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.

REPLY BRIEF

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I. The Court should decide these issues as questions of law and should not consider matters that are more properly before the District Court.

Plaintiff agrees with Defendant that the Certified Questions "are purely matters of law, which can be decided without reference to facts." (Def. Br. p. 5). Defendant then accuses Plaintiff, however, of "inject[ing] facts and assumptions not presently before the Court." (Def. Br. p. 5). As Plaintiff explained in his brief, however, "[i]n 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." (Pl. Br. p. 2, n. 1). Plaintiff limited his expression of the facts in that manner. This follows Rule 244, SCACR.

Defendant proceeds to violate Rule 244 and reference extensive facts and assumptions which the District Court did *not* include in the Order of Certification. (Def. Br. pp. 1-6, 13). Defendant notes it moved before this Court pursuant to Rule 244(b), SCACR, to include an appendix of documents. (Def. Br. p. 5, n. 5). This Court responded that no action would be taken on the motion since Rule 244(b) "provides that it is for the certifying court to determine if additional material will be submitted...."

Defendant then made the motion to the District Court to designate an appendix for this Court's consideration. On September 30, 2015, the District Court acknowledged both the motion to this Court and this Court's response. The District Court ruled:

> The questions certified involve pure questions of state law, and colloquies between the counsel and this court as well as the closing arguments of the attorneys, would be of little benefit to the South Carolina Supreme Court in deciding this issue. For the foregoing reasons, the defendant's motion (ECF No. 270) is denied.

Machin v. Carus Corp., Order (C/A/ No. 3:12-2675-JFA) (ECF Dkt. No. 272). Defendant's brief therefore contains references to matters that are not before this Court for its decision. (See, e.g., Def. Br. p. 5, n. 6).

Defendant then scolds Plaintiff for suggesting the impact this may have had on the jury, contending "these statements are not supported by the evidence or the record in this matter." (Def. Br. p. 6). Plaintiff's statements in the brief were in the nature of advocacy, however, arguing policy reasons in support of Plaintiff's position. The danger that the jury would draw these spurious inferences (indicated by the very question the jury asked) justifies answering the questions in the manner Plaintiff requests.

Defendant has attempted to obfuscate the narrow questions this Court has agreed to answer by misdirecting the Court's attention to irrelevant facts and arguments. The jury *may* have agreed with Defendant's position on such things as the so-called sophisticated user doctrine, warning labels, and causation issues, as Defendant suggests, but such suggestion is just as much "pure speculation" as Plaintiff's argument that the jury was likely misled by the Town's absence in the case.

Defendant then asserts boldly that "Plaintiff cannot have it both ways" and suggests "[he] is asking this Court to find that the jury was influenced to find in favor of [Defendant] 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 at trial." (Def. Br. p. 6) (emphasis in original). In fact, Plaintiff is not asking this Court to "find" anything of the sort, for *that* decision lies with the District Court once this Court tells the District Court how the law of South Carolina guides that

decision. Defendant is making arguments that are best suited for the District Court to resolve, not this Court.

The Court should not be persuaded to venture beyond the questions the District Court asked this Court to answer. Whether the request for a new trial "rest[s] upon Plaintiff's speculation and conjecture about the jury's findings" (Def. Br. p. 6) is a matter for the District Court to decide.

II. Key policy considerations do not mandate the result Defendant advocates.

Prior to discussing the questions that the District Court propounded to this Court, Defendant includes a discussion of purported "overarching concepts that weigh heavily on the determination of the answers to the Certified Questions." (Def. Br. pp. 7-13). Because the Defendant's discussion goes beyond the questions this Court agreed to decide, Plaintiff will address each point in turn.

A. The integrity of the workers' compensation scheme

The upshot of Defendant's discussion is that the workers' compensation system is fault-based because otherwise employers had no incentive to support the compromise that is workers' compensation. (Def. Br. pp. 7-8). Hence, Defendant asserts:

> 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.

(Def. Br. p. 8). This statement promotes a position repeatedly advocated but recently, and resoundingly, rejected. *See, e.g., 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.").

