THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Judge

Walter Smith, Respondent,

v.

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

AND

Brown Trucking Company and Brown Integrated Logistics, Appellants,

v.

Corbett James Mizzell, III, Respondent.

Appellate Case No. 2015-001159

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON THE SAME LEGAL ISSUES REJECTED BY A PRIOR CIRCUIT COURT JUDGE

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE SOUTH CAROLINA IS NO LONGER A PURE JOINT AND SEVERAL LIABILITY JURISDICTION

A. **The common law rule that a plaintiff has exclusive control over which tortfeasors the jury can consider in allocating fault cannot survive the abrogation of pure joint and several liability**

B. **The text, structure, and purpose of S.C. Code § 15-38-15 demonstrate the inclusion of at-fault entities in the allocation of fault is both proper and necessary to prevent the unwarranted imposition of joint and several liability on defendants who are less than 50% at fault**

C. **Due process requires abrogation of the harsh common law rule of joint & several liability**

III. THE CIRCUIT COURT ERRED IN BLOCKING THE DEPOSITION OF PLAINTIFF SMITH BASED ON THE POSSIBILITY HE MIGHT BECOME ANXIOUS AND PROVIDE INACCURATE RESPONSES

STATEMENT OF THE CASE

This Appeal involves two Orders of the Circuit Court. One Order granted summary judgment to Third-Party Defendant Mizzell on all claims alleged in the Third-Party Complaint.[1] The second Order granted Plaintiff's motion to quash the notice of Plaintiff Smith's deposition.[2]

The case arises out of a traffic accident that occurred December 7, 2012, in front of a rural gas station/convenience store on Highway 178 in Saluda County.[3] Prior to filing suit, Plaintiff entered into a Covenant Not to Execute with Corbett James Mizzell, the driver who pulled out from the store parking lot and collided with Plaintiff's vehicle. The Covenant, signed February 8, 2013, expressly reserved the right of Plaintiff to file suit against Mizzell.[4]

On April 25, 2013, Plaintiff filed a complaint against Norman K. Tiffany, Brown Trucking Company, and Brown Integrated Logistics alleging various negligence-based causes of action related to the December 7, 2012, accident. Tiffany had been operating a tractor-trailer that was parked at the store at the time of the accident. Plaintiff did not sue Mizzell.[5]

Defendants timely filed Answers, and Brown Trucking Company and Brown Integrated Logistics (the "Brown Defendants") additionally filed a Third-party Complaint[6] against Corbett James Mizzell, III.[7] Mizzell failed to Answer and an Entry of

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[1] R. pp. 19-31 (Order granting summary judgment, 5/15/15)
[2] R. pp. 14-18 (Order granting motion to quash, 4/30/15)
[3] R. pp. 37-46, ¶¶ 13-14 (Plaintiff's Complaint, 4/25/13)
[4] R. pp. 32-36, ¶¶ 3-4 (Covenant Not to Execute, 2/8/13)
[5] R. pp. 37-46 (Plaintiff's Complaint, 4/25/13)
[6] R. pp. 47-60 (Answer and Third-Party Complaint, 6/17/13)

Default was filed against him. Mizzell thereafter obtained counsel and filed a Motion to Set Aside Default as well as a Motion to Dismiss the Third-party Complaint.[8] A hearing on these motions was held on November 12, 2013, before Circuit Court Judge William H. Seals, Jr.. At the hearing, Judge Seals set aside the entry of default and denied Mizzell's Motion to Dismiss.[9] The formal written order "Granting Motion to Set Aside Entry of Default and Denying Motion to Dismiss filed by Third Party Defendant Mizzell" was filed December 31, 2013.[10] There was no motion to reconsider.

The parties then engaged in discovery. On or about May 9, 2014, Mizzell filed a Motion for Summary Judgment as to all causes of action in the third-party Complaint.[11] Additionally, on or about May 13, 2014, Plaintiff filed a motion to quash the notice of Plaintiff Smith's deposition and for a protective order against such deposition.[12]

On November 5, 2014, Plaintiff's counsel obtained an order from the Saluda County Probate Court appointing a conservator for Walter Smith.[13] None of the other parties to this action were involved in that petition, received notice of the petition, or participated in any proceedings related to the petition.

The parties filed various memoranda in support of pending motions, and a hearing was held on March 18, 2015, before circuit court Judge R. Lawton McIntosh on, *inter alia*, Third-party Defendant Mizzell's motion for summary judgment and Plaintiff's

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[7] This is the same person who received the Covenant Not to Execute.
[8] R. pp. 61-62 (Motion to Dismiss, 8/26/13)
[9] R. p. 5 (Form 4 Order denying Motion to dismiss, 11/12/13)
[10] R. pp. 6-9 (Order of Judge Seals, 12/31/13)
[11] R. pp. 76-78 (Motion for Summary Judgment, 5/9/14)
[12] R. pp. 79-93 (Motion to Quash Plaintiff's Deposition, 5/13/14)
[13] R. pp. 10-11 (Order Appointing Conservator, 11/5/14)

motion to quash the notice of his deposition.[14]

By Order filed April 30, 2015, Judge McIntosh granted Plaintiff's motion to quash the Defendants' notice of deposition of Plaintiff Walter Smith. [15,16] By Order filed May 15, 2015, Judge McIntosh granted Mizzell's motion for summary judgment on the Third-party Complaint.[17]

The Brown Defendants timely filed a Notice of Appeal as to both Orders.[18] This Court granted a motion under Rule 204(b), SCRAP, to certify this appeal directly.

