THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
The Honorable R. Lawton Mcintosh, Circuit Judge

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S.C. SUPREME COURT

Appellate Case No. 2015-001159

Walter Smith, ...Respondent,

v.

Norman K. Tiffany, Brown Trucking Company and
Brown Integrated Logistics, Inc., ...Appellants,

v.

Corbett James Mizzell, III, ...Respondent.

INITIAL BRIEF OF RESPONDENT WALTER SMITH

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INTRODUCTION

This matter concerns an appeal of two separate orders, one granting summary judgment in favor of Respondent/Third-Party Defendant Mizzell on all causes of action, and the other granting Respondent's Motion to Quash Plaintiff Smith's deposition under Rule 26(c), SCRCP.

As to the Order granting summary judgment, the seminal issue on appeal concerns the interpretation and application of South Carolina's Uniform Contribution Among Tortfeasors Act, codified at 15-38-10 et seq. of the South Carolina Code. Specifically, Appellants maintain Respondent Mizzell, who was not named as a Defendant in the underlying case and who had settled and obtained a Covenant not to Execute from the Respondent/Plaintiff Smith, should be named as a party and included on the verdict form so as to enable the jury to apportion fault between and among the Defendants and Mizzell. For the reasons discussed herein, South Carolina's statutory scheme does not permit Appellants to add Mizzell as a party for this purpose. Moreover, Appellant's cannot satisfy the requisite elements to state a negligence claim against Mizzell.

As to the Order on Respondent's motion to quash, Appellant's argument is similarly misguided. As set forth herein, the trial court properly determined, in its broad discretion, that allowing the deposition would improperly subject Respondent Smith to particularized harm and that the information sought was not sufficiently relevant or necessary to the case. Furthermore, even if error, there was no resulting prejudice as Respondent Smith was not at fault in the accident and any information relevant to the issue of damages could be reasonably obtained by other evidence already available to Appellants. Accordingly, for the reasons that follow, both orders were properly decided and must be affirmed on appeal.

STATEMENT OF THE CASE

This appeal arises out of a motor vehicle collision that occurred on U.S. 178 in Saluda County, South Carolina, on December 7, 2012. On that date a tractor trailer operated by the defendant Norman K. Tiffany ("Tiffany"), an employee of Appellants Brown Trucking Company and Brown Integrated Logistics, was parked along the right-hand side of the east-bound lane of U.S. 178. The truck was parked adjacent to and partially blocking the entrance/exit of a gas station parking lot.

Third-party defendant Mizzell stopped at that gas station at approximately 6:00 a.m. When Mizzell was exiting the gas station parking lot, Tiffany's truck blocked his vision of traffic on U.S. 178, requiring Mizzell to pull forward to look beyond Tiffany's truck so as to see on-coming traffic. As Mizzell pulled forward, his vehicle collided with Respondent Smith's vehicle, which was traveling east on U.S. 178.

Mizzell's liability carrier tendered the limits of Mizzell's liability policy to Respondent Smith. In return, Smith signed a Covenant not to Execute in favor of Mizzell on February 8, 2013.

On April 25, 2013, Respondent Smith brought suit against Appellants Tiffany and Brown alleging that Tiffany, while acting within the scope of his employment with Brown, was negligent in the manner in which he parked his truck alongside U.S. 178, and that such negligence was a proximate cause of the collision at issue and of the Smith's resulting injuries and damages. Appellants answered and asserted third-party claims against Mizzell for declaratory judgment, negligence, and for relief under the Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 et seq. (the "Act"). A motion to dismiss filed by Mizzell was denied but after discovery was completed the trial judge granted Mizzell's motion for summary judgment on all causes of action. This appeal follows.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

The appellate court reviews a trial court's order on discovery motions under an abuse of discretion standard. See Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist., 392 S.C. 76, 85, 708 S.E.2d 745, 750 (2011) (applying abuse of discretion standard in review of trial court ruling on motion to compel). "The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion . . . An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support." Id. (quoting Bayle v. S. Carolina Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (internal citations omitted)).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT BASED UPON FACTUAL EVIDENCE REVEALED THROUGH DISCOVERY AND, IN DOING SO, DID NOT RESCIND OR OVERRULE THE PRIOR ORDER OF JUDGE SEALS DENYING RESPONDENT'S MOTION TO DISMISS.

