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

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S.C. Supreme Court

John William Machin,
. . . . . Plaintiff,

v.

Carus Corporation,
. . . . . Defendant.

FINAL BRIEF OF DEFENDANT CARUS CORPORATION

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2. 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 against Plaintiff's employer?

3. 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?

4. 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

Facts Currently Before the Court

Although the certified questions before this Court are largely legal, the case's factual background is useful in providing this Court context in this case and others likely to follow it. This is a certified questions case from the United States District Court, Columbia Division. In the underlying federal court matter, Plaintiff John Machin was an employee of the Town of Lexington ("the Town") at all relevant times. Defendant Carus Corporation ("Carus") is an Illinois corporation engaged in the creation and manufacture of chemical products used in environmental applications for municipal and industrial markets. Among its chemical products, Carus manufactures TOTALOX, a deodorizing chemical that provides a food source for the anaerobic bacteria in sewer systems and prevents the bacteria from producing or exhibiting hydrogen sulfide.

Carus manufactures TOTALOX through a tolling arrangement, where one party, the toller, performs the manufacturing process on the goods of another party, the owner. Relevant here, Carus's toller was The Andersons.[1] The Andersons accepted delivery of permanganate from Carus and blended it with its own stock of calcium nitrate and water. In 2003 or earlier, the Town contracted with Carus to provide deodorizers for its wastewater system. The chemicals, initially branded as ECONOX and later labeled TOTALOX, were delivered by truck in 275-gallon portable totes. The totes' labels contained warnings to avoid breathing a mist of the product, and recommended the use of a respirator. The deodorizer was injected in the sewer main by way of a feed pump leading from the totes. Material Safety Data Sheets were also provided to the Town, containing similar warnings and recommendations.

Due to growth, the Town was forced to increase its deodorizer order and create a larger on-site container system. At the Town's request, 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 from Carus, instead opting to design and construct its own, in-house system without Carus's input. Thus, in late 2009, the Town utility employees began construction on the in-house container system to accommodate the increased volume of TOTALOX. The Town used PVC pipes and fittings to tie together fifteen portable totes into the container system, which allowed tanker trucks to deliver TOTALOX directly to the site. Once the tanker attached its line to the tote configuration, chemicals would offload and Town employees would close the valve on each tote as it was filled. Town employees would continue closing valves until all fifteen totes were filled or the tanker was empty.

[1] The Andersons were also named defendants in this action.

The Town's employees devised this improvised TOTALOX storage system of interconnected totes. The Town did not consult Carus regarding the design of this storage system, and Carus had no role in determining the Town's procedures governing the tote system, the supervision of the Town's employees operating the system, or the training the Town's employees received with respect to the offloading of TOTALOX into the tote system.

For the TOTALOX order delivered on April 13, 2010, one day earlier than scheduled, The Andersons retained Fetter & Sons to transport the chemical to the site. The Town employee typically on site for TOTALOX deliveries was ill and another was on vacation; Plaintiff therefore was assigned to attend the delivery and off-loading. Plaintiff was joined at the lift station by two other Town employees when the truck arrived and began off-loading. Plaintiff and the other Town employees moved regularly among the totes to close valves as the systems filled. Plaintiff was not wearing a respirator during the off-loading of the TOTALOX. After the totes had filled, the truck driver cleared his line with a charge of air. Under pressure, one or more of the tote valves broke and several gallons of TOTALOX were released into the air in the form of a mist. Plaintiff was exposed to TOTALOX, and alleged such exposure caused him to suffer from reactive airways syndrome. At trial, Carus presented evidence that Plaintiff's exposure was insufficient to have caused any permanent respiratory injury, that his co-workers also present were not injured, and that no one had previously claimed such an injury from TOTALOX exposure before Plaintiff.

Carus presented evidence at trial that it provided the Town with material safety data sheets ("MSDS"), on-product warning labels, and an informational data sheet—all

of which warned of the dangers of mist and instructed that users should wear appropriate personal protective equipment, including respirators, in situations where exposure to mist could occur.[2] Both the Town and Plaintiff ignored each of these warnings, as well as MSDS-based training which Carus offered to Town personnel.[3]

The jury returned a defense verdict in favor of Carus. Plaintiff then filed a Motion for New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure, asserting the court erred in refusing any testimony or reference from Plaintiff about workers' compensation and permitting Carus to argue the empty chair defense with respect to the Town. Carus filed a response in opposition to Plaintiff's motion. The district court did not rule on Plaintiff's motion, instead certifying the following questions to this Court:[4]

1. 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?

2. 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 against Plaintiff's employer?

3. 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?

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[2]Town officials understood the Town should rely on the MSDS in determining safe handling and storage procedures for TOTALOX. (Tr. of Jan. 28, 2015 Cross-Examination of Ray Freivolt at 6-10.)

[3]Although Plaintiff knew where the MSDS were kept, he never looked at the notebook and never read the TOTALOX MSDS prior to his accident. (Pl. Dep. at 61-62, 71-72.) Although Plaintiff saw the warning labels on the totes, he made no attempt to heed those warnings or to follow the directions on the label. (*Id.* at 75-76.)

[4] Carus takes issue with the district court's characterization of these questions being "probably most determinative" of the motion for a new trial. Carus contends and the evidence below demonstrates that Carus asserted numerous defenses unrelated to the employer, including most importantly that Carus gave adequate warnings, did not breach any duty owed and that Plaintiff failed to establish causation with respect to his alleged injuries.

4. 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?

Other Facts

As noted above, the Certified Questions before the Court are purely matters of law, which can be decided without reference to facts. However, in his brief, Plaintiff has injected facts and assumptions not presently before the Court. Therefore, in response to Plaintiff's brief, Carus adds the following context in order to provide the Court with the entire picture of the circumstances which occurred in the trial of this matter.[5]

Despite Plaintiff's comments to the contrary, there is simply no evidence in the record supporting the notion that Carus injected workers' compensation into the case. In fact, Carus opposed such injection and the parties and court agreed that workers' compensation would not be mentioned. However, as the transcripts demonstrate, it was Plaintiff who injected workers' compensation into the jury's mind, by provoking the jury to ask the question about the Town's absence.[6]

In his brief, Plaintiff states that he "believes the jury delivered a defense verdict because the jurors reasoned that Plaintiff already received full compensation for his injuries via workers' compensation." (Pl. Br. 8). Plaintiff further states that

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[5] Pursuant to Rule 244(b) of the South Carolina Appellate Court Rules, Carus has moved to include in the record the following documents, which provide the complete and appropriate context of the underlying trial issues: Transcript of February 6, 2015 Charge Conference (ECF No. 249); Plaintiff's Motion to Exclude (ECF No. 150); Defendant's Response to Motion to Exclude (ECF No. 152); Transcript of Counsel for Plaintiff's Closing Argument (ECF No. 252); Transcript of Conference Between Judge and Counsel After First Jury Question Sent (ECF No. 253); Final Verdict Form as Completed by Jury (ECF No. 243); Plaintiff's Motion in Limine filed January 13, 2015 (ECF No. 184). Carus has complied with Rule 244(b) by providing notice to the certifying court.

[6] While Plaintiff cites to the jury's question asking "Why is the Town of Lexington not included in the lawsuit?," Plaintiff fails to cite counsel's closing argument, which stated several times that he was prohibited from explaining why the Town was not sued but encouraging the jury to ask the court why. These comments certainly were the catalyst to the jury's question, despite Plaintiff's failure to acknowledge as much.