FACTS

At approximately 6:20 a.m. on December 7, 2012, a pickup truck driven by Corbett James Mizzell, III, exited the parking lot of a rural Citgo gas station/convenience store on Highway 178 in Saluda County. Mizzell struck a pickup truck being driven by Walter Smith, causing the Smith pickup to exit the road, flip, and strike a power pole. Smith was treated and released, having suffered several small cervical vertebrae fractures which later required surgery. [19, 20]

At the time of the accident, a tractor-trailer owned by the Brown Defendants was

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[14] R. pp. 260-334 (Hearing transcript, 3/18/15)
[15] R. pp. 14-18 (Order granting motion to quash, 4/30/15)
[16] Appellants recognize this Order would not ordinarily be immediately appealable but request the Court consider it in conjunction with the Order granting summary judgment (See, e.g., *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362, 622 S.E.2d 533, 538 (2005); *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001) *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003) ("[T]he courts have made a practice of accepting appeals ... of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable."), or, in the Court's discretion, for the guidance of the parties and trial court and for prevention of a possible appeal on this issue in the future.
[17] R. pp. 19-31 (Order granting summary judgment, 5/15/15)
[18] Notice of Appeal, filed 5/28/15.
[19] R. pp. 37-46; pp. 415-416 (Plaintiff's Complaint, 4/25/13; Collision Report)
[20] Fortunately, Plaintiff was not paralyzed.

parked parallel to Highway 178 at the front of the Citgo parking lot; Defendant Norman K. Tiffany was sitting in the driver's seat of the parked tractor-trailer, listening to the radio, when the accident occurred.[21] The tractor-trailer was not moving at the time of the collision and was not physically involved in the collision.[22] Mizzell had pulled into the parking lot by going behind the tractor-trailer to the front of the store.[23] It is undisputed Mizzell saw the tractor-trailer and took note of its position when he entered the parking lot.[24] However, when Mizzell left the Citgo parking lot, intending to turn right on Highway 378, he did so in front of the tractor-trailer, placing it between him and any traffic traveling in the lane closest to him. [25]

Concerning his view of traffic on Highway 178, Mizzell initially testified at his deposition he could see down the highway past the Brown truck but did not see any approaching traffic; however, he shortly thereafter changed his testimony and claimed the tractor-trailer blocked his view as he was trying to exit in front of it.[26]

Mizzell was charged with Failure to Yield the Right-of-Way. [27] At his deposition, Mizzell admitted he was at fault to some degree in causing this collision:

> Q: Okay. Do you believe that you're at fault at all in this accident?
> A: I -- I agree with the police report that says that I failed to yield right-of-way.[28]

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[21] R. pp. 415-416 (Collision Report); R. p. 338, lines 17-24 (Deposition of Tiffany)
[22] R. pp. 415-416 (Collision Report)
[23] R. p. 382, line 24 - p. 383, line 13 (Deposition of Mizzell)
[24] *Id.*
[25] R. p. 415 (Collision Report); R. p. 388, lines 12-17 (Deposition of Mizzell)
[26] R. p. 381, lines 2-6 and R. p. 386, line 11 - p.387, line 6 (could see) and R. p. 388, line 23 - p. 389, line 13 (could not see) (Deposition of Mizzell)
[27] R. p. 415 (Collision Report); R. p. 393, lines 19-25 (Deposition of Mizzell)
[28] R. p. 393, lines 19-22 (Deposition of Mizzell)

No one has offered evidence to the contrary.

Law enforcement who investigated the collision determined the tractor-trailer was parked lawfully.[29] There is no dispute the Brown truck was parked in a place where it had a right to be. (Plaintiff's allegations relate to the manner in which it was parked – i.e., with no flashers or warning triangles.[30] Defendants dispute that flashers or warning triangles are necessary when parked in a parking lot.)

Mizzell had minimum liability insurance coverage.[31] Plaintiff accepted Mizzell's minimum coverage in exchange for a Covenant Not to Execute.[32] Plaintiff then sued only Tiffany and the Brown Defendants.[33]

There is no assertion that Mizzell is immune, that the court lacks personal jurisdiction over him, or any other argument that he is otherwise not subject to suit. In addition, the issues related to Mizzell's default have been resolved and there is no dispute that Mizzell was, as a matter of procedure, properly joined as a Third-Party defendant.[34]

Relevant to the Order preventing plaintiff's deposition, the Order relies entirely upon the opinions of Plaintiff's expert Dr. Marshall White.

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[29] R. p. 415 (Collision Report)
[30] Plaintiff also argues other places "would have been safer," but, even if true, this does affect the right of the truck to be parked where it was.
[31] See R. pp. 32-36 (Covenant Not to Execute, 2/8/13)
[32] *Id.*
[33] R. pp. 37-46 (Plaintiff's Complaint, 4/25/13)
[34] Mizzell and Plaintiff argue he cannot be joined as a matter of law.