Judge McIntosh's Order granting summary judgment did not have the effect of overruling the prior order denying Plaintiff's motion to dismiss. While it is correct that one circuit court judge may not overrule another, the issues here, i.e. dismissal versus summary judgment, are not the

same and, therefore, did not violate the rule. See Salmonsen v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008) (finding rule not violated where prior ruling of one circuit court judge did not address precise issues in subsequent ruling by another circuit court judge regarding the method of class certification). No matter how Appellants' attempt to characterize Judge McIntosh's Order, a summary judgment ruling on a subsequent motion simply cannot rescind a prior ruling on a motion to dismiss which applies an entirely different standard and procedural posture. Indeed, circuit judges often grant summary judgment on a claim or claims that a prior judge may have allowed to proceed at the preliminary Rule 12(b)(6) stage. In such instances, as in the present case, the court's determination relies on evidence revealed through the discovery process which was not previously available on a motion to dismiss based solely on the pleadings.

Salmonsen v. CGD is particularly instructive. There, this Court was tasked with determining whether the decision of one circuit court judge establishing an "opt-in" notice procedure for putative class members overruled another circuit court judge's prior rulings regarding scheduling of trial and class certification. Id. at 454, 661 S.E.2d at 88. Finding no violation by the subsequent ruling, the Court distinguished the two rulings on the basis that the first judge never ruled on the method of class notification nor did he designate the action as an "opt-out" class action. Id. Moreover, the Court observed that class certification could be altered at any time prior to a decision on the merits. Id.

In the present case, as in Salmonsen, the subsequent ruling of Judge McIntosh addresses factual issues, not mere allegations, under a different procedural rule and an entirely different standard. For instance, the standard applicable on a motion to dismiss is set forth under Rule 12(b)(6), SCRCP, and is far less burdensome than the standard required at summary judgment under Rule 56, SCRCP. A circuit judge reviewing a motion to dismiss under Rule 12(b)(6) is

limited to reviewing only the allegations of the pleadings and construing those allegations in the light most favorable to the nonmoving party. Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) (When deciding a motion to dismiss for failure to state a claim, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief). By contrast, the scope of review of a circuit judge reviewing a motion for summary judgment under Rule 56, SCRCP, is broadened to include a review of factual evidence supporting a nonmoving party's claim. Rule 56(c), SCRCP. On a motion for summary judgment, the circuit judge must construe the facts—not merely the allegations—in order to determine whether a verdict for that party would be reasonable. See Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000) (when reviewing a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party; nonetheless, a court cannot ignore facts unfavorable to that party, and it must determine whether a verdict for that party would be reasonably possible under the facts).

Here, the facts construed in favor of Appellants—facts not available to Judge Seals and premature at the Rule 12(b)(6) stage—simply fail to support Appellants' third-party claim against Respondent Mizzell. Judge McIntosh observed Appellants failed to present any evidence that Mizzell breached a duty owed to Appellants. (Order on MSJ at p. 4). Appellants further failed to establish any evidence of injury or damages as a result of the accident or any conduct of Mizzell during the accident. (Order on MSJ at p. 4). Instead, the only evidence revealed in discovery was that Appellants have incurred legal fees and expenses in responding this action, neither of which are cognizable damages to support Appellants negligence claim. (Order on MSJ at p. 4). Given this glaring lack of evidentiary support, Judge McIntosh correctly ruled that Appellants' negligence claim fails.

Judge Seals' review of the Motion to Dismiss was based not on this evidence but on the allegations of the pleadings viewed in the light most favorable to the Appellants. Indeed, the facts considered by Judge McIntosh were not yet available for Judge Seals' review of the motion to dismiss and, even if known, consideration of these facts outside the pleadings is not permitted at the 12(b)(6) stage and would have converted the motion to one for summary judgment. See Rule 12(b), SCRCP (stating "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ."). Consequently, because the Order on appeal addresses a motion for summary judgment based on new evidence revealed through the discovery process, it did not rescind or overrule Judge Seals' prior Order on Respondent Mizzel's Motion to Dismiss. Accordingly, the Order is not subject to reversal due to an alleged violation of the aforementioned rule.