"[p]ermitting 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." (Pl. Br. 11). However, these statements are not supported by the evidence or record in this matter. Rather, they are assumptions created by Plaintiff in an effort to excuse the defense verdict granted to Carus. As the record bears out, there are multiple reasons as to why the jury found in favor of Carus. As the verdict demonstrates, Carus presented sufficient evidence regarding the sophisticated user doctrine, warning labels, and causation issues, such that the jury found Carus was not liable for Plaintiff's injuries. On the verdict form, when asked whether they found Carus to have been negligent, the jurors checked "No." It is pure speculation to assert that the jury found in favor of Carus based upon workers' compensation considerations because workers' compensation was, in fact, never mentioned during the trial.

Plaintiff cannot have it both ways. It is asking this Court to find that the jury was influenced to find in favor of Carus because there was no mention of workers' compensation, while relying on case law which held that the jury was influenced when there *was* an injection of workers' compensation into the trial. Because there was no mention of workers' compensation at trial, there can be no reasonable finding that the jury reasoned Plaintiff was fully compensated by workers' compensation. Plaintiff's request for a new trial and the resulting certified questions before this Court rest upon Plaintiff's speculations and conjecture about the jury's findings.

ARGUMENT

For the reasons set forth in this brief, the Certified Questions should be answered as outlined below.

I. Key Policy Considerations Compel this Court to Provide Answers to the Certified Questions that Place Non-party Employers on Equal Footing with All Other Non-Party Entities.

There are several important, overarching concepts that weigh heavily on the determination of the answers to the Certified Questions.

A. Preserving the Integrity of the Workers Compensation Scheme

The Workers' Compensation Act (Act) is a comprehensive scheme created "to provide compensation to employees injured by accidents arising out of and in the course of their employment." *Mendenall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 562, 738 S.E.2d 251, 253 (2013) (quoting *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 69–70, 267 S.E.2d 524, 526 (1980)). As this Court has stated:

> The concept of workers' compensation is 'founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer-employee relationship and of substituting therefor the principle of liability on the part of the employer, *regardless of fault*, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of employment.'

Id. (quoting *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 69–70, 267 S.E.2d 524, 526 (1980) (emphasis added)). Under the scheme, "[t]he employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee." *Id.* "This quid pro quo approach to [workers'] compensation has worked to the advantage of society as well as the employee and the employer." *Id.*

The Act's exclusivity doctrine, codified in S.C. Code Ann. Section 42-1-540 (2004), forbids an employee from suing the employer in civil court regardless of how grossly negligent the employer may have been in causing the employee's injuries. Yet, certainly the workers' compensation system was created, in large part, because employers often bear some responsibility for a worker's occupational injury. As noted by this Court in *Mendenall*, the system reflects a legislative compromise between an injured worker's interest in speedily obtaining compensation and employers' interest in avoiding tort liability—not fault. The exclusive-remedy provision grants employers immunity from suit even if the employer is actually at fault for the employee's injuries or damages.

The United States Supreme Court has explained that "[e]mployers relinquished their defenses to tort actions in exchange for limited and predictable liability[,]" and in exchange, "[e]mployees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 461 U.S. 624, 636 (1983) (recognizing that the system was not a simple remedial statute intended for the benefit of works, but a system designed to strike a balance between the concerns of employees and employers). Logic dictates that if employers were never at fault for occupational injuries, there would have been no leverage for the legislative compromise which imposes workers' compensation liability on employers.

B. Maintaining the Distinction Between True Immunity and Nominal Immunity

In addition to the purpose of the workers' compensation system, the issue of immunity is at the center of the certified questions presented in this appeal. There are

two concepts of immunity: true immunity, where a party for public policy reasons cannot be sued, and nominal immunity, where a party owes no duty to the plaintiff or has not otherwise engaged in tortious conduct. When determining whether *fault*, not liability, can be allocated to an immune nonparty, the distinction between the two is critical. Nonparties who are immune from suit for public policy reasons are shielded from liability, even though they may be at fault. On the other hand, nonparties who have not engaged in tortious conduct or who owe no duty to the plaintiff are excluded from allocation of fault, but only because these nominally immune nonparties cannot have "contributed to the alleged injury or damages." S.C. Code Ann. § 15-38-15(D).

The immunity granted by South Carolina's Workers' Compensation Act is true immunity. Thus, the workers' compensation exclusive-remedy provisions grant employers immunity from suit even if the employer is actually at fault for the employee's injuries or damages. However, true immunity from suit does not mean that an entity is free from fault, it simply means that the party cannot be sued. *Pinnacle Bank v. Villa*, 100 P.3d 1287, 1293 (Wyo. 2004). Indeed,

> [True immunity] is a legal shield between a tortfeasor and liability for damages flowing from the tort. The tortfeasor may have committed a negligent act so that duty, breach of duty, causation and damages may be proven by a preponderance of the evidence; but for public policy reasons, a recovery of damages is barred.

Charles R. Adams III, Ga. Law of Torts § 21:1 (2013-2014 ed).

On the other hand, nominal immunity arises where a class of persons or entities owes no duty or has been determined not to be liable for a specific class of conduct. Because a nominally immune party cannot be deemed negligent, fault cannot logically be allocated to a nominally immune party. Thus, an important distinction is to be made

between workers' compensation true immunity and nominal immunity. *See Richards v. Owens-Illinois, Inc.*, 928 P.2d 1181 (Cal. 1997) (distinguishing workers' compensation immunity, which "does not imply that a negligent employer lacks 'fault' or is not a 'tortfeasor,'" and statutory immunity provided to tobacco companies, which derives from a legislative judgment that tobacco companies "have no 'fault' or responsibility" because the companies "simply commit[] no tort against knowing and voluntary smokers by making cigarettes available for their use").

South Carolina's allocation statute requires consideration of the actions and/or fault of truly immune actors, including employers, because true immunity does not prevent a nonparty from being at fault.[7] *See* S.C. Code Ann. §15-38-15(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.)." Furthermore, the South Carolina workers' compensation statutes and cases interpreting the same demonstrate South Carolina's recognition that an employer could be at fault for an employee's injuries. An employer's or co-employer's intentional tort against the employee removes the injury or damages from the exclusivity of the workers' compensation scheme. *See Edens v. Bellini*, 359 S.C. 433, 445, 597 S.E.2d 863, 869 (Ct. App. 2004) (recognizing an exception to the exclusivity provision exists where the injury is not accidental but rather results from the intentional act of the employer or its alter ego). Certainly, this exception would be unnecessary and superfluous if the legislature and courts believed that an employer could not be at fault for an employee's injuries. Moreover, S.C. Code Ann. Section 42-1-580

[7] The statute functions as it is supposed to, for the requirement that the nonparty be alleged to have contributed to a plaintiff's alleged injuries or damages prevents allocation of fault to an immune nonparty who owes no duty or is not as fault, i.e., a nominally immune nonparty.

contemplates an employer's negligence. *See* S.C. Code Ann. § 42-1-580 ("When the facts are such at the time of the injury that a third person would have the right, upon payment of any recovery against him, to enforce contribution or indemnity from the employer, any recovery by the employee against the third person shall be reduced by the amount of such contribution of indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied.").

Plaintiff's positions undermine the integrity of the workers' compensation system, the interplay between the system and the courts of common pleas, and increase the possibility of a double recovery from both the employer and the third-party defendant. On the other hand, permitting reference to the employer's acts and omissions under the empty chair defense and permitting the jury to consider the party-defendant's percentage of fault in light of the non-party employer's promotes the policy of the current joint and several laws and removes a plaintiff's ability to obtain a double recovery.