ARGUMENT

Summary of the Argument

The Third-Party Complaint asserts three causes of action. The first two demand the right to have Mizzell included in any fault allocation (the "allocation causes of action"). The third cause of action is for negligence and is included to support the allocation causes of action (by asserting Mizzell is at fault, in whole or in part, for damages alleged by Plaintiff), to provide Mizzell notice of this claim and an opportunity to defend, and to support a direct claim against Mizzell for the Brown Defendants' costs in defending Plaintiff's claims, which would not have occurred but for Mizzell's failure to yield.

The initial issue in this case invokes the rule that one circuit court judge cannot overrule another circuit court judge. Summary judgment was granted based on the same legal arguments previously rejected by another circuit court judge in denying Mizzell's motion to dismiss.[35]

The Order granting summary judgment on the two allocation causes of action is based exclusively upon the common law rule "a plaintiff has the sole right to determine which co-tortfeasor(s) [to] sue" (hereinafter, the "Plaintiff chooses" rule); however, our caselaw (and logical analysis) show the "Plaintiff chooses" rule is derived from, *and can continue to exist only in*, a pure joint and several liability jurisdiction. If any tortfeasor, regardless of the degree of fault, is fully jointly and severally liable to the plaintiff, it is irrelevant (for purposes of the claim against that defendant) if some other tortfeasor is

[35] This issue, if decided in Appellant's favor, would be dispositive on the appeal of the summary judgment order.

also liable; therefore, under pure joint and several liability, it does not matter which tortfeasor (or how many) the plaintiff sues. This rule, however, cannot survive the passage of S.C. Code § 15-38-15, which explicitly modified the common law pure joint and several liability doctrine; nor can it survive a due process analysis of the rights of those who are sued to be responsible only in proportion to their degree of fault.[36]

S.C. Code § 15-38-15 provides a substantive right to defendants who are less than 50% at fault (and do not fall under other exceptions; see 15-38-15(F)) to be free from the punitive imposition of joint and several liability. Because of the procedural structure imposed by § 15-38-15, a jury must be allowed to consider the total fault of all parties and potential tortfeasors. In a case such as this, the defendants should be allowed to name Mizzell as a party in order for the jury to allocate 100% percent of the fault "to the plaintiff and to the defendants" as outlined by § 15-38-15(C)(3).

In addition, due process considerations of fairness and equity, which a number of jurisdictions have invoked to modify or eliminate joint and several liability, also mandate that a fact-finder be allowed to consider the fault of others in order to properly assess a defendant's share of fault.

Regarding the Order preventing the deposition of Plaintiff, Appellants contend the finding of a particularized harm to Plaintiff is not supported by the evidence and the prohibition against deposing the Plaintiff will unfairly prejudice Defendants.

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[36] If the Court agrees the "Plaintiff chooses" rule no longer survives, the Order granting summary judgment to Mizzell would be reversed and he remains a party, in which case there is no need to address the statutory interpretation of § 15-38-15 or the due process issues. (Although both continue to be issues in other cases and, if nothing else, are academically intriguing.)

Standard of Review

An appellate court reviewing an order on a motion for summary judgment, like the trial court ruling on the motion, "must view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008) (See also, Rule 56(c), SCRCP.) "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). If there is no material dispute as to evidentiary facts, but the conclusion to be drawn from those facts is in dispute, summary judgment is improper. *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) ("Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." (internal citation omitted).)

In reviewing an order regarding a discovery request, the appellate court will generally reverse only for an abuse of discretion (*Dunn v. Dunn,* 298 S.C. 499, 381 S.E.2d 734 (1989).). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson,* No. 2013-001452, 2015 WL 5247124, at *10 (S.C. Sept. 9, 2015) (not yet released for publication), citing *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 681 S.E.2d 885 (2009).)

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON THE SAME LEGAL ISSUES REJECTED BY A PRIOR CIRCUIT COURT JUDGE

A) The reversal of a prior judge's Order –Background

The Third-Party Complaint against Mizzell asserts three claims: a right to declaratory judgment that the Brown Defendants are entitled to have fault allocated to Mizzell, a direct claim for allocation based on S.C. Code § 15-38-15 and due process, and a claim that Mizzell was negligent. Mizzell moved to dismiss the Third-Party Complaint, arguing the Third-Party Complaint was improper based on the common law rule that "a plaintiff has the sole right as a matter of law to determine which co-tortfeasor(s) [to] sue" (i.e., the "Plaintiff chooses" rule).

The Honorable William H. Seals denied the Motion to Dismiss, finding "a defendant in a South Carolina case which does not involve governmental entities has a clear statutory right to have its fault allocated pursuant to § 15-38-15." In addition, Judge Seals found that failing to allow fault allocation to Mizzell "would undermine the purpose of S.C. Code § 15-38-15 and the procedural and substantive rights of a Defendant to pay no more than its fair share of damages" and that fault allocation to a tortfeasor such as Mizzell was necessary "in order to protect the rights granted under § 15-38-15 and the due process protections of both the State and Federal Constitutions."

