." Totalox is an odor eliminator that provides a food source for the anaerobic bacteria in sewer systems and prevents the anaerobic bacteria from exhibiting or producing hydrogen sulfide.

Totalox has its own Material Safety Data Sheet ("MSDS") to communicate to users the applicable hazards, warnings, recommended personal protective equipment and product information. Totalox is a proprietary chemical whose formula Carus developed, and includes the chemicals sodium permanganate and calcium nitrate. Carus manufactures Totalox through a tolling arrangement, where one party – the toll producer or toller – performs a manufacturing process on the goods of another party, the owner. At the time of Plaintiff's incident, Carus's toller was The Andersons.[2] The Andersons accepted delivery of permanganate from Carus and blended it with its own stock of calcium nitrate and water.

In order to transport sewage from far-reaching areas of its water district, the Town uses more than seventy-five lift stations that pump wastewater from low-lying areas to

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[2] At the time of the incident, Golden Eagle Products, Inc. was a division of New Eezy-Gro, Inc., an Ohio based corporation. Post incident, The Andersons acquired New Eezy-Gro, Inc. in a stock purchase.

higher elevations. To service its growing northeastern edge, in 1999 the Town constructed the Millstream regional station near Twelve Mile Creek. Wastewater is pumped from smaller lift stations to Millstream. Sewage passes through Millstream and into the nearby City of Cayce, home of the Joint Municipal Water & Sewer Commission plant, which provides a single location for water treatment for several Lexington County municipalities.

In 2003 or earlier, the Town contracted with Carus to provide deodorizers for its wastewater system. Initially branded as "ECONOX," the chemicals were delivered by truck in 275-gallon portable totes. Like the MSDS, the totes' labels contained warnings to avoid breathing a mist of the product and recommended the use of a respirator. Each tote had a circular lid on top for venting and a valve on the bottom for dispensing. In the early years of the Millstream station, only a few totes were necessary for deodorization. The totes were situated on a concrete slab surrounded by gravel. The deodorizer was injected into the sewer main by way of a feed pump leading from the totes. As each tote was emptied, another full tote was set in its place.

As the Town grew, so did its use of the Millstream lift station and use of the Cayce-based water treatment plant. The City of Cayce became concerned with odor levels, as well as corrosion caused by the increased sewage from Millstream, and mandated further reduction of hydrogen sulfide. The Cayce mandate compelled both an increase in the Town's deodorizer order and a larger on-site container system at Millstream. In light of this growth and conversations with Town employees, Carus issued a proposal in September 2009 for the installation of a large-volume tank to hold the

Totalox. The Town did not order the tank, opting to design and construct its own in-house system instead.

In late 2009, Town utility employees began work on the in-house container system to hold the increased volume of Totalox – the three totes of Totalox became fifteen totes. The Town used PVC pipes and fittings to tie together fifteen portable totes into the container system for Totalox. The new configuration allowed tanker trucks to deliver Totalox directly to Millstream.[3] Once the tanker attached its line to the tote configuration, chemical would offload and Town employees would close the valve on each tote as it filled. Employees would continue closing valves until all fifteen totes were filled or the tanker was empty.

To facilitate delivery of its products, Carus provided The Andersons with the identity of the Carus customer who was to receive each order of Totalox. On occasion, The Andersons used its own tanker trucks to transport orders of Totalox to Carus customers. On other occasions, The Andersons used third party carriers to transport loads of chemicals from The Andersons' plant to Carus customers.

For the Totalox order delivered on April 13, 2010, purportedly one day earlier than scheduled, The Andersons retained Fetter & Sons to transport the chemical. David Patton, a Town employee, was usually on site at the Millstream lift station when Totalox deliveries were made. On April 13, 2010, Patton was ill and Adrian Taylor, another Town employee, was on vacation, so Plaintiff was assigned by the utility department to attend

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[3] Before the container configuration, TOTALOX was delivered in the individual portable totes to the central utility office, and Town employees would truck the totes to the lift station.

the delivery and off-loading.

The Fetter & Sons driver, Weiser, arrived at Millstream and began off-loading. Plaintiff was joined at the lift station by three other Town employees. Plaintiff and his coworkers moved regularly among the totes to close valves as the system filled. Plaintiff was not wearing a respirator during the offloading of Totalox. After the totes had filled, Weiser cleared his line with a charge of air. Under pressure, one or more of the tote valves broke and a significant amount of Totalox was released into the air. Plaintiff was exposed to the chemical. Plaintiff alleged that such exposure to Totalox has caused him to suffer from reactive airways syndrome, which is known as chemically induced asthma or obstructive lung disease.