II. THE CIRCUIT COURT COMMITTED NO ERROR IN GRANTING SUMMARY JUDGMENT AS TO APPELLANTS' IMPROPER IMPLEADER.

Appellants ask this Court to reconcile an alleged conflict regarding allocation of fault within the General Assembly's adoption of limited joint and several liability in its 2005 enactment of the Uniform Contribution Among Tortfeasors Act, codified at 15-38-10 et seq. (hereinafter the "Act"). However, as outlined herein, both the plain language of the Act and the legislative intent supporting that language are clear: allocation of fault under § 15-38-15 is inapplicable in a case such as this where the Plaintiff has chosen to file suit against only one defendant. Notwithstanding, Appellants have sought, improperly, to circumvent § 15-38-15 by impleading a nonparty for purposes of asserting that the nonparty is liable for any or all of Plaintiff's damages. For the reasons that follow, permitting Appellants to allocate fault under this scenario is not only against

the plain language of the statutory scheme, it is against both the legislative intent underpinning the Act and the firmly entrenched common law principle securing a plaintiff's right to choose which, if any, co-tortfeasors he will sue.

a. § 15-38-15 did not abrogate a plaintiff's common law right to choose his defendant.

It is well-settled under the common law that a plaintiff has the exclusive right to choose its defendant or to determine which co-tortfeasors he will sue. Chester v. S. Carolina Dep't of Pub. Safety, 388 S.C. 343, 345-46, 698 S.E.2d 559, 560 (2010) (finding "plaintiff chooses" rule not abrogated under identical provisions of the Tort Claims Act). As observed in Chester, "a ruling that a . . . defendant can compel a plaintiff to join other alleged tortfeasors as defendants in that suit would overturn this firmly entrenched common law principle." 388 S.C. at 346, 698 S.E.2d at 560. "Moreover, a concomitant ruling that where these defendants cannot be joined because they have already settled with the plaintiff, the action must be dismissed, would thwart our strong public policy favoring the settlement of disputes." Id. (citing Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987)).

Chester involved a tort claims act defendant and a virtually identically worded apportionment statute, 15-78-100(c) under the South Carolina Tort Claims Act ("SCTCA" or "TCA"). Importantly, applying this similar statutory language, the Court was "not persuaded that the General Assembly, in enacting § 15–78–100(c), giving a TCA defendant the right to a proportionate verdict 'when an alleged tortfeasor is named a party defendant,' intended to abrogate the tort plaintiff's right to choose her defendant, nor to effectively force the plaintiff to choose between settling with some parties and thereby forego her right to sue a TCA defendant, or going to trial against all co-tortfeasors." Id. at 346, 698 S.E.2d at 560 (citing Compare Wade v. Berkeley County, 348 S.C. 224, 559 S.E.2d 586 (2002)).

For these same reasons observed in Chester, there is likewise no indication that the General Assembly, in enacting § 15-38-15, intended to abrogate this right with regard to non-TCA claims or to force a plaintiff to choose between settling with some parties or going to trial against all co-tortfeasors. See e.g. Smalls v. S. Carolina Dep't of Educ., 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000) (finding apportionment not warranted under similar provisions of the tort claims act where all other parties had settled and defendant was the only remaining party).

b. Inclusion of nonparties on the verdict form for purposes of allocation of fault is against the language, purpose and legislative intent of § 15-38-15.

Section 15-38-15 of the Act provides that the determination of joint and several liability is based on the defendant's percentage of fault relative to the fault of the other defendants and the plaintiff. Notably absent from the statutory scheme is any mention of fault allocation to non-defendants. Non-defendants are likewise not mentioned in the specific subsection regarding fault allocation, which states: "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." S.C. Code Ann. § 15-38-15(C)(3). Specifically, section 15-38-15 of the Act provides, in relevant part:

> (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).

