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.

PLAINTIFF'S BRIEF IN RESPONSE TO AMICUS BRIEF OF SCDTAA AND DRI

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I. The Amici Present the Same Arguments Defendant Presented and Add Nothing Truly New to the Inquiry Before the Court

This Court accepted the Amicus Brief filed by the SCDTAA and DRI ("Amici"). However, this brief is, at bottom, a "me, too" brief that fails to present anything the parties have not already brought to the Court's attention. *See Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir.1997) (Posner, C.J.) ("The term '*amicus curiae*' means friend of the court, not friend of a party.... An amicus brief should normally be allowed when ... the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.") (internal citation omitted); *Black's Law Dictionary* 98 (9th ed. 2009) (*Amicus curiae* means "friend of the court."). As Chief Judge Posner noted in *Ryan*:

> The bane of lawyers is prolixity and duplication, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.

125 F.3d at 1064.

The parties presented thorough arguments in support of their relative positions. The Amici present nothing new – they fail to provide the Court with anything new. Plaintiff will, however, proceed pursuant to Rule 213, SCACR, to address those arguments once again.

II. South Carolina Law Does Not Permit a Jury to Apportion Fault to an Employer Where a Plaintiff Is Injured on the Job and Subsequently Seeks Recovery from a Third-Party Tortfeasor

The Amici begin their presentation with the same false premise the Defendant presented in its Brief (Brief of Defendant pp. 24, 34-35), that is, that the 2005 amendment to South Carolina's joint and several liability law "abolished pure joint and several liability in South Carolina." (Amicus Brief, p. 3). As Plaintiff pointed out in reply to Defendant's Brief, the 2005 Act did *not* abolish the doctrine. Rather, the 2005 amendment modified the doctrine in several respects, including maintaining *full* joint and several liability for any defendant found to be 50% or more at fault. S.C. Code Ann. § 15-38-15(A) (2005). Furthermore, 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). That is, a defendant who meets the test of Subpart (F) remains liable in full – *i.e.*, under common law joint and several liability – for injuries caused by such defendant's conduct.

The 2005 amendment did not abolish joint and several liability in South Carolina. *See, e.g., Stretch v. Murphy*, 112 P.2d 1018, 1021 (Ore. 1941) ("[t]he word 'abolish' has a definite and distinctive meaning, namely, 'to do away with, annul or make void; put an end to; destroy.'"); *Dutcher v Culver*, 24 Minn. 584, 594, 1877 WL 3999 (1877) (equating "abolish" to mean "to destroy utterly and completely"). As the Supreme Court of New Jersey noted:

> The verb 'abolish' imports absolute destruction. It has its root in

> the Latin word '*abolere*,' meaning 'to utterly destroy.' It is defined thus: 'To extinguish, abrogate, or annihilate a thing.' *Bouvier's Law Dictionary*. 'To do away with wholly; to annul; to make void; to put an end to or destroy as a physical object; to wipe out.' 'Abolish' applies particularly to things of a permanent nature, such as institutions, usages, customs; as the abolition of slavery.' *Webster's New International Dictionary*.

Pondelick v. Passaic County, 168 A. 146, 147 (N.J. 1933). *See also Black's Law Dictionary* p. 6 (9th Ed. 2009) ("abolish" means "[t]o annul, eliminate, or destroy, esp. an ongoing practice or thing"). The 2005 amendment did not "annul, eliminate, or destroy" joint and several liability in South Carolina, and this Court should not accept the Amici's premise to the contrary.

A. Omitting Employers from Apportionment Is Not Unjust to Third-Party Defendants

The Amici point to this Court's decision in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (adopting modified comparative fault as the law in South Carolina) as somehow leading to the adoption of the amendment to joint and several liability in South Carolina nearly 15 years later. (Brief of Amicus, pp. 3-4). This argument is specious. The 2005 amendment had nothing to do with *Nelson*.

There was an attempt in 2004 to completely abolish joint and several liability. This was part of a nationwide effort by various special interest groups. *See* H. 3744, 2004 S.C. Acts (bill proposing to amend South Carolina tort law to, among other things, "Add Chapter 41 to Title 15 So as to Provide That in an Action for Personal Injury, Property Damage, or Wrongful Death, the Liability for Each Defendant *Is Several Only* and must Be Allocated to the Defendants Based on Each Defendant's Percentage of Fault and to

Establish Criteria for Establishing the Percentages of Fault")(emphasis added).[1] Ultimately the version of H. 3744 presented to the Senate would have preserved joint and several liability for a defendant who was 20% or more at fault or a defendant who acted intentionally. H. 3744, 2004 S.C. Acts, Section 9.