NATURE OF THE CONTROVERSY

Plaintiff's position is that, under South Carolina statutory law, only the *amount of compensation* paid by an employer under workers' compensation is declared to be inadmissible evidence. S.C. Code Ann. § 42-1-570 (1976). Thus, it is Plaintiff's position that issues involving workers' compensation are admissible, and only the *amount of compensation* is inadmissible.

The Plaintiff relies heavily on this Court's decision in *Powers v. Temple*. In *Powers*, the trial court granted plaintiff's request for a new trial when the defendant mentioned the amount of workers' compensation paid, and the plaintiff was not allowed to counter that the money was all paid to the insurance carrier and not the plaintiff. 250 S.C. 149, 165, 156 S.E.2d 759, 766–67 (1967). The *Powers* Court stated "[u]pon such

new trial, both the matter of Workmen's Compensation and the covenant not to sue should be withheld from the jury *in the absence of any factual issue arising thereabout for its determination.*" *Id.* (Emphasis added).

The Plaintiff maintained that Carus brought into question, via the "empty chair" defense, the Town's alleged negligence by offering evidence that the Town was responsible for Plaintiff's injuries for:

(1) using an inadequate storage system to store and off-load Totalox;

(2) not informing Plaintiff of the hazards associated with Totalox; and

(3) not providing MSDS-based training regarding the safe handling of the product as required by the Occupational Safety & Health Administration's ("OSHA").

Consequently, the Plaintiff argued that fairness necessitated explaining to the jury why he did not sue the Town, the nature of workers' compensation, and the limits on recovery under the South Carolina Workers' Compensation Act. The Plaintiff believes the jury delivered a defense verdict because the jurors reasoned that Plaintiff already received full compensation for his injuries via workers' compensation.

The Plaintiff also argued that the District Court also erred by allowing Carus to point blame at the Town. In short, Plaintiff argued that under S.C. Code Ann. § 15-38-15(D)[4], the Town could never be a "potential tortfeasor" because workers'

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[4] That code section provides "(D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code Ann. § 15-38-15 (D) (2005).

compensation arises out of contract created by law and not out of any theory of tort.[5] Accordingly, Plaintiff requested that the Court prohibit any discussion about the Town's negligence, or at a minimum, explain to the jury that it may not assess fault against any employer, as the employer's legal responsibility has been determined in another forum, specifically, the South Carolina Workers' Compensation Commission.

In contrast, Carus argued that evidence bearing on the Town's conduct and legal duties under the OSHA Hazard Communication regulations were directly relevant to its claims and defenses. Carus cited numerous cases from other jurisdictions that allow defendants to argue the empty chair defense notwithstanding disallowing apportionment of fault to immune, non-party employers. Accordingly, Carus asserted that the District Court did not err in allowing Carus to argue the empty chair defense, or charging the jury regarding the sophisticated user doctrine, intervening/superseding cause, and the Town's hazard communication and training obligations under OSHA. Moreover, Carus argued that the exclusivity of the workers' compensation remedy, Plaintiff's receipt of workers' compensation benefits, and the no-fault workers' compensation framework were wholly collateral and irrelevant to the only issue before the jury – whether negligence on Carus's part proximately caused Plaintiff's injury. It was Carus's position that any jury charge or explanation that addressed workers' compensation would confuse, mislead, or distract the jury from the real issue of the case.

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[5] To support its position, Plaintiff cited *Indemnity Ins. Co. of North America v. Odom*, 237 S.C. 167, 176, 116 S.E.2d 22, 27 (1960) and *Gordon v. Phillips Utilities Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005).

ARGUMENTS

SUMMARY OF ARGUMENTS

The manner in which this case was tried is fundamentally unfair. Plaintiff may not sue the Town, his employer, under the exclusive remedy provision of the Workers' Compensation Act. S.C. Code Ann. § 42-1-540 (1985). *See Poch v. Bayshore Concrete Products*, 405 S.C. 359, 747 S.E.2d 757 (2013) (the Act is the exclusive remedy against an employer for work-related injury). Thus, the Town is not an available "potential tortfeasor" for purposes of joint and several liability under Section 15-38-15 of the Contribution Among Joint Tortfeasor's Act. Therefore, Carus should not have been permitted to argue the "empty chair" defense.