Even the Defendant eventually acknowledges the correctness of the view that workers' compensation benefits are payable regardless of whether there is *any* fault on the part of the employer. (Def. Br. p. 7), citing *Mendenall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 738 S.E.2d 251 (2015). As Defendant notes, in *Mendenall* this Court stated:

> The Act is a comprehensive scheme created "to provide compensation to employees injured by accidents arising out of and in the course of their employment." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 69–70, 267 S.E.2d 524, 526 (1980). 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 *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 530–531, 115 S.E.2d 57, 66 (1960)). "The 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.*

Id. at 562; 738 S.E.2d at 253 (emphasis added). This has been the law of this State since the inception of the workers' compensation system. *See Layton v. Hammond-Brown-Jennings Co.*, 190 S.C. 425, 435, 53 S.E.2d 492, 496 (1939) ("One of the purposes of the

Workmen's Compensation Act is to protect and partially compensate employees who are injured while engaged in the regular course of their employment *irrespective* of mishap independent of the injury itself, and/or negligence on the part of either the employee or employer.") (emphasis added). And as this Court stated early on:

> A basic purpose of the compensation law is to eliminate fault as a requisite to liability. Here it is not contended that there was any fault on the part of the employer but that does not relieve from liability for compensation. Nor can the employer find refuge in the fault of claimant's fellow servant. *Cf.* Code, § 7035-17. Contributory negligence of a claimant also plays no part, or even his sole negligence. These concepts are difficult to one grounded in the principles of the common law, yet they control in the realm of workmen's compensation. Our act contains a provision which in substance denies compensation when the injury results from intoxication or wilful misconduct of the injured employee but that does not encompass this case. Code, § 7035-15.

Allsep v. Daniel Const. Co., 216 S.C. 268, 274, 57 S.E.2d 427, 429 (1950).

The payment of benefits under the Workers' Compensation Act has never been viewed as grounded in tort liability. *Cf. Brown v. Town of Patrick*, 202 S.C. 236, 242, 24 S.E.2d 365, 368 (1943) ("And for another reason it is certainly not a tort liability, the payment is of compensation, not damages, *and conditions for tort liability need not exist.*") (emphasis added). While it may be true that immunity under the Act sometimes makes no sense absent potential tort liability exposure for the employer, neither the employer's responsibility nor its immunity under the Act are dependent on concepts of common law tort liability, including whether an employer is considered "another joint tortfeasor" for purposes of joint and several liability. The Court should not hold otherwise.

B. The nature of immunity under the Act

Defendant posits the idea that there are two different "concepts of immunity" – "true" immunity versus "nominal" immunity – and contends "the distinction between the two is critical" when "determining whether fault, not liability, can be allocated to an immune party." (Def. Br. pp. 8-11). This is, however, another way of seeking to bring notions of "fault" into the workers' compensation system. This Court should not be persuaded to adopt such concepts.

Defendant cites to a California case, *Richards v. Owens-Illinois, Inc.*, 928 P.2d 1181 (Cal. 1997), in support of advocating that this Court acknowledge distinct forms of immunity. (Def. Br. p. 10). The *Richards* case, however, dealt with products liability exposure during a period of time that California had an "immunity statute." California repealed that statute after the *Richards* case was decided, effectively overruling the result. *See Myers v. Philip Morris Companies, Inc.*, 850 P.3d 751 (Cal. 2002) (discussing *Richards* and the effect of the Repeal Statute of 1998). The question in *Richards* was this: "To the extent [the Immunity Statute] protects tobacco companies from direct 'liab[ility]' for harm caused by smoking, does it also preclude the allocation of proportionate 'fault' to absent tobacco companies in a smoker's suit for asbestos-related lung injury, in order to reduce the 'non-economic' damages payable by the asbestos defendant under Proposition 51?" The California Court noted the inspiration for the California Immunity Statute derived from product liability principles, particularly comment *i* to Section 402A of the Restatement of Torts. *Richards*, 928 P.2d at 1190. The *Richards* court added:

> However, comment *i* asserts an important qualification of the general rule.... [It] makes clear that ... '[t]he rule [of liability] applies *only* where the defective condition of the product makes it *unreasonably* dangerous to the user or consumer.' (Restatement, p. 352, italics added.) As comment *i* then explains, '[m]any products cannot possibly be made entirely safe for all consumption,' but if a product is pure and unadulterated, its *inherent* or *unavoidable danger*, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.