When the 2004 bill failed in the Senate, the proponents returned in 2005 with another comprehensive tort "reform" bill that did *not* include a complete abolition of joint and several liability but raised the threshold for full joint liability from <20% to <50% at fault. *See* H. 3008, 2005 S.C. Acts ("Adding Section 15-38-15 So as to Provide in an Action to Recover Damages Resulting from Personal Injury, Wrongful Death, Damage to Property, or to Recover Damages for Economic Loss or Noneconomic Loss, Joint and Several Liability Does Not Apply to a Defendant *Who Is less than Fifty Percent at Fault*, to Provide for Apportionment of Percentages of Fault among Defendants, and to Provide That the Provisions of this Section *Do Not Apply* to a Defendant Whose Conduct Is Wilful, Wanton, Reckless, Grossly Negligent, Intentional, or Conduct Involving the Use, Sale, or Possession of Alcohol or Drugs") (emphasis added).[2]

Contrary to the Amici's argument, the General Assembly did not adopt the proposal to completely eliminate joint liability, but instead modified joint and several liability as set forth in the 2005 Act. That is, for a defendant found to be less than 50% of the total fault liability is several only, but for any defendant found to be 50% or more

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[1] The 2004 version of this Bill is on line at http://www.scstatehouse.gov/billsearch.php?billnumbers=3744&session=115&summary=B

[2] The 2005 version of this Bill is on line at http://www.scstatehouse.gov/billsearch.php?billnumbers=3008&session=116&summary=B

responsible for the total fault, liability is joint *and* several. Furthermore, under Section 15-38-15 (F), the 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 drugs." That means the legislature intended to preserve the existing common law rule of joint and several liability for any defendant found to be 50% or more at fault or any defendant who meets the test set forth in (F). Had the legislature intended to abolish joint and several liability, these provisions would be surplusage and would make no sense. All of the Amici's arguments flow from their false premise – that joint and several liability is dead.

The Amici next set up a chart demonstrating their complaint that adopting Plaintiff's position would lead to "injustice." (Brief of Amici, pp. 6-7). The Amici's argument here is based upon two other false premises: (1) that the non-party *in this case* is a "joint tortfeasor" and (2) that the non-party's "liability" to pay for damages in this case is based upon notions of fault. As Plaintiff presented in his Reply Brief, when a plaintiff is injured on the job, the third-party employer is *not* considered a joint tortfeasor, and the employer's responsibility for workers' compensation payment is not based on notions of fault. The Court would have to accept opposite and erroneous views of these two points in order to adopt the positions being advocated by the Amici.

As Plaintiff contended in his Reply Brief to these same exact arguments, the statute requires a third party to be a "joint tortfeasor" before the jury may assess any portion of fault in the verdict. The Court should reject the positions being advocated first by Defendant, then again by the Amici.

B. The Statute's Plain Language Does Not Support Including Employers on the Verdict Form in a Case Against a Third-Party Tortfeasor

The Amici contend that the language of S.C. Code Ann. § 15-38-15(D) "leads inexorably to the conclusion that the legislature intended for at-fault non-parties to be included on verdict forms." (Brief of Amicus, p. 8). The Amici make the same argument here that the Defendant made, that is, that *Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) is no longer good law (Brief of Amicus, p. 9, n. 1), and that an employer *must* be a joint tortfeasor for all workplace injuries (a back door way of arguing the Workers' Compensation system is fault-based). This Court should not be persuaded by these arguments.

Plaintiff would refer to his Reply Brief for his response to these positions. (Reply Brief, *passim*, esp. pp. 16-18). The legislature intended for only an absent "joint tortfeasor" to be included on the verdict form, and under *Gordon* (which remains good law), an employer (whose liability is not based upon fault) is not a "joint tortfeasor" for a workplace injury. Furthermore, an employer's responsibility under the Workers' Compensation Act is not based in fault.

CONCLUSION

The Amici quote Justice Potter Stewart's words "Fairness is what justice really is," *see* D. Shrager and E. Frost, *The Quotable Lawyer* § 71.68 at 158 (1986), and contend fairness "requires a defendant to bear only her due share of responsibility for the harm visited upon another." (Brief of Amicus, p. 11). They contend a "plain statutory reading of the Apportionment Act supports the notion that the legislature intended to eliminate, not perpetuate this unfairness." (Brief of Amicus, p. 11).

This conclusion, of course, advocates that this Court completely rewrite the Act to eliminate joint and several liability for all defendants, including those 50% or more at fault or those engaged in aggravated behavior. These positions were presented to the General Assembly in 2004 and soundly rejected. And in 2005, the General Assembly understood that the policies underlying joint and several liability – shifting loss from the innocent injured party onto the tortfeasor who brought about the harm – remain the public policies of South Carolina for tortfeasors whose liability is 50% or more or who engage in fault greater than ordinary negligence. Had the legislature intended what the Amici advocate, it would have said "potential liable person or entity," "any nonparty," "any person," or similar language.

The legislature used the phrase "another potential tortfeasor," which has a specific meaning in the law. The change in the Act being sought by the Amici should be done by the legislature not by this Court.

Respectfully submitted,

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PROOF OF SERVICE

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

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