C. Third-Party Product Manufacturers are Entitled to the Same Trial and Defenses as all Other Defendants

Advancing Plaintiff's positions, including explaining to the jury workers' compensation issues and denying a defendant the right to assert an empty chair defense also creates disparate treatment issues. Indeed, often times product liability cases that advance to trial involve use of products as part of a person's employment and the manufacturer has to assert, as a part of its defense, the sophisticated user doctrine and/or comparative negligence of the user. More often than not, in such situations, the employer of the plaintiff is not an individual or small operation, but rather a sophisticated user with sophisticated and trained employees, like the Town. By prohibiting the manufacturer of the used product from arguing, in essence, that the employer and the

plaintiff knew better or deviated from the directions deprives manufacturing defendants of their ability to assert a complete defense to the allegations of its own negligence.

In any other scenario involving an immune, non-party entity or person, a defendant would be able to assert the empty chair defense, without an explanation as to the potential tortfeasor's absence or liability. If Plaintiff's position is correct, product manufacturers would be placed at an extreme disadvantage in asserting their complete defenses, and subject to different treatment than any other defendants who are sued in the court of common pleas. The defenses of sophisticated user doctrine, intervening act, and negligence of others, among others, would be unavailable to the defendant-manufacturer if its product was used in an employment context, while such defenses would be available to another defendant. Taken one step further, excluding argument and assessment of nonparty fault would reinstate product manufacturers as targets for disproportionate damages recoveries based upon their financial assets rather than their fault. *See Ocasio v. Fed. Exp. Corp.*, 162 N.H. 436, 442, 33 A.3d 1139, 1144 (2011) (noting that "manufacturers, professional and public agencies ... become targets for damage recoveries because of their potential monetary resources rather than their fault") (citing *N.H.S. Jour.* 286 (1989)). This cannot possibly be the intent of the General Assembly or this Court.

D. Avoiding Jury Confusion at Trial Through Injection of Collateral Issues

Finally, the Court must consider these questions with an eye towards avoiding jury confusion. *See Generally Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (holding a jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of

the trial). Indeed, implicit in the South Carolina Rules of Civil Procedure, which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action," is the need to avoid jury confusion. *See* Rule 1, SCRCP.

With these concepts in mind, Carus addresses the Certified Questions before this Court.

II. When a plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, a jury should not be permitted to hear an explanation of why the employer is not part of the tort action.

In light of the arguments discussed *infra*, this Court should answer Certified Question No. 1 in the NEGATIVE.

A jury should not be permitted to hear an explanation of why the employer is not part of the tort action. Doing so will only cause confusion to the jury and be in derogation to the spirit of Rule 1 of the South Carolina Rules of Civil Procedure.[8] Answering Certified Question No. 1 in the affirmative creates a host of unnecessary problems and issues. For example, issues abound as to who would be responsible for explaining the employer's absence, what would the scope and substance of the explanation be, and at what point in the trial would the explanation be offered? With respect to the scope and substance of the explanation, would the explanation be limited to a negative, i.e., the employer cannot be sued in the Court of Common Pleas, or couched in the positive, i.e., the employer has been sued in the Workers' Compensation Commission? The implications of these seemingly similar explanations are vastly different.

[8] As demonstrated in Carus's Rule 244 motion, Plaintiff's counsel in the underlying matter implicitly injected the issue of workers' compensation into the trial at closing argument before the jury, despite the parties' agreements via motions in limine to exclude reference thereto. Thus, Carus respectfully submits an explanation of workers' compensation was not necessary in any event, and the issue related thereto would not have been raised by the jury without counsel's comments to the jury.

Surely, the benefits of an explanation of the employer's absence are outweighed by the jury confusion and potential harm to each party's case. For example, if an explanation is provided to the jury, the jury could assume the plaintiff has been fairly compensated for his injuries via workers' compensation and render a smaller verdict, if any verdict at all. Further, the jury could also assume that the plaintiff has not been compensated at all and therefore must not have suffered any injuries as a result of the incident. Conversely, a jury could assume the employer has already compensated the plaintiff for its fault or assume the employer was not at fault at all, and place the entirety of the fault burden on the defendant. The better practice is the one followed by the trial judge here, to instruct the jury not to consider such matters.

Moreover, explaining to the jury the absence of the employer elevates the employer over other types of non-party, immune entities. In any other scenario involving an immune, non-party entity or person, a jury likely would not be able to hear an explanation for the entity's absence. *See Ocasio v. Fed. Exp. Corp.*, 162 N.H. 436, 447, 33 A.3d 1139, 1148 (2011) (stating "we do not conclude that immune employers should be treated differently than other immune tortfeasors"). Finally, as discussed *infra*, it treats certain defendants who have been sued over an accident that occurred during the plaintiff's employment different from other defendants. Certain defendants, like Carus, are placed at an extreme disadvantage in presenting its case and defending its liability simply because its product was used in an employment context.

Finally, Plaintiff's reliance on *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967)), is misplaced. As Plaintiff himself quotes, "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." Despite Plaintiff's assertions, *Powers* and the Workers' Compensation Act simply provide that the amount of workers' compensation shall not be admissible in a third-party action.[9] There is no indication that either goes further in permitting all other issues of workers' compensation to be admissible. In relying on *Powers*, Plaintiff presumes that all matters of workers' compensation, except the award, is admissible—no case or statute that Carus is aware of has ever stood for the proposition. Such reasoning would defy the integrity and separation of the workers' compensation system and the common pleas system, and create jury confusion and unnecessary, collateral issues.

In light of the overarching concepts discussed above in conjunction with the certain confusion to result, the Court should answer Certified Question No. 1 in the NEGATIVE and hold that a jury cannot hear an explanation of the employer's absence.

III. When a plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, a defendant should be permitted to argue the empty chair defense and suggest that the plaintiff's employer is the wrongdoer.

In light of the foregoing arguments discussed *infra*, this Court should answer Certified Question No. 2 in the AFFIRMATIVE.

Subsection (D) of section 15-38-15 of the South Carolina Contribution Among Tortfeasors Act states: "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

[9] Carus notes that *Powers* was decided in 1967 under the old system of contributory negligence and the old laws of joint and several liability. However, South Carolina currently operates under systems of comparative negligence and modified joint and several liability. Carus submits the fault analysis discussed in *Powers* no longer exists and a third-party defendant may properly argue both the comparative negligence of a plaintiff and the negligence of a non-party employer while asserting its own lack of negligence, and doing so does not inject workers' compensation issues into the trial.

may be liable for any or all of the damages alleged by any other party." A tortfeasor is generally understood to be a "wrongdoer; an individual or business that commits or is guilty of a tort." Blacks Law 1489 (6th ed. 1990). Thus, for the purposes of arguments related to fault or negligence, an employer can be a tortfeasor, whether or not it can be sued or liable in the litigation.