Mizzell then filed a motion for summary judgment on the Third-Party Complaint. As to the allocation causes of action, Mizzell's argument for summary judgment (joined by the Plaintiff in a Motion to Strike) was the same as its argument on the Motion to Dismiss - the plaintiff has the sole right to choose who is a party. Judge McIntosh granted

the motion on this ground, which resulted in this appeal.

The only difference between the Motion to Dismiss and the Motion for Summary Judgement involved the negligence cause of action. Mizzell introduced evidence Plaintiff settled with Mizzell under a Covenant Not to Execute prior to suing Tiffany and the Brown Defendants, and, additionally, that Brown had suffered no damages other than legal fees and expenses defending the present suit, which Mizzell argued were not sufficient to support the negligence claim.

In granting summary judgment to Mizzell, Judge McIntosh held there could be no negligence claim because Brown had suffered no cognizable damages. On the joinder and allocation issues, the judge held a plaintiff has the sole right to determine which tortfeasors to sue, that S.C. Code § 15-38-15 did nothing to change this, and that "Mizzell's inclusion in this action is, therefore, not necessary for the just adjudication of the Plaintiff's claims under Rule 19, the third-party complaint is not proper under Rule 14, and Brown's due process rights are not violated by the inability to join Mizzell or include him for purposes of allocation."

B) The reversal of a prior judge's Order – Law

Our courts have uniformly held "[o]ne Circuit Court Judge does not have the authority to set aside the order of another." *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 340 S.E.2d 546 (SC 1986) (citing *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979).) "A succeeding judge will not rescind an order made by a preceding judge; ... [u]niformity and harmony in our courts necessarily demand that such be the law... ." *Dukes & Dukes, Inc. v. Hygrade Food Products Corp.*, 236 S.C. 69, 113 S.E.2d 254

(1960) (internal citations omitted; collecting cases.) Numerous cases are in accord. (*See, e.g., Ex parte State*, 263 S.C. 363, 367-68, 210 S.E.2d 600, 602 (1974); *Carolina Baking Co. v. Geilfuss*, 169 S.C. 348, 168 S.E. 849, 851 (1933); *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 386, 752 S.E.2d 269, 274 (Ct.App.2013).)

The rule applies even if the reviewing court believes the original order might be incorrect. (See, e.g., *State v. Harrelson*, 211 S.C. 11, 43 S.E.2d 593 (1947) ("Although we have stated we are in accord with the holding of Judge Dennis ... [it] ... is in conflict with the previous ruling of Judge Gaston, ... [and] ... will have to be reversed since one Circuit Judge has no power to review, revise or reverse the action of another Circuit Judge.").)

Here, as to the allocation issues, Judge McIntosh overturned the Order of Judge Seals based on the same "plaintiff chooses" legal argument rejected by Judge Seals. This was improper, and the case should be remanded to the circuit court to proceed based upon the Order of Judge Seals.

C) Negligence Issue

In his Motion to Dismiss, Mizzell asserted the negligence claim should be dismissed for failure to "state a colorable claim for negligence"[37] because the Brown Defendants did not claim they were directly harmed by Mizzell's negligence. However, the Third-party complaint does allege the Brown Defendants "suffered losses including legal fees and expenses in responding to this action" as a result of Mizzell's negligence.[38] Judge Seals ruled generally that all three causes of action "are properly pled causes of

[37] R. pp. 66 (Memorandum in support of Motion to Dismiss)
[38] R. p. 59, ¶ 81 (Answer and Third-Party Complaint)

action against Mizzell."

By contrast, in granting summary judgment on the negligence issue, Judge McIntosh ruled Mizzell breached no duty owed to the Brown Defendants and their legal fees and expenses defending this suit were not "cognizable damages." Appellants assert that, in circumstance such as this, where a the claim would never have occurred but for the actions of another, legal fees and expenses should support a claim against the entity who was primarily and actively at fault in causing the Plaintiff's injuries;[39] however, for purposes of this issue (one judge overruling another), Judge McIntosh's Order improperly overruled the Order of Judge Seals which found the negligence cause of action was properly pled.

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[39] The Brown Defendants have incurred legal fees and expenses in defending a claim they assert was wholly the fault of Mizzell. However, there is no contract or special relationship (based on existing law) between Brown and Mizzell to support an indemnity claim, and the Covenant not to Execute most likely precludes a contribution claim (how contribution works in light of § 15-38-15 is another unresolved issue). Under these circumstances, in cases such as this, where Plaintiff's injuries would not have occurred but for the primary and active fault of Mizzell in driving around a parked truck (i.e., the Brown Defendants' fault, if any, being passive), if the Brown Defendants are determined to be wholly free from fault for this collision, they should be allowed to pursue recovery of their defense costs from Mizzell. (See, e.g., dissent of Judge Lockemy in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC,* 776 S.E.2d 426, 433 (S.C. Ct. App. 2015), citing *Addy v. Bolton,* 257 S.C. 28, 183 S.E.2d 708 (1971) and the Restatement (Second) of Torts § 914 (1979) ("One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.").