Further, the recovery available to Plaintiff under the Workers' Compensation Act is limited as part of the societal policy decisions that underlie that Act. *Mendenhall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 738 S.E.2d 251 (2013). For example, an employer gives up various fault-based defenses, *Parker v. Williams and Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980), while a claimant gives up several things: (1) there is no recovery for several elements of damages recoverable in tort, such as pain or suffering, *Breeden v. TCW, Inc.*, 355 S.C. 112, 584 S.E.2d 379 (2003); (2) weekly compensation is capped at 2/3 of the average weekly wage, S.C. Code Ann. § 42-9-20, and (3) compensation is further capped by an artificial maximum compensation rate set by the Commission for the prior fiscal year. *Id.*; S.C. Code Ann. § 42-1-50 (2005).[6] In addition, the workers' compensation carrier has a statutory lien on any recovery from third party

[6] *See* http://www.wcc.sc.gov/welcomeandoverview/compensationrates/Pages/default.aspx

defendants so that benefits paid must be reimbursed, at least to some extent reflecting the different elements of recovery in workers' compensation and in tort. *Breeden v. TCW, Inc.*

Permitting a non-employer at-fault party to argue the "empty chair" defense creates a false impression in the minds of the jurors that Plaintiff has already been made whole through workers' compensation recovery. Fairness dictates that either the defendant be precluded from deflecting fault onto the employer, who is immune from suit, or, alternatively, that the court be required to explain the nature of workers' compensation recovery, why the employer is not part of the action, and that the employer's responsibility has been determined in another forum, the Workers' Compensation Commission.

Lastly, the court should not allow the jury to apportion fault against the non-party employer by placing that employer's name on the verdict form. The employer is not a "potential tortfeasor" who the jury may find contributed to the alleged injury or damages, or who the jury may find to be liable for any of Plaintiff's damages. S.C. Code Ann. § 15-38-15(D) (2005). And the court should not permit such a finding by placing the name of the non-party employer on the verdict form.

Plaintiff will address each question as stated and in the order the District Court presented to this Court and in the order granting the request for certification.

I. Under South Carolina Law, When a Plaintiff Seeks Recovery from a Person, Other than His Employer, for an Injury Sustained on the Job, It is Permissible for the Jury to Hear an Explanation of Why the Employer Is Not Part of the Instant Action

When a plaintiff who is injured on the job seeks recovery from a person other than his employer, the jury should be permitted to hear an explanation of why the employer is not part of the action. Under South Carolina law, only the *amount of compensation* paid by an employer under workers' compensation is declared to be inadmissible evidence in a third-party action. Other issues involving workers' compensation are, however, admissible. Hence the Court should answer Question 1 in the affirmative.

The Workers' Compensation Act provides:

> The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages.

S.C. Code Ann. § 42-1-570 (1976). This section bars evidence that a claimant has already received some compensation for his injury. *Reiland v. Southland Equipment Service*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998) (citing *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967)), *disagreed with on other grounds Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005).

In *Powers*, the trial court granted plaintiff's request for a new trial when the defendant mentioned the amount of workers' compensation paid, and the plaintiff was not allowed to counter that the money was all paid to the insurance carrier and not the plaintiff. 250 S.C. at 165, 156 S.E.2d at 766–67. The *Powers* Court stated "[u]pon such new trial, both the matter of Workmen's Compensation and the covenant not to sue

should be withheld from the jury *in the absence of any factual issue arising thereabout for its determination.*" *Id.* (emphasis added).

Thus, the exclusion set forth under the statute is limited to evidence of the "amount of compensation" either paid by the employer or to which the claimant is entitled. As the Court of Appeals noted in *Reiland*, the *Powers* Court held "the primary purpose and intent of the rule is to prevent a third party from injecting workers' compensation into a case because the jury should decide the full amount of damages suffered by the employee on account of his injury, notwithstanding any workers' compensation award." *Reiland*, at 638, 500 S.E.2d at 156. *Accord Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (1985) (the purpose of section 42-1-570 is to prevent the liable third party from injecting workers' compensation into a case for the *sole* purpose of attempting to reduce his liability; if the evidence is offered for other purposes (such as its relevancy to the credibility of witnesses), it is admissible).