Richards, 928 P.2d at 1190 (emphasis added). The *Richards* Court also added:

> The clear premise of comment *i* is that no 'liability' arises [for the manufacture or distribution of a product that in its pure and unadulterated form poses for its voluntary users an inherent and unavoidable danger] because *there is no sound basis for liability*. In other words, comment *i* posits, a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, in unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers.

Richards, 928 P.2d at 1190 (emphasis added). As the *Myers* Court stated, "[i]n short, our unanimous decision in *Richards* ... made clear that between January 1, 1988, and December 31, 1997, when the Immunity Statute was in effect, supplying pure and unadulterated tobacco products to knowing and voluntary consumers of those products was not subject to tort liability because it *breached no legal duty and thus constituted no tort*." *Meyers*, 850 P.2d at 756 (emphasis by the Court). So the *Richards* Court was dealing with a situation where a manufacturer of tobacco products had no"liability" for harm because there was no *duty* owed to the consumer for injuries caused by the use of the product. The Court noted the Immunity Statute "represents a legislative judgment that to the extent of the immunity afforded, such companies have no 'fault' or responsibility, in the legal sense, for harm caused by their products. To the same extent, such companies

are thus not 'tortfeasors' to whom comparative 'fault' can be assigned for purposes of Proposition 51 [governing joint and several liability]." *Richards*, 928 P.2d at 1091.

At bottom, the *Richards* Court was not dealing with true immunity, but a statutory declaration that a manufacturer of tobacco products owed no duty of care to a consumer of its products. *Richards* does not inform the questions before this Court.

Defendant contends all workers' compensation "immunity" is "true immunity," where an employer cannot be sued even though the employer has some level of fault. (Def. Br. Pp. 10-11). But that is not correct. As noted above, the workers' compensation system is *not* based upon any analysis of fault – either on the part of the employer or the employee. It is enough if the employee is acting within the course and scope of his or her employment at the time of the injury and suffers an injury by accident.

Defendant asserts "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." (Def. Br. p. 11). The converse is actually true. Defendants would have the Court accept that a recovery in tort is equal to a recovery under the workers' compensation system (the same fallacy they posited before the District Court), but the two systems are, by design, not equal. As Plaintiff pointed out at page 10 of his brief, the recovery available under the Workers' Compensation Act is limited as part of the societal policy decisions that underlie that Act. *Mendenhall*, 401 S.C. at 558, 738 S.E.2d at 251. For example: (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). Any concern regarding "double recovery" is tempered by the fact that the workers' compensation insurance carrier may assert a lien on any third party recovery that requires repayment to the carrier for benefits the carrier paid to an injured employee. S.C. Code Ann. § 42-1-560 (Supp. 2014); *Breeden*.

Defendant contends that the Workers' Compensation Act "contemplates an employer's negligence," and cites to S.C. Code Ann. § 42-1-580 (Supp. 2014). (Def. Br. pp. 10-11). This Court, however, has held that Section 42-1-580 is *not* applicable in the situation where an injured employer sues a third party defendant (as in this case) because "the third-party defendant and the employer *are not joint tortfeasors*." *Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005) (emphasis added). And as pointed out above, "fault" – either negligence or otherwise – is not part of the calculus under the workers' compensation system.

Lastly, Defendant asserts that permitting it to argue the "empty chair" in this case "promotes the policy of the current joint and several laws and removes a plaintiff's ability to obtain a double recovery." (Def. Br. p. 11). Once again this argument ignores two things: (1) the current joint and several laws apply only to "tortfeasors" and an employer is not a "tortfeasor" with regard to workplace injuries under the definition of the term and this Court's decision in *Gordon*; and (2) the differences in available remedies and the existence of subrogation rights for the employer allay any concern over double recovery.