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE SOUTH CAROLINA IS NO LONGER A PURE JOINT AND SEVERAL LIABILITY JURISDICTION

A. The common law rule that a plaintiff has exclusive control over which tortfeasors the jury can consider in allocating fault cannot survive the abrogation of pure joint and several liability

The rule that a Plaintiff has the exclusive right to choose its defendant is an anachronism of the common law doctrine of pure joint and several liability. Modern decisions of this court have already introduced the doctrine of comparative fault based on due process concepts of fairness and equity,[40] and the passage of S.C. § 15-38-15 statutorily abrogated the doctrine of pure joint and several liability for tortfeasors who are less than 50% at fault or not otherwise engaged in aggravated activities.

Under common law pure joint and several liability, a defendant who is at fault to any degree is fully jointly and severally liable; therefore, it is irrelevant whom the Plaintiff sues or who else could possibly be joined. The only issue in a pure joint and several liability jurisdiction is whether the defendant whom plaintiff sues is at fault to some degree. If so, that defendant is fully liable regardless of who else may also be liable. However, without the doctrine of pure joint and several liability as a foundation, the "Plaintiff chooses" rule cannot survive.

An analysis of the derivation of the "Plaintiff chooses" rule shows clearly that the rule was based on pure joint and several liability. Recent cases (including those in the summary judgment order at issue here) simply cite "the common law rule" without foundational analysis; however, every opinion in which the court provided a justification

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[40] See, e.g., *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991); *Fernanders v. Marks Construction of South Carolina, Inc.*, 330 S.C. 470, 499 S.E. 2d 509 (Ct. App. 1998).

for the "Plaintiff chooses" rule cites the doctrine of pure joint and several liability.

Tracing the derivation of the rule often leads to the 1949 opinion in *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 55 S.E.2d 68 (1949) - when pure joint and several liability was the only law relevant to fault:

> If the defendant and those sought to be brought in as additional parties defendants are joint tort-feasors, the recent decisions of this Court are clear to the effect that defendant has no right to bring in as parties defendants joint tortfeasors who were not made parties by the plaintiff. One who is injured by the wrongful act of two or more joint tort-feasors has the option of bringing an action against either one or all of them as parties defendants, ***all* being severally liable**. (emphasis added)

Other cases can be traced to *S.C. Dep't of Health and Envir. Control v. Fed–Serv Indus., Inc.*, 294 S.C. 33, 362 S.E.2d 311 (Ct.App.1987), which provides:

> [O]ne who is injured by the wrongful act of two or more joint tort-feasors has the option of bringing an action against either one or all of them, ***all* being severally liable**. ... "[T]he joint tort-feasor **with joint and several liability** remains merely a permissive party. ... **Since a joint tort-feasor is severally liable for the *entire* damage**, complete relief can be accorded between the parties to the suit. (citing, *inter alia*, *Doctor v. Robert Lee, Inc.*) (emphasis added)

or to *Simon et al. v. Strock*, 209 S.C. 134, 139, 39 S.E.2d 209 (1946):

> It is well established in this jurisdiction that one who is

> injured by the wrongful act of two or more joint tort-feasors has an election or option to sue each of such tort-feasors separately or to join them as parties defendant in a single action. ***Every* person who joins in committing a tort is severally liable for it and cannot escape liability by showing that another person is liable also.** (emphasis added)

Unless South Carolina remains a pure joint and several liability state, an absolute rule that "plaintiff chooses" cannot survive.

Chester v. South Carolina Dep't of Pub. Safety, 388 S.C. 343, 698 S.E.2d 559 (2010), a two page *per curiam* opinion addressing a different statutory scheme, is the touchstone for some recent cases involving the "Plaintiff chooses" rule, as well as for the Order at issue here. *Chester* addresses the Tort Claims Act, which deals with the limited abrogation of governmental immunity and, unlike § 15-38-15, does not address the issue of joint and several liability.[41] The *Chester* opinion merely repeats the "Plaintiff chooses" rule, citing, without analysis, the *Doctor* and *Fed-Serv* cases (excerpted above, based on pure joint and several liability). The opinion has no discussion of the justification for the rule or whether it survives the passage of S.C. Code § 15-38-15 in a case such as the one at issue here. Neither *Chester* nor cases since *Chester* have examined

[41] The Tort Claims Act already provides for proportionate liability. (§ 15-78-100(c)) Unlike § 15-38-15, *which specifically curtails joint and several liability*, there is no mention of joint and several liability in the Tort Claims Act.

or even addressed the common law foundation of the rule.[42]

Fagnant v. K-Mart Corp., No. 4:11-CV-00302-RBH, 2013 WL 6901907 (D.S.C. Dec. 31, 2013) (R. pp. 428-431), an unpublished U.S. District Court case cited heavily in the Order below, cites to *Chester* and concludes the "Plaintiff chooses" rule applies because *Chester* was decided after the passage of § 15-38-15, despite the fact *Chester* addresses a different statute. Neither the *Fagnant* court nor the court below analyzed the foundation of the rule, or even mentioned the *Doctor* and *Fed-Serv* cases cited in *Chester*.

Therefore, an actual analysis of the "Plaintiff chooses" rule shows it is founded upon, *and can survive only within*, the doctrine of pure joint and several liability. Where pure joint and several liability no longer exists, the "Plaintiff chooses" rule serves no purpose.