Fundamentally, it is a plaintiff's responsibility at trial to prove that Carus's conduct, and not some other cause, proximately caused the accident. *Allen v. Long Mfg. N.C., Inc.*, 332 S.C. 422, 432-433, 505 S.E.2d 354, 359-60 (Ct. App. 1998). Keeping this tenet in mind, a defendant has a right to defend against this allegation as best it can. There is South Carolina precedent demonstrating that employer conduct is relevant in product liability cases and that the manufacturer is entitled to argue that it was the employer's conduct which caused the injury rather than the manufacturer's. In *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 535, 462 S.E.2d 321, 324 (Ct. App. 1995), a case involving an electrical fire in an aerial bucket truck, evidence was presented that Bragg's employer, a large electrical contractor, had improperly installed a black conductive hose to the aerial bucket manufactured by Hi-Ranger. *See id.* at 535, 462 S.E.2d at 324. Bragg's employer had also failed to train its employees to "know an orange hose was nonconductive and a black hose was conductive." *Id.* at 536, 462 S.E.2d at 324. Under these facts, the South Carolina Court of Appeals concluded that the trial court properly charged the jury as to both the sophisticated user doctrine and intervening/superseding negligence. *See id.* at 547-51, 462 S.E.2d at 330-32.

Numerous other jurisdictions have also held that a defendant may assert the "empty chair" defense with respect to the non-party employer's negligence. These

jurisdictions have preserved a defendant's right to argue that an immune, non-party employer's negligence constituted the sole proximate cause or an intervening/superseding cause of the plaintiff's injuries—at least where there is evidence to support the defense.

In *Archambault v. Sonecy/Northeastern, Inc.*, 946 A.2d 839 (Conn. 2008), the Supreme Court of Connecticut held that a defendant is entitled to assert, under a general denial, that the negligence of an employer who is not a party to the action is the sole proximate cause of the plaintiff's injuries. This is consistent with the laws of other jurisdictions. *See, e.g., Williams v. Union Carbide Corp.,* supra, 734 S.W.2d 699, 703 (Tex. Ct. App. 1987) (defendant entitled to assert, under general denial, that plaintiff's injuries, which were covered by workers' compensation, had been proximately caused by negligence of nonparty employer). *See also Chumbley v. Dreis & Krump Mfg. Co.*, 521 N.W.2d 192 (Iowa Ct. App. 1993) (holding that the employer's negligence can be the sole proximate cause of injury in action brought by injured employee against manufacturer of product, even if the employer is immune from suit under the workers' compensation laws); *Williams v. White Mt. Constr. Co.,* 749 P.2d 423, 429(III)(B) (Colo.1988) (notwithstanding exclusivity of workers' compensation remedy, "[t]ortfeasors sued by injured employees are now able to present evidence of employer [negligence or fault] at trial so as to reduce whatever damages may be assessed against them to a level proportionate to their liability").

In *Dresser Industries, Inc. v. Lee,* 880 S.W.2d 750 (Tex.1993), the Supreme Court of Texas addressed the circumstance in which a defendant sought to introduce evidence in a personal injury action that the negligence of the plaintiff's employer had caused the accident, even though the nonparty employer was shielded from liability because the

plaintiff's injuries were covered by worker's compensation. The court stated that "[i]f a defendant were unable to show the role of [the] plaintiff's employer in the circumstances of [the] plaintiff's injury, the defendant would be limited in its defense to countering evidence that its negligence caused the injuries." *Id.* at 753. The *Dresser* court further reasoned:

> A defendant is entitled to try to convince the jury that not only did it *not* cause plaintiff's injuries, but someone else *did*. A void of evidence concerning the employer's conduct would leave a logical hiatus in the story presented to the jury. With no one allowed to show what part the employer's conduct played, the jury would be left to wonder whether anyone other than the defendant *could* have caused plaintiff's injuries.

Id. at 753 (internal citations omitted; emphasis original). Indeed, categorically precluding a defendant from presenting evidence that the immune employer's actions were the sole proximate cause of the accident would have "unjust consequences." *Id.; see also Steele v. Encore Mfg. Co.*, 579 N.W.2d 563 (Neb. Ct. App. 1998) ("[r]egardless of the plaintiff's not being entitled to tort compensation from the [nonparty] employer, if the employer's actions are the sole proximate cause of the employee's injuries, then it follows that the defendant's conduct is not a proximate cause, and the defendant should be entitled to argue and have the jury instructed accordingly"); *Williams v. White Mt. Constr. Co.*, 749 P.2d 423, 429(III)(B) (Colo.1988) (notwithstanding exclusivity of workers' compensation remedy, "[t]ortfeasors sued by injured employees are now able to present evidence of employer [negligence or fault] at trial so as to reduce whatever damages may be assessed against them to a level proportionate to their liability").[10]

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[10] *Accord See Ocasio v. Fed. Express Corp.*, 162 N.H. 436, 445-49 (2011) (permitting; *Glenn v. Union Pac. R.R. Co.*, 2011 WY 126, P29 (Wyo. 2011) (permitting named defendant to assert negligence of non-party employer); *Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107, 1114-15 (Miss. 2003); *Keith v. United States Fid. & Guar. Co.*, 694 So. 2d 180, 182 (La. 1997) (permitting allocation of fault to statutory employer; *Inland/Riggle Oil Co. v. Painter*, 925 P.2d 1083 (Colo. 1996) (permitting argument and apportionment