* * *

(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).

S.C. Code Ann. § 15-38-15 (emphasis added).

The plain language of § 15-38-15 clearly states that apportionment is only available between "two or more defendants"—not a defendant and a potential tortfeasor who is a nonparty, or even a third-party defendant. This language highlights one critical procedural threshold for joint liability to apply: that the joint tortfeasor must be an existing defendant. Thus, where, as here, the plaintiff has chosen to file suit against only one defendant, apportionment is not available under §

15-38-15. See e.g. Smalls, 339 S.C. at 218, 528 S.E.2d at 687 (finding apportionment not warranted under similar provisions of the tort claims act where all other parties had settled and defendant was the only remaining party). Likewise, a defendant cannot implead a potential tortfeasor to circumvent this procedural threshold for, as argued above, such an impleader would negate the well-settled "plaintiff chooses" rule, i.e. that a plaintiff has the exclusive right to choose which tortfeasors he will sue. Moreover, even if such an impleader is permitted, that party is still not a "defendant" for purposes of the Act—he is instead a "third-party defendant."

Such an interpretation omitting non-defendants from fault allocation is consistent with the legislative intent of the Act. See Cabiness v. Town of James Island, 712 S.E.2d 416, 425 (2011) ("The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute."). Review of previous unadopted versions of the Act reveals the legislature considered but rejected language specifically permitting allocation of fault to non-defendants. For instance, one version proposed language requiring the fact finder to consider the fault of all tortfeasors, including that of non-defendants, stating: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged injury . . . regardless of whether the person was, or could have been, named as a party to the suit." H.B. 3008, 2005 Leg., 116th Sess. § 15-32-30(A) (as referred to the H. Comm. on the Judiciary, Dec. 8, 2004). This version likewise provided the specific method for asserting the nonparty defense:

> Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice within one hundred twenty days of the date of the trial that a nonparty was wholly or partially at fault. The notice must be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last-known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

H.B. 3008, 2005 Leg., 116th Sess. § 15-32-30(A) (as referred to the H. Comm. on the Judiciary, Dec. 8, 2004).

Another version of the Act specifically included a provision instructing the jury or court to consider the percentage fault of settled or released parties in determining each defendant's proportionate share of damages:

> (B) The proportionate share of damages for which each defendant is liable is calculated by multiplying the damages by a fraction in which the numerator is the defendant's percentage of liability determined pursuant to subsection (C), and the denominator is the total of the percentages of liability determined pursuant to subsection (C), to be *attributable to all defendants whose actions are a proximate cause of the injury, death, or damage to property including settles or released persons pursuant to Section 15-38-50.*
>
> (C) The jury or court, if there is no jury, shall specify:
>
> * * *
>
> (3) the percentage of liability that proximately caused the injury . . . in relation to one hundred percent, that is attributable to each defendant whose actions are a proximate cause of the injury . . . including settled or released persons pursuant to Section 15-38-50.

H.B. 3008, 2005 Leg., 116th Sess. § 15-38-15(B)-(C) (as reported by H. Comm. on the Judiciary, Feb. 9, 2005) (emphasis added). However, the legislature ultimately declined to adopt either of the aforementioned version and instead, decided on a method that not only omitted non-defendants and settled or released parties altogether, but specifically instructed the jury to consider only the fault of the plaintiff and the existing defendants. The implication, therefore, is that the legislature deliberately chose to omit non-defendants from consideration in fault allocation. Indeed, had the legislature intended non-defendants to be considered in a jury's fault allocation determination, it certainly could have included such language in subsection (B) or (C)(3).

Moreover, while no appellate decision has considered this precise issue, a finding against Appellants improper impleader is consistent with the recent analysis of § 15-38-15 by the Federal District in Fagnant v. K-Mart Corp., 4:11-CV-00302-RBH (D.S.C. Dec. 31, 2013). There, following a voluntary dismissal of an individual defendant by the plaintiff, co-defendants K-Mart and Gator Investors moved to strike the dismissal or, in the alternative, to join the individual defendant as an indispensable party. Although the motion arose out of the joinder of a co-defendant rather than impleader as in the instant case, the District Court considered and rejected a number of the same arguments raised by Appellants in this appeal.