A rule without a purpose is a delusion. It provides an illusion of justice without the effect; it is merely a comfortable mantra to bypass critical analysis and simply move on to the next issue. Here, exclusive control by the plaintiff is a vestigial crutch devoid of its original expediency and inconsistent with the passage of S.C. Code § 15-38-15 and the abrogation of joint and several liability. The superficial application of the anachronistic rule to dismiss Mizzell from the consideration of fault in this case was improper and should be reversed.

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[42] Also, unlike here, the trial court in *Chester* had entirely dismissed plaintiff's claims when it held entities who could not be added were indispensable parties under the Tort Claims Act. The Supreme Court reversed on two grounds: one, the "Plaintiff chooses" rule, and two, that a plaintiff should not be forced "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." Such is not the case here.

B. The text, structure, and purpose of S.C. Code § 15-38-15 demonstrate the inclusion of at-fault entities in the allocation of fault is both proper and necessary to prevent the unwarranted imposition of joint and several liability on defendants who are less than 50% at fault

S.C. Code § 15-38-15 changed the law in South Carolina. (See, e.g., *Denene, Inc. v. City of Charleston,* 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) "The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.").[43] Under the statute, Defendants who are less than 50% at fault and have not engaged in certain aggravated activities[44] are protected from the imposition of joint and several liability. (See § 15-38-15(A))

The overriding rule of statutory construction is to fulfill the legislative intent. (See, e.g., *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.") In addition, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

The Act which created S.C. Code § 15-38-15 is entitled the "Economic

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[43] The passage of S.C. Code § 15-38-15 occurred as part of a series of tort reform measures in South Carolina's legal system. The elimination or modification of pure joint and several liability was (and remains) an agenda item of those who are likely targets of lawsuits and who justifiably fear the inequity of imposing full liability on those who may share little fault in causing injury. Chief Justice Toal recognized the ameliorative effect of such laws in her State of the Judiciary address in 2005 ("This General Assembly is appropriately embarked upon a thoughtful effort to improve the tort system in South Carolina. I support and applaud these efforts. There is no reason for South Carolina courts to be ranked in the 40's in business climate by the U. S. Chamber of Commerce.") (http://www.scstatehouse.gov/sess116_2005-2006/sj05/20050302.htm)

[44] See § 15-38-15(F)

Development, Citizens, and Small Business Protection Act of 2005"[45] Section 15-38-15 provides:

> **§ 15-38-15. Liability of defendant responsible for less than fifty per cent of total fault; apportionment of percentages; willful, wanton, or grossly negligent defendant and alcoholic beverage or drug exceptions.**
>
> (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

[45] The Economic Development, Citizens, and Small Business Protection Act of 2005, , Act 27, House Bill 3008, Resolution 23, 2005 Leg., 116th Sess., effective July 1, 2005. http://www.scstatehouse.gov/sess116_2005-2006/bills/3008.htm The Act's heading includes: "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."

proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).

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

(b) After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral argument, with the length of such argument subject to the discretion of the trial judge, on the determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.

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

(E) Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C).

(F) This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

These substantive sections of S.C. Code § 15-38-15 must be read together to give effect to the legislative intent. (*Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C.

452, 468, 636 S.E.2d 598, 606-07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."); *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole."))

Subsection (A) specifically grants protection against joint and several liability to defendants whose conduct is not the primary cause of plaintiff's damages. It repeats this right twice, and ends with a clear statement of the purpose of the statute: "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."

This definitive statement of purpose, along with the structure of the statute, mandate that defendants must be allowed to name other at-fault entities as parties for purposes of allocation of fault in order to prevent the improper imposition of punitive joint and several liablity upon defendants who share less than 50% of the fault and have not engaged in the aggravated activities listed in Subsection (F).[46]

Subsection (C) requires a step-by-step procedure if a plaintiff proves liability. First, the factfinder determines the amount of Plaintiff's damages; second, it determines the amount of plaintiff's negligence. The last step is for the factfinder to allocate percentages of fault to all defendants who proximately caused plaintiff's damage. The

[46] There is no Subsection (F) allegation here, so Appellants will not continue to address this exception.

critical aspect of Subsection (C), however, is "**the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent.**" If an entity with large share of the fault is not included in this calculation, the percentage allocated to "the defendants" is artificially increased; this creates the very real and substantial risk that a defendant who is actually less than 50% at fault in proximately causing plaintiff's damage will receive an allocation which would subject it to joint and several liability.

The case at hand is a conspicuous example. Mizzell's fault is not only clear, it is admitted. If a jury allocates fault without consideration of Mizzell, his share of fault is added to the percentage allocated to others, thereby guaranteeing that joint and several liability will be imposed on one or more of the other defendants.[47] For example, if a factfinder allocates fault at 33.3% each to Mizzell, Tiffany, and the Brown Defendants (if treated as one under Subsection(C)(3)(a)), no defendant would face joint and several liability. If Mizzell is removed, however, and the ratios remain the same, the percentage of fault allocated to both Tiffany and the Brown Defendants would rise to 50%, and each would be subject to joint and several liability. In other words, each would be liable for 100% of plaintiff's damages not based on actual fault (which is only 1/3), but solely based on the artificially forced calculation of one hundred percent and the absence of Mizzell.