related to employer's negligence); *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180, 1182 (Fla. 1993) (answering certified question so that liability be apportioned to all participants in an accident, including plaintiff's employer despite employer's immunity from suit); *DaFonte v. UpRight, Inc.*, 828 P.2d 140 (Cal. 1992) (apportionment statute applies to third-party suits by injured employees and eliminates third-party's joint and several liability to injured employee for damages attributable to immune employer); *Bode v. Clark Equip. Co.*, 719 P.2d 824, 827 (Okla. 1986) (permitting argument and apportionment regarding negligence of non-party employer tortfeasor); *Espaniola v. Cawdrey Mars Joint Venture*, 68 Haw. 171, 707 P.2d 365 (1985) (holding evidence of negligence or fault of the employer would be admissible to enable trier of fact to decide the degree of each actor's negligence or fault); *Connar v. West Shore Equip.*, 68 Wis. 2d 42, 227 N.W.2d 660 (Wis. 1975) (holding jury must have opportunity to consider negligence of employer, whether or not a party the lawsuit or can otherwise be held liable); *see also Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987) (reversing district court's ruling which declined to include employer on allocation section of special verdict form). *See also Brodsky v. Mile High Equip. Co.*, 69 Fed. Appx. 53, 57 (3d Cir. 2003) (concluding that evidence of employer's OSHA violations and failure to train the decedent employee was properly admitted in products liability case); *Geurin v. Winston Indus.*, 316 F.3d 879, 885 (9th Cir. 2002) (noting that evidence of immune employer's improper maintenance or repair of product is admissible "not as proof of liability on the part of the employer, but as proof that no wrongdoing on the part of [the manufacturer] caused the injury"); *Robertson v. Norton Co.*, 148 F.3d 905, 910 (8th Cir. 1998) (concluding that, although jury could not apportion fault to immune non-party employer, district court properly instructed jury on intervening cause); *Kulingoski v. Liquid Transporters*, 1994 U.S. App. LEXIS 31484, at *7-8 (1st Cir. Nov. 10, 1994) (concluding that evidence that employer failed to require its employee to follow adequate safety procedures was properly admitted and justified jury charge on superseding cause); *Singleton v. Manitowoc Co.*, 1991 U.S. App. LEXIS 7566, at *8 (4th Cir. Md. Apr. 29, 1991) (noting that employer's failure to warn can constitute intervening cause); *Wilson v. Sentry Ins.*, 993 F. Supp. 2d 662, 668 (E.D. Ky. 2014) (granting summary judgment to product manufacturer where the plaintiff's employer's negligence constituted "superseding cause" of accident); *Smith v. Ardew Wood Prods., Ltd.*, 2009 U.S. Dist. LEXIS 124882, at *7, 2009 WL 36882 (W.D. Wash. Jan. 5, 2009) (explaining that although fault allocation was not allowed, Ardrew was entitled to argue that negligence of employer was sole proximate cause of injuries) (citing *Edgar v. City of Tacoma*, 129 Wn.2d 621, 630, 919 P.2d 1236 (1996)); *Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp. 2d 530, 538-39 (E.D. Pa. 2005) (allowing expert testimony regarding negligence of employer, as jury could conclude that employer's negligence was superseding cause of accident); *Kline v. ABCO Eng'g Corp.*, 991 F. Supp. 747, 750 (D. Md. 1997) (granting summary judgment where employer's negligent instructions to plaintiff employee resulted in misuse of product); *Carriere v. Cominco Alaska, Inc.*, 823 F. Supp. 680, 692 (D. Alaska 1993) (noting that under Alaska law, although allocation of fault to employer was impermissible, the defendant was entitled to present evidence that the employer's fault was a superseding cause of the injury); *Baldwin v. Harris Corp.*, 751 F. Supp. 2, 5 (D.D.C. 1990) (noting that manufacturer may argue that employer's negligence is superseding cause); *see also Downey v. W. Cmty. College Area*, 282 Neb. 970, 987, 808 N.W.2d 839, 853 (2012) (holding that defendant could point to employer's negligence as sole cause of the accident even though defendant was precluded from apportioning fault to employer); *Archambault v. Soneco/Ne., Inc.*, 287 Conn. 20, 40-41, 946 A.2d 839 (2008) (holding that "a defendant may introduce evidence of a nonparty employer's negligence as the *sole* proximate cause of the plaintiff's injuries under a general denial"); *Cieplinski v. Caldwell Elec. Contrs., Inc.*, 280 Ga. App. 267, 276, 633 S.E.2d 646, 652-53 (2006) (affirming grant of summary judgment where employer's negligence was intervening cause of accident); *Parker v. Casa Del Rey - Rapid City, Inc.*, 641 N.W.2d 112, 120-21 (S.D. 2002) (concluding that jury should be allowed to consider whether immune employer's negligence was sole proximate cause of injury); *Draleau v. Crathern Eng'g Co.*, 1996 Mass. App. Div. 1, 3, 1996 Mass. App. Div. LEXIS 1, at *9-10 (Mass. App. Div. 1996) (reversing judgment in favor of plaintiffs in product liability suit where evidence showed that combined negligence of employer and plaintiff employee was proximate cause of accident): *Mark v. Mellott Mfg. Co.*, 106 Ohio App. 3d 571, 587, 666 N.E.2d 631, 641 (Ohio Ct. App. 1995) (concluding that jury should be allowed to consider whether employer's OSHA violations were proximate cause of injury); *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 824 (Del. 1995) ("[T]he alleged negligence of the employer may be raised as evidence of superseding cause even though the employer is otherwise immune from suit under workers' compensation laws and thus cannot be deemed a 'joint tortfeasor.'"); *Patel v. Brown Mach. Co.*, 264 Ill. App. 3d 1039, 1055, 637 N.E.2d 491, 501 (Ill.

Moreover, subsection (D) provides that "[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) (emphasis added). In addition to being able to present the defense of a non-party employer's sole proximate cause, the words "contribution" and "any" in the subsection imply that a defendant retains a right, under this section, to argue partial or contributory negligence to a non-party employer. Otherwise, the terms in the section would be meaningless. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding that courts must construe statutes so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous") (internal quotations and citations omitted). Undeniably, subsection (D)'s language refutes the alleged "all or nothing" approach of an employer's sole proximate cause defense and permits a defendant to argue, as part of its empty chair defense, the employer's contributory fault and/or partial negligence.

Indeed, the statute expressly provides that the defendant may argue the partial or total fault of another, non-party. There is nothing in the statutory scheme's language or

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App. Ct. 1st Dist. 1994) (observing that products liability defendant is entitled to present evidence of employer's negligence in order to argue that employer's conduct was sole proximate cause of the plaintiff's injury): *Chumbley v. Dreis & Krump Mfg. Co.*, 521 N.W.2d 192, 194 (Iowa Ct. App. 1993) (holding that jury properly considers whether third party employer's fault was sole proximate cause of injury, even though non-party is immune under worker's compensation laws); *Dresser Indus. v. Lee*, 880 S.W.2d 750, 752-53 (Tex. 1993) (holding that even though apportionment of fault to immune employer is not permitted, the defendant manufacturer had a right to argue that the employer's negligent failure to ventilate its foundry and to require safety masks constituted the sole cause of injury); *Coffman v. Keene Corp.*, 133 N.J. 581, 608, 628 A.2d 710, 723 (1993) ("[I]n a given case, the defendant may be able to establish that the employer's conduct, not the failure to warn, was the cause in fact of the injuries attributable to the harmful product. An employer's conduct, in either thwarting effective dissemination of a warning or intentionally preventing employees from heeding a warning, may be a subsequent supervening cause of an employee's injury that will serve to break the chain of causation between manufacturer and employee."); *Billsborrow v. Dow Chemical, U.S.A.*, 177 A.D.2d 7, 17-18, 579 N.Y.S.2d 728, 734 (N.Y. App. Div. 2d Dep't 1992) (concluding that whether employer's negligent failure to warn employee or to provide respirator sufficient to filter out hazardous product's vapors constituted superseding cause was issue for jury).

case law that renders this provision inapplicable to a non-party employer who contributes to the injuries and/or damages of the plaintiff. Again, doing so would fail to recognize the concept of true immunity and simultaneously elevate the employer and employer-plaintiff above others based upon their status alone. Thus, this Court should answer Certified Question No. 2 in the AFFIRMATIVE.

IV. If a defendant may argue the empty chair defense against the plaintiff's employer, a court should not be permitted to instruct the jury that an employer's legal responsibility has been determined by the South Carolina Workers' Compensation Commission.

In light of the foregoing arguments discussed *supra*, this Court should answer Certified Question No. 3 in the NEGATIVE.

Additionally, because workers' compensation is a no-fault system, an explanation of why the employer has not been sued in the civil matter is unnecessary and in fact, would confuse the jury in contravention to the Rules of Civil Procedure. If a defendant is permitted to assert an "empty chair" defense related to the employer, which is a contingency of Certified Question No. 3 and appropriate under the law, instructing the jury that the plaintiff's employer's legal responsibility has been determined in another forum will, in no uncertain terms, eviscerate the empty chair defense. The instruction will strongly imply that the employer has already compensated the plaintiff for its *fault*, which is simply not the case. As discussed above, the workers' compensation system is a no-fault system. In other words, the fault of the employer in contributing to the employee's injuries is never determined or considered in the workers' compensation system when compensating the employee.[11] Thus, despite such lack of considerations, an instruction to the jury explaining that the employer's "legal responsibility" has been

[11] Carus recognizes the exception to this statement when the employer commits an intentional tort against the employee.

determined elsewhere necessarily implies that its fault has been determined, which is categorically not the case.

Moreover, an instruction would include reference to workers' compensation no-fault system and very likely could confuse the jury by imply that the employer had, in fact, no fault in causing the plaintiff's injuries. Practically, such an instruction lends itself to multiple, confusing and misleading implications and tasks a civil jury with the responsibility of considering and understanding an entirely foreign legal system which should not be placed before it.