The Court should not be persuaded by Defendant's arguments but should apply the law as set forth by the General Assembly and this Court's settled precedents.

C. Third party product manufacturers are not unfairly disadvantaged

Defendant asserts adopting Plaintiff's position "creates disparate treatment issues" for third-party product manufacturers in suits arising out of the workplace. (Def. Br. pp. 11-12). Defendant contends these rulings would preclude it from raising such defenses as comparative negligence of the user or the sophisticated user doctrine although other defendants get to proffer these defenses. This Court should not be persuaded by this argument.

Defendant claims, without citation to authority, that "[i]n 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." (Def. Br. p. 12). Defendant posits that adopting Plaintiff's view, when "taken one step further," would create an atmosphere where a manufacturer is a "target for disproportionate damages recoveries based upon their financial asserts rather than their fault." (Def. Br. p. 12).

This argument is an invitation to this Court to rewrite the joint and several liability statute. As pointed out in Plaintiff's principal brief, the 2005 amendment to the statute 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, however, cannot be sued and is thus not considered a "tortfeasor" for on-the-job injuries sustained by an employee for purposes of contribution statutes. *See Gordon* (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). *See also Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002) (the court of common pleas lacks original jurisdiction to adjudicate workplace injuries; the General Assembly has placed such original jurisdiction with the Workers' Compensation Commission).

In sum, if the situation does, in fact, create a disparate situation, it is for the General Assembly to amend this statute, not this Court. *American Petroleum Institute v. S.C. Dept. of Rev.*, 382 S.C. 572, 579, 677 S.E.2d 16, 20 (2009) ("it is not the province of [the] Court to perform legislative functions."). It is also not within this Court's authority to alter the plain meaning of the statute by altering the phrase "another potential tortfeasor," but the fact remains that there is no disparity. The Court should reject Defendant's assertion and answer the questions as Plaintiff suggests.

D. There will be no jury confusion by prohibiting the "empty chair" argument or, alternatively, explaining workers' compensation to the jury, as Plaintiff suggests

Defendant contends that this "Court must consider these questions with an eye towards avoiding jury confusion." (Def. Br. p. 12-13).

This is a two-sentence argument, and answering the certified questions the way Defendant proposes will *create* confusion (as it did in this case) because it creates an atmosphere where a jury is led to believe that a non-party who cannot be held liable in tort has actual tort liability for the Plaintiff's injuries and will make Plaintiff whole. Not only would this be "jury confusion," Defendant's positions actually create a situation where the jury is left to speculate about why the employer is not in the courtroom and whether the Plaintiff has already received a recovery for his damages. While "jury confusion" is generally a concern for the court, procedures or instructions that mislead a jury are also to be avoided. *Cf. Carson v. CSX Transp.*, 400 S.C. 221, 734 S.E.2d 148 (2012) (noting a court always has discretion to exclude evidence *sua sponte* if it believes it will mislead a jury); *S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (noting it is improper to use a special verdict form which is likely to mislead the jury); *Poston by Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987) (noting that secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion); *State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 263 S.C. 391, 210 S.E.2d 613 (1974) (noting concern over requested jury instruction that tended to mislead the jury).

The caption of this subpart of Defendant's Brief suggests that the certified questions before the Court concern the "injection of collateral issues." (Def. Br. p. 12). Defendant does not explain this remark. The issues here, however, are not collateral. *See* Black's Law Dictionary 907 (9th ed. 2009) ("collateral issue" means "a question or issue

not directly connected with the matter in dispute"). The issues in this case – whether Defendant may use the "empty chair" defense where the third-party is not a "tortfeasor" and whether the court may explain something about the reason for the third-party's absence – are directly connected with the matter in dispute, namely, Defendant's liability for Plaintiff's harm.

The Court should reject Defendant's conclusory assertion that answering the questions as Defendant suggests would avoid "jury confusion at trial" on "collateral issues."