In this case, the jury sent a question specifically asking, "Why is the Town of Lexington not included in the lawsuit?" As noted above, the District Court told the jury they were to consider only the evidence presented and the instructions on the applicable law. Specifically, the Court stated:

> I am somewhat constrained in how I respond to that, and I have to say this, and you may not be satisfied with this answer, but this is the answer I'm required to give. You have heard the evidence pertinent to this case. You have heard my instructions on the law applicable to this case. We have given you a verdict form that walks you through the questions that would will (sic) need to answer to properly decide this case. That is all of your concern in this case. That is your—that is your mission in this case is to answer those questions on the verdict form unanimously under the law that I have given you and the evidence that I have allowed you to hear.

And that is the length – that is the extent of my response to your question. (Order for Certification, pp. 5-6 and n. 3). This instruction left the jury to speculate about why the Town was not in the case, including speculation about whether Plaintiff had already been fully compensated for his injuries.

Section 42-1-570 and *Powers v. Temple* permitted the District Court to explain to the jury that the Town's responsibility for Plaintiff's injuries is subject to adjudication before the Workers' Compensation Commission, that the Workers' Compensation Act governs benefits recoverable thereunder, that the elements of recovery under the Workers' Compensation Act are more restricted than those recoverable in tort, and that the Town would have a right of subrogation against Plaintiff to recover amounts it had paid under the Workers' Compensation Act. The Court would then advise the jury to determine whether the defendant was liable at all for Plaintiff's injury and, if so, to determine the total amount of damages. Any repayment to the Town through subrogation would be handled by the Court.

This explanation would not have violated Section 42-1-570, which is concerned with admitting evidence about the *amount* of compensation paid or due on a claim. And *Powers* would permit the explanation because the jury's question created a "factual issue arising thereabout for [the jury's] determination."*Powers*, 250 S.C. at 165, 156 S.E.2d at 766–67.

Accordingly, the Court should answer Question 1 in the affirmative.

II. Under South Carolina Law, When a Plaintiff Seeks Recovery from a Person, Other than His Employer, for an Injury Sustained on the Job, a Defendant May Not Argue the "Empty Chair" Defense and Suggest That Plaintiff's Employer Is the Wrongdoer

The "empty-chair" defense is a "trial tactic in a multi-party case whereby one defendant attempts to put all the fault on a defendant who plea-bargained or settled before trial or on a person who was neither charged nor named as a party." Bryan A. Garner, *Black's Law Dictionary*, 484 (9th Ed. 2009). This defense, however, is not available to suggest a plaintiff's employer is the wrongdoer where the plaintiff's injury occurred on the job. Accordingly, this Court should answer the Question 2 in the negative.

In South Carolina, an employee injured on the job may not sue his employer under the exclusive remedy provision of the Workers' Compensation Act. S.C. Code Ann. § 42-1-540 (1985); *Poch v. Bayshore Concrete Products*, 405 S.C. 359, 747 S.E.2d 757 (2013) (the Act is the exclusive remedy against an employer for work-related injury). Thus, the employer is not an available "potential tortfeasor" for purposes of joint and several liability under Section 15-38-15 of the South Carolina Contribution Among Joint Tortfeasor's Act (SCCAJTA).

The 2005 amendment to the SCCAJTA provides:

> A defendant shall retain the right to assert that another *potential tortfeasor*, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

S.C. Code Ann. § 15-38-15(D) (2005) (emphasis added). An employer is not considered a "tortfeasor" for on-the-job injuries sustained by an employee for purposes of contribution statutes. *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005)

(concluding that because under the Workers' Compensation Act employer could not be liable in tort to employee, employer was not "jointly and severally liable in tort" for employee's injury and thus there could be no right of contribution under the Contribution Among Joint Tortfeasors Act for the third-party defendant).