First, Appellants maintain that § 15-38-15 creates a substantive right for a tortfeasor not to pay more than its actual allocation of fault (so long as it is less than 50% at fault). Appellants base this assertion on § 15-38-15(A) which partially abrogated our state's "pure" joint and several liability by mandating that "[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." S.C. Code Ann. § 15-38-15(A). Appellants thus maintain that if Respondent Mizzell is not included in the allocation of fault, the share of fault of others is artificially increased, leading to the possibility that a party who is actually less than 50% at fault could be allocated 50% or more of the fault.

The District Court rejected this argument in Fagnant, citing this Court's opinion in Chester, which, as noted above, interpreted a comparable provision of the SCTCA that similarly limits the liability of government defendants to their proportion of fault. Fagnant at *3; See S.C. Code Ann. § 15-78-100(c) ("[T]he trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined."). The rational underlying the decision in Chester was that the SCTCA could not be read to "compel a plaintiff to join other alleged

tortfeasors as defendants" in light of the "well-settled" rule that "a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." 698 S.E.2d at 560. For this same reason, Appellants' third-party complaint against Respondent Mizzell is an improper attempt to implead a co-tortfeasor that Plaintiff rightfully elected not to sue.

Appellants further assert they have the right to name Mizzell as a "party" for purposes of allocation of fault based on 15-38-15(D), which 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." Id. Notably, the Fagnant defendants relied on this same subsection to similarly assert that, at a minimum, the dismissed defendant must be included on the jury verdict form in order to permit the jury to allocate fault among all tortfeasors. Fagnant at *4. However, this too was rejected in Fagnant. Citing to Chester, the Fagnant Court again observed the South Carolina Supreme Court "emphatically reaffirmed – *after* the enactment of the statute at issue – the long recognized rule that 'a plaintiff has the sole right to determine which co-tortfeasors she will sue.'" 698 S.E.2d at 560 (emphasis in original). Prior to the enactment of section 15-38-15, defendants were entitled to assert an "empty chair" defense at trial and receive a setoff for any settlement obtained from a joint and several tortfeasor. See Chester, 698 S.E.2d at 560. The Fagnant court determined that the plain language of the statute simply codified a defendant's retention of these rights. Fagnant at *5.

As in Fagnant, Appellants' impleader of Respondent Mizzell is an improper attempt to ensure that Mizzell, a non-defendant, is on the jury verdict form. Absent a substantive claim asserted by Appellants against Mizzell, which has not been alleged, there is simply no basis to support Appellants' attempt to bring Mizzell into this action by way of third-party complaint. Furthermore, even if such an impleader is permitted, Mizzell is still not a "defendant" for purposes of the Act—he is instead a

"third-party defendant." As detailed above, Plaintiff is vested with the exclusive right to choose whom he sues. Appellants cannot unilaterally abolish this right as a means of circumventing the plain language and legislative intent of the Act to improperly add parties to Plaintiff's action for purposes of fault allocation.

c. The right to set-off under §§ 15-38-15(E) and 15-38-50 provides Appellants with the appropriate remedy to allocate fault to an alleged joint-tortfeasor.

Where the plaintiff has settled with one co-tortfeasor, as in the instant case, the Appellants are not without a remedy. As outlined in §§ 15-38-15(E), if Appellants are found liable, they will be entitled to a set-off from any settlement received from any potential tortfeasor, such as Respondent Mizzell:

> (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).

S.C. Code Ann. § 15-38-15(E). The availability of such a set off is further reinforced under § 15-38-50, which states:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it *reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater*; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50. It is through these subsections that Appellants are provided recourse, not through improper impleader of Respondent Mizzell.

d. An impleader which fails to comply with Rule 14, SCRCP, cannot succeed merely as a means for fault allocation.