The setoff provision of Subsection (E) does not remedy the potential harm. Setoff occurs after the allocation of fault; it does nothing to prevent the unwarranted imposition

[47] The statute protects those "less than 50% [at] fault" so there could potentially be two defendants with joint and several liability (i.e., if both are assessed exactly 50%).

of joint & several liability caused by an artificially forced allocation which occurs as the result of a missing at-fault entity.

In situations such as this, where two or more tortfeasors combine to cause injury, the clear legislative intent of S.C. Code § 15-38-15 is that the punitive imposition of joint and several liability should be reserved only for the most culpable defendants. If a plaintiff can easily defeat the protection of § 15-38-15 by simply filing suit against one defendant, or separate suits against each,[48] the legislative intent of § 15-38-15 is completely thwarted. If the statute can be side-stepped so easily, a defendant with less than 1% of actual fault can be held fully liable for all of plaintiff's damages, and § 15-38-15 is rendered meaningless.[49]

Third-party practice is the most reasonable and practical method of complying with the procedures of § 15-38-15 and safeguarding the legislative mandate for certain defendants to be free from joint and several liability. Allowing (or requiring) that other at-fault entities be named via third-party practice[50] provides notice to all concerned, requires the party who names them to provide proof of their fault, and allows the court to address any other procedural or substantive issues related to the party (such as jurisdiction, statute of limitations, immunity, or other concerns).

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[48] Consolidation is purely discretionary (Rule 42, SCRCP), and a plaintiff can simply spread out separate complaints over time to make consolidation unlikely or impossible. See also, *Town of Kearny v. Brandt*, 214 N.J. 76, 104, 67 A.3d 601, 618 (2013) ("The jury's assessment of the [dismissed] defendants' fault promotes fair allocation of responsibility and avoids creating an incentive for a plaintiff to strategically target only one of a range of culpable defendants.")

[49] Which, again, is contrary to basic rules of statutory interpretation. See, e.g., *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002).

[50] Using the Declaratory Judgment Act (S.C. Code Ann. §15-53-10 *et seq.*,), Rule 14, and/or Rule 19, SCRCP.

In particular, Rule 19 provides: "Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action ***if ... in his absence complete relief cannot be accorded among those already parties....***" (Rule 19, SCRCP) Section 15-38-15's protection against joint and several liability is dependent on the relative fault of others. If a clearly culpable entity "who is subject to service of process and whose joinder will not deprive the court of jurisdiction" is not included in the forced calculation of 100% of the fault, the result is "in his absence complete relief cannot be accorded among those already parties."

Contrast this to the claims in *S.C. Dep't of Health and Envir. Control v. Fed–Serv Indus., Inc.*, 294 S.C. 33, 362 S.E.2d 311 (Ct.App.1987), where, under the doctrine of pure joint and several liability, the court held ***"[s]ince a joint tort-feasor is severally liable for the entire damage,*** complete relief ***can*** be accorded between the parties to the suit." (emphases added) Because of the procedural structure of § 15-38-15, unless a culpable entity who can be made a party is joined, "complete relief" (including the protection against joint and several liability explicitly provided in § 15-38-15 "cannot be accorded among those already parties."[51]

The Brown Defendants filed and served a Third-party complaint against Mizzell, thereby making him a Third-party Defendant for purposes of allocation of 100% of the fault under § 15-38-15(C)(3). There is no assertion that Mizzell is immune, that the court lacks personal jurisdiction over him, or any argument (other than "plaintiff chooses") that

[51] Although Rule 19 was rejected as a procedure for adding parties in Tort Claims Act cases in the *Chester* opinion, the Tort Claims Act does not have the protection against joint and several liability which is explicitly provided in § 15-38-15.

he is otherwise an improper party.[52] And Mizzell has, in fact, **admitted** he is an at-fault entity.[53] Without the inclusion of Mizzell in the calculation of fault, any allocation to the remaining defendants is artificially increased, which renders the protection against joint and several liability wholly illusory. Appellants properly followed the third-party procedure to name him as a defendant in this action, and the fact-finder should be allowed to consider his percentage of fault in its mandated allocation of "one hundred percent."

Indeed, other jurisdictions have specifically mandated third-party practice in similar circumstances, including some which allow third-party practice in the absence of any specific provision for such in the underlying statutes. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 470, 380 S.E.2d 100, 103 (1989) ("Where the plaintiff elects to sue only one of the joint tortfeasors, the original defendant may have others joined as additional or third party defendants."); *Benner v. Wichman*, 874 P.2d 949, 958 (Alaska 1994): "We hold that "party" for purposes of [Alaska's allocation statute] means parties to an action, including third-party defendants and settling parties."); *Carter v. Builders Transp., Inc.*, 812 F. Supp. 97, 98-99 (W.D. Ky. 1992) (The Kentucky allocation statute, which specifically allows third-party claims, "is not clear whether apportionment may be made to settling non-parties. However, if Carter [a settling non-party] is a named third party defendant then the jury, when apportioning fault, may consider Carter's negligence, if any. Because of the uncertainty in the statute

[52] In addition, although Mizzell was given a Covenant Not to Execute by the Plaintiff, it was not a complete Release; it reserved the Plaintiff's right to sue him. (R. pp. 32-36 (Covenant Not to Execute))

[53] R. p. 393, lines 19-22 (Deposition of Mizzell)

Carter should be named as a third party defendant and her motion for summary judgment will be denied.")