III. 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.

Plaintiff adheres to the arguments he presented in his principal brief. However, Plaintiff wishes to respond to a few points in Defendant's Brief on Question 1.

Defendant asserts that *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967) is no longer good law because it was decided prior to this Court's adoption of comparative negligence. (Def. Br. p. 15, n. 9). Defendant does not explain, however, why South Carolina's modification of joint and several liability or the adoption of comparative negligence affects the relevant portion of *Powers v. Temple*, which explains the operation of Section 42-1-570 of the Workers' Compensation Act (a provision that remains intact in the same form as it existed in 1967; *See* S.C. Code Ann. § 72-127 (1962)). The short answer is that *Powers* is still good law.

The remaining arguments Defendant makes under this subsection restate its

"policy" arguments, and Plaintiff has addressed those in this brief and in his principal brief. The Court should reject these assertions and answer Question 1 in the affirmative.

IV. 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 the plaintiff's employer is the wrongdoer.

Plaintiff adheres to the arguments he presented in his principal brief. However, Plaintiff wishes to respond to a few points in Defendant's Brief on Question 2.

Defendant lists cases from other jurisdictions that it asserts supports its argument that "numerous jurisdictions have also held that a defendant may assert the 'empty chair' defense with respect to the non-party employer's negligence." (Def. Br. pp. 16-21). Assuming Defendant accurately portrays the holdings of these cases, each state's statute is different and must be examined.

For instance, Defendant cites *Archambault v. Sonecy/Northeastern, Inc.*, 946 A.2d 839 (Conn. 2008) for the purported rule that the Connecticut Supreme Court "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." (Def. Br. p. 17). The statutory scheme in *Archambault*, however, does not contain a provision similar to S.C. Code Ann. § 15-38-15(D), which expressly preserves a defendant's right under amended joint and several scheme to assert an "empty chair" defense against "another joint tortfeasor," whether or not a party. This distinction limits *Archambault* to its particular facts and circumstances and does not aid this Court. An

employer is not a joint tortfeasor.

Much of the discussion that follows in Defendant's brief (pp. 17-18) derives from *Archambault* and is, therefore, also not helpful in resolving the certified questions under South Carolina's joint and several liability law.

Defendant points to the Nebraska case of *Steele v. Encore Mfg. Co.*, 579 N.W.2d 563 (Neb. Ct. App. 1998) in support of its assertion that it should be entitled to present "evidence that the immune employer's actions were the sole proximate cause of the accident" to avoid "unjust consequence." (Def. Br. p. 18). *Steele* did not involve a statute similar to § 15-38-15(B), nor was there any analysis of a provision similar to S.C. Code Ann. § 42-1-570. In fact, the Nebraska court's analysis is based purely on application of general rules governing the "empty chair" defense without any analysis that informs the certified questions before this Court.

The same is true of Defendant's cite to *Williams v. White Mt. Constr. Co.*, 749 P.2d 423 (Colo. 1988). The *Williams* Court noted that Colorado enacted a complete abolition of joint and several liability in 1986. The 2005 amendment to South Carolina's joint and several liability law, however, did *not* abolish the doctrine. Rather, the amendment modified it in several respects, including maintaining *full* joint and several for any defendant found to be 50% or more at fault. S.C. Code Ann. § 15-38-15(A) (2005). And the limitations provided by the section do not apply to any 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." S.C. Code Ann. § 15-38-15(F) (2005). *Williams* is therefore of

no aid to the Court in resolving the certified questions.

The rest of the cases are the same. In the interest of brevity Plaintiff would merely ask the Court not to take Defendant's representation of the holdings of these cases at face value but, instead, to compare each of these cases to the facts and law applicable to the certified questions before the Court. They are all distinct from South Carolina law in meaningful ways.

For the reasons Plaintiff presented in his principal brief the Court should answer Question 2 in the negative.

V. In connection with question 2, if a defendant retains the right to argue the empty chair defense against a 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 adheres to the arguments he presented in his principal brief on Question 3. That is, *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.