Appellants' third-party complaint cannot survive summary judgment absent evidence of a substantive claim that would impose liability on Respondent Mizzell. Appellants' third-party Complaint asserts Mizzell was negligent and is directly liable to the Plaintiff for causing the subject collision. The Complaint further seeks a declaratory judgment that Mizzell is at fault, and asserts that Mizzell must be joined under Rules 14 and 19 of the South Carolina Rules of Civil Procedure, and also under § 15-38-15, and Article 1, Section 3 of the S.C. Constitution and/or the Fourteenth Amendment to the United States Constitution. However, nowhere in the third-party Complaint is it alleged that Mizzell, as a third-party Defendant, is liable in any way to Appellants.

Third-party practice in South Carolina is governed by Rule 14, SCRCP, which sets forth the circumstances under which a defendant may bring in a Third-Party defendant. Specifically, Rule 14(a) provides:

> At any time after commencement of the action a defending party, as a Third-Party Plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

Rule 14(a), SCRCP. In order to validly assert a third-party claim, a third-party plaintiff must have a "substantive claim" against a third-party defendant founded upon "derivative liability." First Gen. Servs. of Charleston, Inc. v. Miller v. Serv. Master, Inc. 314 S.C. 439, 441, 445 S.E. 2d 446, 447 (1994). "[H]owever, no right exists to implead a third-party defendant who is directly liable to the plaintiff." Id.

Absent a substantive claim against Mizzell, Appellants third-party Complaint fails to comport with the requirements of Rule 14(a), SCRCP. Typically the basis for a defendant bringing in a third-party defendant under Rule 14(a) relates to allegations which would create a third-party claim under the doctrines of equitable indemnity or contribution. However, even if asserted, an action for

contribution under these circumstances is expressly prohibited under § 15-38-50. Pursuant to § 15-38-50, a potential tortfeasor who has entered into a release or covenant not to sue, like Respondent Mizzell, is discharged from liability for contribution to any other tortfeasor, such as Appellants in this case:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) *it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.*

S.C. Code Ann. § 15-38-50 (emphasis added). Thus, Appellants are not even permitted to pursue a contribution action against Respondent Mizzell under the circumstances of this case. As set forth above, Appellants remedy is one for set-off set forth under §§ 15-38-15(E) and 15-38-50.

e. As correctly decided by the Circuit Court, even if Appellants' impleader were proper, Appellants' third-party claims fail for lack of evidentiary support.

Even assuming Appellants' impleader survived Rule 14, SCRCP, the facts construed in favor of Appellants simply fail to support Appellants' third-party negligence claim against Respondent Mizzell. To prevail in a negligence action, the plaintiff must show three essential elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by a negligent act or omission; and 3) damage proximately caused by a breach of duty. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). A plaintiff may not maintain an action in negligence if there is no legal duty of care owed by defendant to plaintiff: "Without a duty, there is no actionable negligence." Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

As noted in the Circuit Court Order, Appellants' counsel conceded that Mizzell had neither breached any duty owed to Appellants nor caused Appellants any specific injury. (Order on MSJ at p. 4). Moreover, as observed by Judge McIntosh, Appellants failed to present any evidence that Mizzell breached a duty owed to Appellants. (Order on MSJ at p. 4). Appellants further failed to establish any evidence of injury or damages as a result of the accident or any conduct of Mizzell during the accident. (Order on MSJ at p. 4). Instead, the only evidence revealed in discovery was that Appellants have incurred legal fees and expenses in responding this action, neither of which are cognizable damages to support Appellants' negligence claim. (Order on MSJ at p. 4). Absent any evidence of breach and resulting damage, Appellants' negligence claim fails.

In sum, as provided by the legal framework and analysis set forth herein, Appellants simply cannot maintain a third-party claim against Mizzell based upon the facts of this case. To permit Appellants' improper impleader would run counter to the well-settled rule that a plaintiff has a right to choose his defendant. Fault allocation and policy arguments in favor of joint and several liability cannot overcome the plain language and legislative intent of § 15-38-15. The Order of the Circuit Court granting Mizzell's motion for summary judgment as to Appellants' third-party Complaint was therefore proper and must be affirmed on appeal.