In the same vein, answering Certified Question No. 3 in the affirmative creates similar issues as discussed with respect to Certified Question No. 1. For example, what would the scope and substance of the instruction be, or what would the protocol be if the employer's legal responsibility had not yet been determined, or was on appeal, or the employee chose to pursue the tort action against the third party without choosing to pursue a workers' compensation claim? These issues and others would undoubtedly result and unnecessarily so.

Furthermore, instructing the jury in this regard elevates the employer over other types of non-party, immune entities. In any other scenario involving an immune, non-party entity or person, the trial court would not be able to instruct the jury on determination of the "legal responsibility" of such entity. Answering the third certified question in the affirmative elevates the employer's status over its conduct. Doing so would also elevate employers above other non-party tortfeasors, where other non-party tortfeasors or settling defendants would not warrant an explanation of its "legal responsibility" being provided to the jury simply because they do not retain the status of

employer. *See Ocasio v. Fed. Exp. Corp.*, 162 N.H. 436, 447, 33 A.3d 1139, 1148 (2011) (stating "we do not conclude that immune employers should be treated differently than other immune tortfeasors"). Moreover, it treats an employee-plaintiff differently than all other plaintiffs, who likely would not be afforded the opportunity to explain the absence of an entity who caused or contributed to the plaintiff's injuries, but is otherwise not named in the lawsuit. Finally, as discussed *infra*, it treats certain defendants who have been sued over an accident that occurred during the plaintiff's employment different from other defendants. All of these disparate treatments combine to place certain defendants, like Carus, at extreme disadvantage in presenting its case and defending its liability.

If the defendant is entitled to assert an empty chair defense with respect to the non-party employer, then the Court should answer Certified Question No. 3 in the NEGATIVE and refuse to permit the Court to instruct the jury that the employer's legal responsibility has been determined in another forum.[12]

V. When a plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, the Court should allow the jury to apportion fault against the non-party employer by placing the name of the employer on the verdict form.

For the reasons stated above, this Court should answer Certified Question No. 4 in the affirmative. Moreover, an analysis of the statutory scheme and policies related thereto support placing the name of the employer on the verdict form for fault apportionment purposes.

[12] If this Court elects to answer Certified Question No. 3 in the affirmative, which Carus discourages, the undersigned submits that a detailed instruction should be provided to the jury explaining that nature and purpose of the workers' compensation, with great emphasis placed upon the fact that it is a no-fault system which does not take into consideration the fault of the employer or its contribution to the plaintiff's damages.

In 2005, South Carolina abolished joint and several liability. Consistent with this reform, allocation of a percentage of fault to the non-party employer is necessary to ensure that a defendant, if held liable, will be required to pay damages commensurate with its degree of fault. Excluding employers from assessment of fault would require a defendant that is only partially at fault to pay damages as if it were solely at fault.

1. Statutory Construction of Section 15-38-15 Permits Apportionment of Fault to Non-Party Employer

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.,* 313 S.C. 1, 437 S.E.2d 6 (1993)). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Id.* (citing *In re Vincent J.,* 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted)). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* The language must also be read with a sense which "'harmonizes with its subject matter and accords with its general purpose.'" *Mun. Ass'n of S. Carolina v. AT & T Commc'ns of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (quoting *Hitachi Data Sys. Corp. v. Leatherman,* 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

S.C. Code Ann. § 15-38-15 states:

> (A) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to

be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.

(B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).

(C) The jury, or the court if there is no jury, shall:

(1) specify the amount of damages;

(2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and

(3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).

(a) For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.

(b) After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral argument, with the length of such

> argument subject to the discretion of the trial judge, on the determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.
>
> (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.
>
> (E) Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C).
>
> (F) This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

Subsection (D) specifically provides that "[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) (emphasis added). This subsection, by its plain language, should answer Certified Question No. 4 in the AFFIRMATIVE. If an employer contributed to a plaintiff's injury, the jury can and should consider the employer's fault in assessing a percentage of fault (if any) against named defendants.

Furthermore, the words "contribution" and "any" in subsection (D) implies that a defendant retains a right, under this section, to apportion part of the fault to a non-party. Surely, if the General Assembly did not intend for non-party fault to be apportioned, the General Assembly would not have used the words "contributed" and "any" in the subsection. Otherwise, these terms would be meaningless. The inclusion of these "partial" terms signify an intent that non-parties' fault be apportioned. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding that

courts must construe statutes so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous") (internal quotations and citations omitted).

Moreover, subsection (C) and subsection (D) are distinct provisions: (C) is directed to apportionment of damages among party defendants whom the jury has found to be liable and who can be liable, while subsection (D) separately provides that such apportionment should take into account whether another potential tortfeasor, "whether or not a party," contributed to the alleged injury and may be held liable for any or all of the damages alleged by any other party. Addressing a similar statute's corresponding provisions, the Supreme Court of Georgia stated that the apportionment section of its statute "addresses the full universe of tortfeasors, whether parties or not." *Couch v. Red Roof Inns, Inc.*, 729 S.E.2d 378 (Ga. 2012).

Logically, such a conclusion makes sense. Otherwise, the jury will be utterly confused. As the United States Court of Appeals for the Fifth Circuit has stated:

> The jurors likely felt compelled by the structure of the verdict form to allot 100% of the negligence between [the plaintiff] and [the defendant], the only parties there listed, even if they deemed [the employer] to be at least partially responsible for the accident. The court gave no curative instruction that permitted the jury to apportion less than 100% negligence between [the plaintiff] and [the defendant]. Although [the defendant's] counsel in his closing argument urged the jury to consider [the employer's] responsibility for the accident, the verdict form and charge offered no commonsense opportunity to make that distinction. Moreover, [the plaintiff's] attorney emphasized the apparent "either/or" nature of the fault issue. The evidence presented at trial, however, implies that much of the fault for this accident could have been attributed to [the employer]. . . . We must conclude that the district court erred when it excluded from the verdict form a question inquiring into [the employer's] proportionate share of fault.

Nance v. Gulf Oil Corp., 817 F.2d 1176, 1181 (5th Cir. 1987).

The purpose of the apportionment statute is to allow the jury to consider the fault of anyone who contributed to a plaintiff's injuries or damages. Answering Certified

Question No. 4 in the negative would elevate the *status* of the employer over the *conduct* of the employer, and essentially disallow a jury to consider an entire category of persons or entities under the apportionment statute. Moreover, it treats an employee-plaintiff differently than any other type of plaintiff. These results simply cannot stand in light of the purpose of the new joint and several laws.

Plaintiff continuously confuses the concepts of "fault" and "liability." As discussed above, an immune party's conduct can breach legal duties owed and such conduct can serve as the proximate cause of harm to a third party, and yet the immune party has no liability for the conduct, which otherwise may have been actionable. In this scenario, the immune party has fault for the damages caused, but it has no liability. It is the conduct of the parties, immune or not, that should be considered in addressing fault. Status is irrelevant—conduct, i.e., contribution to the injury, is paramount.