VI. 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.

Plaintiff adheres to the arguments he presented in his principal brief. However, Plaintiff wishes to respond to a few points in Defendant's Brief on Question 4.

Defendant asserts that "[i]n 2005, South Carolina abolished joint and several liability." (Def. Br. p. 24). That is an incorrect statement of the effect of the 2005 amendments to Section 15-38-15. The General Assembly expressly preserved complete joint and several liability for any defendant found to be at least 50% at fault (§ 15-38-15(A)) as well as any defendant whose liability is aggravated or impacted by substance abuse. (§ 15-38-15(F)). This point may seem pedantic, but it is not. States like Colorado *did* completely abolish the doctrine and did so with express language. That identical language, however, does not appear in the statute the South Carolina General Assembly enacted. Instead, our version specifically retained joint and several liability, though in a modified form. Because each word in a statute is presumed to have meaning, we must presume the "empty chair" language was added deliberately using the specific phrase "another potential tortfeasor."

Defendant asserts that the express language of Section 15-38-15(D), standing alone, requires answering Question 4 in the affirmative. (Def. Br. Pp. 26-27). Defendant points to several words from the Act in support of its argument, contending that "no word, clause, sentence, provision or part" of a statute "shall be rendered surplusage, or superfluous." (Def. Br. pp. 26-27). Defendant conspicuously overlooks, however, the operative words "another potential tortfeasor." And as this Court has held, an employer is not a "joint tortfeasor" in a case involving workplace injuries. *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005) ("[t]he third party defendant and the employer are *not* joint tortfeasors.").

Defendants accuse Plaintiff of "continuously confus[ing] the concepts of 'fault'

and 'liability.'" (Def. Br. p. 28). As pointed out above, it is the Defendant that attempts to blur the distinctions between the two concepts in an attempt to sneak "fault" back into the Workers' Compensation system. Defendant would also have this Court read the term "liable" in Section 15-38-15(D) in a vacuum without the express actor – another potential tortfeasor – included in the mix. The statute does not say "potential liable person" or similar language; rather, it uses the phrase "another potential tortfeasor," which has a specific meaning in the law.

Once again, Defendant then cites to numerous cases from other jurisdictions without referencing the applicable statutes. (Def. Br. pp. 26-34). The analysis here, however, does not lend itself to such a "cookie cutter" approach. Each state that has addressed joint and several liability has adopted its own version of the statute; some have abolished the doctrine completely while others, like South Carolina, have retained the doctrine in modified form.

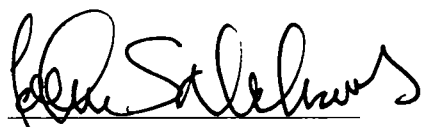
Defendant criticizes this Court's decision in *Gordon* as wrongly decided, but then describes the case as a relic since it predates the adoption of Section 15-38-15, which Defendant contends "abolished the old system of joint and several liability." (Def. Br. pp. 34-35). This statement demonstrates a fundamental misunderstanding of the law. The 2005 Act did not abolish joint and several liability but, instead, modified the doctrine except for defendants who are 50% or more at fault (§ 15-38-15(A)) or defendants who engage in aggravated behavior (§ 15-38-15(F)).

Plaintiff maintains that the Court should answer Question 4 in the negative.

CONCLUSION

When a plaintiff seeks recovery from a person, other than his employer, for an injury that was sustained on the job, the defendant should not be able to argue the "empty chair" defense, and the jury should not be able to allocate fault to the employer. This is because the employer is not "another joint tortfeasor." This honors the language of the relevant statutes, and it is fair because the Workers' Compensation Act prevents double-recovery—the Workers' Compensation carrier that pays benefits gets a right to subrogate against the recovery from the defendant in the tort suit. If the Court determines that a third-party defendant may argue the "empty chair" defense, then the trial judge should permit the trial judge to explain to the jury why that chair is empty. Otherwise, the atmosphere is highly misleading, in a way that can only prejudice the plaintiff.

Respectfully submitted,



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October 6, 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

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 *Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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