III. THE CIRCUIT COURT COMMITTED NO ERROR IN GRANTING PLAINTIFF'S REQUEST FOR A PROTECTIVE ORDER QUASHING PLAINTIFF'S DEPOSITION.

Appellants maintain the Circuit Court erred in blocking Plaintiff's deposition based on a finding of "particularized harm," arguing the potential for agitation, disruption of sleep patterns and the likelihood that Plaintiff might provide inaccurate information are insufficient grounds to prevent Plaintiff from being deposed in this case. On the contrary, South Carolina courts recognize the stress of testifying as a particularized harm worthy of protection in a case such as this, where testifying will result in adverse mental and physical health effects. See In re Thames, 544 S.E.2d

854, 344 S.C. 564 (Ct. App. 2001) (noting trial court quashed subpoena after hearing testimony from Appellant's personal physician that the stress of testifying would be hazardous to Appellant's physical health in light of Appellant's mental incapacity). As detailed herein, the Circuit Court's finding of particularized harm is aptly supported by the evidence and was, therefore, properly within the Court's discretion.

On certiorari, the Supreme Court of South Carolina will review only errors of law and will not review factual findings unless wholly unsupported by the evidence. Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (citation omitted). "The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion . . . An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support." Bayle, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (internal citations omitted).

Rule 26(c) of the South Carolina Rules of Civil Procedure grants the circuit court broad discretion to limit discovery, as in the instant case, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense." In particular, when the discovery process threatens to become abusive or create a particularized harm to a litigant or third party, the trial judge may issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense. Hamm v. S.C. Pub. Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994). "The person requesting protection from the court or commission must initially show good cause by alleging a particularized harm which will result if the challenged discovery is had." Id. If a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is "relevant and necessary" to the case. Hollman, 384 S.C. at 578, 683 S.E.2d

at 498 (internal citations omitted). In determining whether information is necessary, the party seeking the information must "demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." Id. (quoting Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154, 163 (2009)). The trial court must determine whether there are reasonable alternatives available to discover the information. Id.

Here, Plaintiff presented expert testimony from Dr. Marshall A. White, MD, a board certified neurologist, who thoroughly evaluated Plaintiff's condition. Dr. White's diagnosis revealed a traumatically induced brain disorder as a result of the motor vehicle accident at issue. Due to the severity of Plaintiff's brain disorder, Dr. White concluded that Plaintiff's brain injury and resulting dementia prevents him from participating in the deposition process. Specifically, Plaintiff's participation in a deposition would prove detrimental to his underlying condition. Dr. White stated that Plaintiff is "neuropsychologically fragile" and as a result, "a confrontational deposition would tend to . . . agitate [Plaintiff] and could have short term adverse consequences" such as agitation and alteration of sleep patterns.

In addition, Dr. White testified that Plaintiff's dementia interferes significantly with his ability to provide accurate information due to his limited memory and cognitive defects. These cognitive defects similarly result in a tendency to confabulate and Plaintiff would be inclined to agree with his questioner in a deposition setting to conceal his lack of memory of the accident. Dr. White explained Plaintiff would also become easily frustrated and was likely to "shut down" in a deposition setting.

Given Dr. White's testimony, the Circuit Court found Plaintiff "mentally unfit to testify" and that "his tendency to confabulate would thwart the purpose of discovery and harm Plaintiff."

(Order on Mtn. to Quash at 2). Citing Dr. White's conclusion that "his underlying brain injury would likely cause him to become frustrated, withdrawn, and agitated during and for a period after the deposition," the Circuit Court determined the potential for such injury "pos[ed] a sufficient particularized harm to Mr. Smith such that he should be protected from giving his deposition." (Order on Mtn. to Quash at 4). In so finding, the Circuit Court noted Appellants "proffered no medical or expert evidence or testimony showing Mr. Smith is of sound mind and that Mr. Smith could give his deposition without confabulating, experiencing agitation, aggravation and exacerbation of his underlying brain injury." (Order on Mtn. to Quash at 3).