There are no reported cases interpreting the statutory scheme in the context currently before the Court. However, numerous jurisdictions throughout the country have enacted laws allowing for the apportionment of fault to non-parties; the overwhelming majority of these states have concluded that it is appropriate to allow the jury to allocate fault to an immune non-party employee.[13] In *Mack Trucks, Inc. v. Tackett*,

[13] *Glenn v. Union Pac. R.R. Co.*, 2011 WY 126, P29 (Wyo. 2011); *Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107, 1114-15 (Miss. 2003); *Keith v. United States Fid. & Guar. Co.*, 694 So. 2d 180, 182 (La. 1997); *Inland/Riggle Oil Co. v. Painter*, 925 P.2d 1083 (Colo. 1996); *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180, 1182 (Fla. 1993); *Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352, 354 (Utah 1993); *DaFonte v. UpRight, Inc.*, 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238, 828 P.2d 140 (Cal. 1992); *Dietz v. General Elec. Co.*, 169 Ariz. 505, 510, 821 P.2d 166, 171 (1991); *Bode v. Clark Equip. Co.*, 719 P.2d 824, 827 (Okla. 1986); *Espaniola v. Cawdrey Mars Joint Venture*, 68 Haw. 171, 707 P.2d 365 (1985); *Powers v. Kansas Power & Light Co.*, 234 Kan. 89, 671 P.2d 491, 498-99 (1983); *Pocatello Indus. Park Co. v. Steel W.*, 101 Idaho 783, 786-87, 621 P.2d 399 (Idaho 1980); *Connar v. West Shore Equip.*, 68 Wis. 2d 42, 227 N.W.2d 660 (Wis. 1975); *see also Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987); *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223 (8th Cir. 1981); *but see Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252 (Tenn. 1997).

841 So.2d 1107 (Miss. 2003), the Supreme Court of Mississippi stated the issue with great clarity when it opined

> Immunity from liability does not prevent an immune party from acting or omitting to act. Rather, immunity shields that party from any liability stemming from that act or omission. There is nothing logically or legally inconsistent about allocating fault but shielding immune parties from liability for that fault.

Id. at 1114. In *Tackett*, the Mississippi court held it was appropriate to apportion fault to an employer, despite the fact the employer was immune from a tort suit. The court stated:

> The result of immunizing employers from fault as well as from liability is that third parties pick up the tab for the employer's fault, potentially paying more than their share in order to make up for the excluded employer. The dissenting opinion in the Court of Appeals' opinion in *Ladner* [fill] bears attentive reading:
>
> The question becomes whether the injured plaintiff must see his potential recovery diminished by an assignment of fault to his immune employer or whether a third party defendant may be made to respond in damages in an amount that exceeds that defendant's proportionate share of fault in causing the injury. In my view, the **more equitable result is to permit allocation of fault to the exempt employer.** ***While this diminishes the injured party's ultimate recovery in the tort action, the injured party has already obtained or may, post verdict, seek recovery under the compensation law from his employer.*** This right of recovery under workers' compensation law is ***specifically intended*** **to replace the previously-existing common law right of recovery against the employer in tort.**
>
> To immunize employers from fault allocation in third-party tort suits would go against the spirit of the bargain between employers and employees that underlies workers' compensation; instead, the third party would pay the employer's cost of compensation, and the employee would have the possibility of recovering in tort for his employer's fault, since that would then be allocated to the third party. This certainly would benefit employers, and to some extent plaintiffs-but third parties should not be assessed to supplement our system of workers' compensation.

Id. at 1115 (internal citations an quotations omitted) (emphasis in original).

Likewise, in *Zaldivar v. Prickett*, No. S14G1778, 2015 WL 4067788 (Ga. July 6, 2015), the question before the Supreme Court of Georgia was whether a non-party which is not "liable" to the plaintiff as a matter of law could be considered by the trier of fact as a non-party responsible, in whole or in part, for the "fault" which caused the underlying injury, thus reducing the liability of the defendant by the percentage of fault under Georgia's apportionment statute. There, the non-party was the plaintiff's employer, which the named defendant asserted was negligent in entrusting the plaintiff with a company truck and therefore should bear some apportionment of responsibility for any injuries he sustained.

The court discussed the apportionment statute and opined that,

> Not every tortfeasor can be held liable for his torts. A tortfeasor may have an affirmative defense or immunity that admits the commission of a tort that is the proximate cause of the injury in question. Although such a defense or immunity may cut off liability, a tortfeasor is still a tortfeasor, and nothing about his defense or immunity means that he cannot be said to have committed a tort that was a proximate cause of the injury to the plaintiff. What happened, happened, and affirmative defenses and immunities do not change what happened, only what the consequences will be. As such, the apportionment statute permits consideration, generally speaking, of the "fault" of a tortfeasor, notwithstanding that he may have a meritorious affirmative defense or claim of immunity against any liability to the plaintiff.

Id. at *7 (internal citations omitted). Thus, the *Zaldivar* court ultimately held that Georgia's apportionment statute requires the trier of fact to consider the fault of all persons or entities who contributed to the alleged injury or damages, including the plaintiff, defendants, and every other tortfeasor whose commission of a tort against a plaintiff was a proximate cause of his injury, regardless of whether such tortfeasor would have actual liability in tort to the plaintiff. *Id.* at *9. *See also Sedgwick Ins. v. CDS, Inc.*, 47 F.Supp.3d 536, 549(B)(2) (E.D.Mich.2014) (fault of nonparty-employer could be

considered under Michigan apportionment statute, notwithstanding that employer would have defense as against plaintiff-employee under exclusive remedy provision of workers' compensation statute).

In *Pinnacle Bank v. Villa*, 100 P.3d 150 (Wyo. 2011), the Supreme Court of Wyoming considered a certified question which essentially asked it to determine whether the jury can consider and compare the fault of the State of Wyoming, which was immune from recovery under the circumstances, or in other words, whether the State of Wyoming could appear on the verdict form. 100 P.3d at 1292. Analyzing its comparative fault statute, the court stated:

> The definition of 'actor' includes an entity whose fault is determined to be the proximate cause of the injury whether or not a party to the litigation. The State, although immune from suit, certainly may be the proximate cause of the death, injury, or damages and clearly fits that portion of the definition. However, because the definition of actor contains the word "fault," we must also consider that definition. As defined, "fault" includes an act or omission determined to be the proximate cause of the injury that is in any manner negligent or that subjects the actor to some sort of strict liability. § 1–1–109(a)(iv). While the State is not here subject to strict liability, it can act in a negligent manner by failing to use reasonable care. We therefore conclude that the State can be at "fault" and, therefore, fits the definition of "actor."
>
> Furthermore, considering the intent of the comparative fault scheme, it is apparent that the State should be included. As noted, it is clear that each defendant is liable only for the percentage of fault attributed to him. Should an "actor" not be included because it is immune, the defendants and other actors are apportioned a share of that "actor's" fault. Indeed, "immunity" does not mean that a party is not at fault; it simply means that the party cannot be sued. Allocating a portion of an immune party's fault to other "actors" thwarts the intent of the comparative fault scheme. Additionally, it is well established that, under Wyoming's comparative fault scheme, a jury is entitled to apportion the fault of ***all*** those whose acts proximately caused injury to the claimant, parties and nonparties alike. Indeed, because the legislature includes both parties and non-parties in the definition of "actor," it is clear that some parties may be apportioned fault but may not actually be liable to the plaintiff.

Id. at 1293 (concluding that the State, even though immune from suit, could be included on the verdict form and in the jury's comparative fault analysis) (internal citations omitted) (emphasis in original)). The same result should be reached here with the non-party employer who retains the same "true immunity" as a State.