In fact, the *Gordon* Court expressly stated "[t]he third party defendant and the employer are *not* joint tortfeasors." *Id.* at 407, 608 S.E.2d at 427 (emphasis added). *Accord Ramos v. Browning Ferris Ind. of South Jersey*, 510 A.2d 1152 (N.J. 1986) (Supreme Court of New Jersey held employer was not a "joint tortfeasor" and, therefore, was not subject to contribution liability under the Comparative Negligence Act; hence, the trial court did not err in refusing to permit jury to assess employer's negligence along with third-party defendant's negligence against plaintiff's negligence in comparative fault system). *See also Romig v. Baker Hi-Way Express, Inc.*, 5th Dist. No. 2011AP–02–0008, 2012-Ohio-321 (Ct. App. 2012) (2012 WL 258563)[7], *review denied* 968 N.E.2d 491 (Table) (2012) (Ohio Court of Appeals held that because workers' compensation is the exclusive remedy in Ohio, there is no such thing as "employer negligence," and a third-party tortfeasor cannot raise the "empty chair" defense as to an employer for negligent acts).

Because the Town, as Plaintiff's employer, was not a "potential tortfeasor," Section 15-38-15(D) did not permit Carus to argue the "empty chair defense" and suggest the Town was the wrongdoer. This is also so because the Town was not a "party" or a

[7] Rep. Op. Rule 3.4, Ohio Sup. Ct. Rules, permits citation as legal authority of all opinions of the Ohio Court of Appeals issued after May 1, 2002, "without regard to whether the opinion was published or in what form it was published."

"defendant" in the case, nor could it have been under the exclusive remedy provision of the Workers' Compensation Act.

Accordingly, this Court should answer Question 2 in the negative.

III. In Connection with Question 2, If a Defendant Retains the Right to Argue the "Empty Chair" Defense Against Plaintiff's Employer, a Court May Instruct the Jury That an Employer's Legal Responsibility Has Been Determined by Another Forum, Specifically, the South Carolina Workers' Compensation Commission

Plaintiff contends this Court should answer Question 2 in the negative and should therefore find the Court need not answer Question 3.

However, if the Court answers Question 2 in the affirmative and permits the third-party defendant to assert the "empty chair" defense against a plaintiff's employer, the trial court should be permitted to then instruct the jury that the employer's legal responsibility has been determined by another forum, namely, the Workers' Compensation Commission. Accordingly, if this Court answers Question 2 in the affirmative, the Court should then answer Question 3 in the affirmative.

While this Court has never directly addressed the issue of the negligence of an employer during a third-party tort action, the Tennessee Supreme Court has provided some guidance in how this issue may be treated. In *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79 (Tenn. 1996), the Tennessee Supreme Court dealt with an interlocutory appeal on the issue of whether a defendant in an action for damages for personal injuries was allowed to plead as an affirmative defense that the plaintiff's employer caused or contributed to the plaintiff's injuries. The Court stated "[l]imiting the parties to whom

fault may be attributed to those subject to liability, accomplishes the policy objectives of fairness and efficiency." *Id.* at 83. The Court held that "the plaintiff's right to recover *on allegations of negligence and strict liability is determined without reference to the employer's conduct*." *Id.* at 84 (emphasis added).

The Tennessee Supreme Court thereafter addressed the issue in *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252 (Tenn. 1997). In *Snyder*, the Court was asked to answer the following certified question:

> Whether the products liability defendants in a suit for personal injuries based on allegations of negligence and strict liability in tort may introduce evidence at trial that the plaintiff's employer's alteration, change, improper maintenance, or abnormal use of the defendants' product proximately caused or contributed to the plaintiff's injuries.

Id. at 253. The Court determined that a jury "may consider all evidence relevant to the actions of the employer with respect to the defendant's product in assessing whether the plaintiff has met his burden of establishing the elements necessary to recover against defendants." *Id.* However, the Court went on to say that "the jury may not assess fault against the employer." *Id.* The Court further stated "the employer cannot be found to be the proximate, or legal, cause of the plaintiff's injuries because the employer is immune from tort liability under Tenn. Code Ann. § 50-6-108(a)." *Id.* at 256 (Tenn. Code Ann. § 50-6-108(a) is the exclusive remedy rule under Tennessee's Workers' Compensation Act).

The *Snyder* Court concluded:

> The defendants may not . . . ask the jury to assign fault to the employer. That is, the defendants may not take the legal position that the employer's actions were the legal cause of the plaintiff's injuries. The jury

> should be instructed that it may consider the actions of the employer only in assessing whether the plaintiff has met his burden of establishing the elements necessary to recover against the defendants.