Based on these findings, the Court correctly concluded that "[d]eposing Mr. Smith under these conditions would be abusive, cause him embarrassment and cause him particularized harm." (Order on Mtn. to Quash at 4). These findings are appropriately supported by expert testimony from Dr. Smith. Absent evidence to the contrary, which Appellants did not present, there is no abuse of discretion in the Circuit Court's conclusion. See Hollman, 384 S.C. at 577, 683 S.E.2d at 498 (noting the Supreme Court of South Carolina will not review factual findings unless wholly unsupported by the evidence); Bayle, 344 S.C. at 128, 542 S.E.2d at 742 (internal citations omitted) (stating "[a]n abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support.").

Furthermore, as the Circuit Court correctly determined, Appellants would suffer no resulting prejudice by limiting this discovery because "the Defendant truck driver Tiffany and the defense expert accident reconstruction engineer have conceded that Walter Smith did nothing wrong and was not a contributing cause to the accident." (Order on Mtn. to Quash at 4). As to Plaintiff's damages, the Circuit Court cited ample other evidence from which Appellants could use to evaluate this aspect of Plaintiff's claim, including depositions of treating physicians, depositions

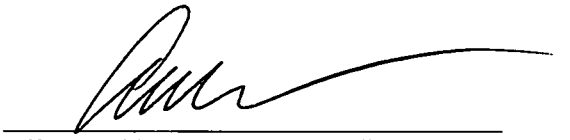
of fact witnesses such as Plaintiff's sisters who are his caregivers, the accident report, witness statements, all medical records, all medical bills, and long term damage evaluations contained in the Life Care Plan prepared by expert Sarah Lustig and the economic damage report by expert Oliver Wood. Based on this wealth of other available evidence, Appellants can fully evaluate liability and damages without needlessly requiring Plaintiff to undergo annoyance, embarrassment or oppression by allowing his deposition, especially when his testimony is medically proven to be inaccurate and unreliable.

Thus, even if error, Appellants cannot demonstrate that "the information sought is 'relevant and necessary' to the case" as it is reasonably available by other means. See Hollman, 384 S.C. at 580, 683 S.E.2d at 500 (reversing circuit court order allowing nonparty patient interviews finding no evidence that interviews were necessary to case or that the information sought wasn't available by other reasonable alternatives). Accordingly, the Circuit Court's decision to block Plaintiff's deposition based on its aptly supported finding of particularized harm, lack of relevance and lack of necessity was not an abuse of discretion. See Bayle, 344 S.C. at 128, 542 S.E.2d at 742 (internal citations omitted) (stating "[a]n abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support.").

CONCLUSION

For the reasons addressed herein, the Order of the Circuit Court granting summary judgment as to Appellants' improper third-party complaint should be affirmed. In addition, the Order of the Circuit Court quashing Respondent Smith's deposition, being within the Court's discretion and supported by the evidence, should likewise be affirmed. Respondent further asks the Court to affirm the Orders presently on appeal for any ground appearing on the record or previously argued to the lower court as provided by Rule 220(c) of the South Carolina Appellate Court Rules.

Respectfully submitted,



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January 19, 2016
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
The Honorable R. Lawton Mcintosh, Circuit Judge

Appellate Case No. 2015-001159

Walter Smith, ...Respondent,

v.

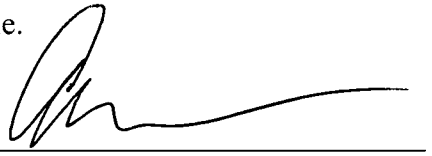
Norman K. Tiffany, Brown Trucking Company and
Brown Integrated Logistics, Inc., ...Appellants,

v.

Corbett James Mizzell, III, ...Respondent.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that the foregoing Brief of Respondent Walter Smith complies with Rule 208 of the South Carolina Appellate Court Rule.



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PROOF OF SERVICE

I certify that I have served copies of the Initial Brief of Respondent Walter Smith and Respondent's Designation of Matter to be Included in the Record on Appeal by depositing copies of same in the United States Mail, postage prepaid, on January 19, 2016, addressed to the respective attorneys of record:

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