As stated by the Supreme Court of New Hampshire, "[a]llocating fault to an immune employer does not disturb this *quid pro quo* relationship between employee and employer or the legislative policy underlying it. A plaintiff may still obtain benefits, without having to prove the employer's negligence, and the employer is still immune from liability." *Ocasio v. Fed. Exp. Corp.*, 162 N.H. 436, 445, 33 A.3d 1139, 1147 (2011). In holding that an immune employer should not be treated differently than other immune tortfeasors, the *Ocasio* court stated:

> We are not persuaded that "fairness" dictates that a non-employer defendant, such as FedEx in this case, should be responsible for paying a plaintiff's entire damage award, particularly when the non-employer is only minimally at fault and the immune employer is nearly completely at fault. As we observed [previously] '[t]here is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.'

Id. at 1147 (internal citations omitted). In *Dietz v. General Electric Co.*, 821 P.2d 166 (Ariz. 1991), the Supreme Court of Arizona answered in the affirmative the certified question of whether fault can be assessed against an employer that enjoyed statutory immunity under the workers' compensation act. The court emphasized the purpose of Arizona's reform of its tort system and concluded it was an effort to "abrogate[e] joint liability . . . and establish[] a system of several liability making each tortfeasor responsible for paying for his or her percentage of fault and *no more*." *Id.* at 171 (emphasis in original). Surely, as these cases suggest, "liability [must] be apportioned to

all participants in an accident in order to determine a defendant's percentage of fault." *Allied-Signal, Inc. v. Fox*, 623 SO.2d 1180 (Fla. 1993).

Giving the words of section 15-38-15 their ordinary meaning and harmonizing the language with its subject matter, while also considering the workers' compensation statutory scheme, this Court should answer Certified Question No. 4 in the AFFIRMATIVE and hold that a court should allow the jury to apportion fault against the non-party employer by placing the name of the employer on the verdict form. It seems clear that the section was intended by the General Assembly to complete the shift to a fault apportionment approach, thereby requiring the fault of all tortfeasors, including employers, whether or not a party to the suit, to be considered by a jury or court when apportioning fault. *See* Amity S. Edmonds, *Tort Liability in South Carolina: Does Section 15-38-15 Truly Limit Joint and Several Liability or Is It A Mere Illusion in the Realm of Phantom Tortfeasors?*, 5 Charleston L. Rev. 679, 682 (2011).

Answering Certified Question No. 4 in the negative is tantamount to finding that an employer, as a matter of law, is incapable of causing or contributing to injury of its own employees. It would render section 15-38-15 an inefficacious attempt to limit the doctrine of joint and several liability because it would allow employee-plaintiffs the opportunity to impose backdoor joint liability on defendants who, consequently, will be forced to absorb the entire fault of nonparties.

On the other hand, answering the question in the affirmative does not create the parade of horribles Plaintiff suggests. Rather, it permits the statutory scheme created by the General Assembly under the joint and several statutes to properly allocate percentages of fault and damages to the proper tortfeasor, whether or not they are a party to the action

and whether or not they can ultimately be held liable for such allocations. Such a scheme makes no sense if a plaintiff's employer is excluded from consideration by this Court.

2. Allowing Apportionment of Fault to Non-Party Employers Harmonizes the Contribution Among Tortfeasors Act and the Workers' Compensation Act.

Excluding employers from assessment of fault essentially leaves a defendant product manufacturer, or any other defendant, completely without protection under the law. Indeed, as it currently stands, employees are protected by both the workers' compensation no fault system and their ability to also pursue a third party tortfeasor in the civil courts. The employer is protected by S.C. Code Ann. § 42-1-560, which gives the employer a lien against any proceeds from the third-party action to the extent the employer has paid benefits. However, the third party is wholly unprotected. S.C. Code Ann. § 42-1-580 was intended to give some protection to the third party if the employee was injured because of the negligence of both the third-party and the employer. Section 42-1-580 states

> When the facts are such at the time of the injury that a third person would have the right, upon payment of any recovery against him, to enforce contribution or indemnity from the employer, any recovery by the employee against the third person shall be reduced by the amount of such contribution of indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied.

However, this Court's holding in *Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005), as it stands, seemingly foreclosed any protection provided by section 42-1-580. In *Gordon*, the Court held the section was inapplicable to the plaintiff's action against a third party, and the defendant was not entitled to set-off the amount of workers' compensation benefits that the employee received from his

employer.[14] The Court held that the defendant and employer were not joint tortfeasors because the employer could not be held liable in tort and therefore there was no right of contribution. Id. at 407, 608 S.E.2d at 427. Furthermore, the Court held that application of the statute would be unfair to the employer, because it was not a party to the action and would be absent from trial, and the statute did not address how the company's negligence would be determined. *Id.* *Gordon* essentially renders section 42-1-580 meaningless and superfluous. Surely, this is not what the General Assembly intended. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding that courts must construe statutes so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous") (internal quotations and citations omitted).

However, it is significant that *Gordon* was decided prior the passage of section 15-38-15, which abolished the old system of joint and several liability. Section 15-38-15 expressly states "[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). Apportionment of fault, in harmony with subsection (D) of section 15-38-15, provides the solution the *Gordon* court was concerned with and addresses how the company's negligence would be determined. Reading the sections together and permitting the jury to apportion *fault* (without regard to the amount of benefits paid) to the employer provides protection to all entities at play: the employee receives what he is entitled to, the employer is protected by its lien rights, and the third-party defendant is

[14] Certainly, *Gordon* speaks to set-off in the amount of the workers' compensation benefits paid. Carus admits that the certified questions before this Court do not concern set-off. However, implicit in *Gordon*'s holding is that the employer's negligence cannot be asserted at trial and/or apportioned by the jury because the employer is absent from trial. It is this portion of *Gordon*'s opinion Carus takes issue with.

liable for only those damages it contributed to, not the entirety of the plaintiff's injuries. Doing so would not disrupt the "quid pro quo" that is our workers' compensation system.

Excluding employers from apportionment would subject the defendant that is only partially at fault to pay for the full amount of damages as if it were solely at fault, and thus would subject the defendants to the very type of joint and several liability that the General Assembly eliminated in 2005. Moreover, it would subject only certain defendants to this retroactive application of a system that was abolished in 2005, while permitting others the privilege and benefit of the new system, which was intended for all defendants, not simply those whose alleged product was not used in a workplace. Furthermore, it would undermine the balance cultivated between the new law and the workers' compensation scheme. This Court must recognize that the principal purpose of proportional liability is to limit the damages paid by a defendant to its own comparative share of fault. Thus, the Court should answer Certified Question No. 4 in the AFFIRMATIVE and permit the plaintiff's employer to be placed on the verdict form for the purposes of apportioning fault.

CONCLUSION

The language and purpose of S.C. Code Ann. § 15-38-15, the workers' compensation scheme, in conjunction with the concepts of immunity, conduct over status, and jury confusion compel the foregoing answers to the Certified Questions asserted by Carus.

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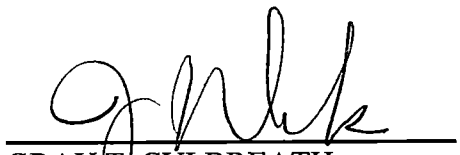
Respectfully Submitted,



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September 23, 2015

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

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S.C. Supreme Court

John William Machin,
. . . . . Plaintiff,

v.

Carus Corporation,
. . . . . Defendant.

PROOF OF SERVICE

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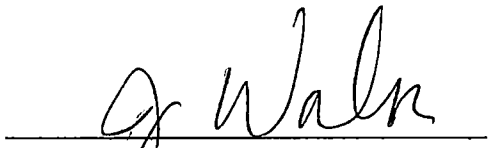

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