Id. at 257. The Court added "the jury should be instructed that it may not, in making that determination, assess fault against the employer. Finally, the trial judge should give an instruction that lets the jury know that the employer's legal responsibility will be determined at a later time or has already been determined in another forum." *Id.*

Tennessee's Supreme Court has revisited *Ridings* and *Snyder* on several occasions and each time adhered to the rule that defendants cannot apportion fault to a plaintiff's employer, but the defendants "must be permitted to argue that an employer was a cause in fact to the plaintiff's injuries." *Troup v. Fischer Steel Corp.*, 236 S.W.3d 143, 146 (Tenn. 2007). *See also Carroll v. Whitney*, 29 S.W.3d 14, 19 (Tenn. 2000) (noting *Snyder* and *Ridings* were not overruled and "they remain uniquely applicable with regard to the allocation of fault to employers in workers' compensation cases. In such cases, an employer's liability is governed exclusively by the Workers' Compensation Law.").

Other courts are in accord. See *Reynolds v. United States*, 929 P.2d 844 (Mont. 1996) (immune employer could not be apportioned liability or negligence as nonparty); *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex.1983) (negligence of employer could not be considered for the purpose of reducing the damages in employee's action against third-party tortfeasor); *Hamme v. Dreis & Krump Manufacturing Company*, 716 F.2d 152 (3rd Cir.1982) (Pennsylvania law does not allow the consideration of an employer's negligence for the purpose of allocating fault under the comparative negligence statute).

Thus, if the defendant retains the right to argue the "empty chair" defense against a plaintiff's employer, the trial court should be permitted to instruct the jury that the employer's legal responsibility will be or has been determined by another forum, specifically, the South Carolina Workers' Compensation Commission. Furthermore, the jury should be instructed not to assign any portion of fault or liability to the employer when determining defendant's liability for plaintiff's injuries.

Accordingly, *if* the Court answers Question 2 in the affirmative, the Court should then answer Question 3 in the affirmative as well. If the Court answers Question 2 in the negative (and it should), then the Court would not need to answer Question 3 at all.

IV. Under South Carolina Law, When a Plaintiff Seeks Recovery from a Person, Other than His Employer, for an Injury Sustained on the Job, the Court May Not Allow the Jury to Apportion Fault Against the Non-party Employer by Placing the Name of the Employer on the Verdict Form

As discussed above, an employer is not considered a "joint tortfeasor" or "potential tortfeasor" for purposes of claims involving on-the-job injuries. Instead, the plaintiff's only remedy is to pursue workers' compensation benefits. *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005) (concluding that because under the Workers' Compensation Act employer could not be liable in tort to employee, employer was not "jointly and severally liable in tort" for employee's injury and thus there could be no right of contribution under the Contribution Among Joint Tortfeasors Act for the third-party defendant; Court expressly stated "[t]he third party defendant and the employer are *not* joint tortfeasors."). Because an employer is not a

potential tortfeasor and has no tort liability for on-the-job injuries to an employee, the trial court should not allow the jury to apportion fault against the non-party employer by placing the employer's name on the verdict form.

Additionally, workers' compensation is a "no fault" system, and an employer may incur responsibility for paying benefits without there being any fault. *Nicholson v. S.C. Dept. of Soc. Servs.*, 411 S.C. 381, 390, 769 S.E.2d 1, 5 (2015) (Court noted the "Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation," and added "[r]equiring an employee to prove a fall was the 'fault' of the employer in creating a danger or hazard is unfaithful to the principles underlying the creation of workers' compensation and turns the entire system on its head."). Placing the employer on the verdict form would permit the jury to impermissibly shift blame onto a person or entity who is required to pay benefits regardless of fault.

Furthermore, because the elements of damages recoverable in tort are different from the benefits available under the Workers' Compensation Act, *Breeden v. TCW, Inc.*, the jury should not be permitted to apportion liability for damages or losses among the employer and any third parties as if the elements of recovery were identical.

Accordingly, the Court should answer Question 4 in the negative.

CONCLUSION

For the reasons stated, Plaintiff requests that the Court answer Question I in the affirmative and Question II in the negative. If the Court answers Question II in the affirmative, the Court should answer Question III in the affirmative as well. Finally, the Court should answer Question IV in the negative.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, Jr., United States District Judge

Appellate Case No. 2015-000901

John William Machin ..... Plaintiff,

v.

Carus Corporation ..... Defendant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Defendant with a copy of the *Plaintiff's Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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