In *Alaska Gen. Alarm, Inc. v. Grinnell*, 1 P.3d 98, 101 (Alaska 2000), the Supreme Court examined the history of its allocation law, including a modification of its Rule 14 to comply with the Court's interpretation of the intent of the law:

> We also concluded [in *Brenner*, cited above] - in the absence of any explicit statutory procedure - that equity demanded that defendants be allowed to mitigate their damages by filing third-party claims against other potentially responsible persons.
>
> The following year, we adopted Alaska Civil Rule 14(c) to establish the procedure that defendants could use for equitable apportionment of damages to third parties who had no direct liability to the defendant but were potentially responsible to the plaintiff. Rule 14(c) provides that a defendant, as a third-party plaintiff, may join any party whose fault may have been a cause of the damages claimed by the plaintiff. The rule specifies that a judgment may be entered against the third-party defendant in favor of the plaintiff even in the absence of a direct claim."

New Jersey's Comparative Negligence Statute[54] has similar provisions. N.J. Stat. Ann. § 2A:15-5.2(a)(2) requires an allocation of 100% of the fault to "all the parties," and a defendant found less than sixty percent at fault is protected from joint and several liability.[55] In interpreting these provisions, the New Jersey Supreme Court has held:

> [T]he Comparative Negligence Act and the Joint Tortfeasors Contribution Law promote the distribution of loss in proportion to the respective faults of the parties causing that loss. Given the impact of a defendant's percentage of fault on the scope of its liability, ***the statutes' objectives are best served when the factfinder evaluates the fault of all potentially responsible parties.***
>
> *Town of Kearny v. Brandt*, 214 N.J. 76, 102, 67 A.3d 601, 617

[54] N.J. Stat. Ann. 2A:15–5.1 *et seq.*
[55] N.J. Stat. Ann. 2A:15–5.3

(2013) (internal citations omitted) (emphasis added)

The *Kearny* court also held "when a defendant ceases to participate in the case by virtue of a settlement, a non-settling defendant who meets the relevant requirements as to notice and proof may obtain an allocation of fault to the settling defendant." *Town of Kearny v. Brandt*, 214 N.J. 76, 100, 67 A.3d 601, 615-16 (2013).

In *Kearny*, the New Jersey Supreme Court held the jury must be allowed to consider the fault of defendants who had been dismissed (based on a statute for repose), in order to provide the statutory protection against joint and several liability to defendants who are less than sixty percent at fault. Like S.C. Code § 15-38-15, the New Jersey statute requires allocation of 100% of the fault, and the removal of clearly culpable parties for circumstances beyond the control of any remaining defendant(s) will artificially increase the allocation and the resulting potential for a defendant to be subject to joint and several liability regardless of the statutory protection. The *Kearny* Court therefore held that non-immune tortfeasors who were given notice of the allocation claim should be included in the statutorily-mandated calculation of 100% of the fault.

Again, this is exactly the danger posed by the dismissal of Mizzell. Without the inclusion of Mizzel's admitted fault in the calculation, the percentage of fault potentially allocated to the remaining defendants would be distorted and false, and any imposition of joint and several liability based on such allocation would be unwarranted, inequitable, and contrary to legislative intent.

The only basis for the grant of summary judgment on the causes of action which seek allocation of fault to Mizzell was "a plaintiff has the sole right to determine which co-tortfeasor(s)" to sue. As discussed above, this rule can no longer apply after the

passage of S.C. Code § 15-38-15, and the only reasonable (and practical) interpretation of the text, structure, and purpose of the statute is to require the fault of other tortfeasors be weighed in the calculation of "one hundred percent" of fault. The use of third-party practice is a reasonable and practical method of implementing § 15-38-15, protecting the right of certain defendants to be free from the danger of an artificially increased fault allocation (and the potential result of unwarranted joint and several liability), as well as addressing other procedural and substantive concerns. Appellants followed this method here, and the dismissal of Mizzell was improper.

C. Due process requires abrogation of the harsh common law rule of joint & several liability

Over the last three decades, South Carolina tort law has seen laudatory change. During this time, our courts and our legislature have moved steadily away from harsh, all-or-nothing outcomes such as pure joint and several liability and toward outcomes that are proportionate to a party's actual culpability. The 1988 South Carolina Uniform Contribution Among Tortfeasors Act (S.C. Code §§ 15–38–10 to –70; "Contribution Act") reflected a change which had been presaged in early decisions and abrogated the common law rule against contribution. (See e.g., *Fay v. Grand Strand Reg'l Med. Ctr., LLC*, 412 S.C. 185, 202, 771 S.E.2d 639, 648-49 (Ct. App. 2015)

The shift away from strict common law concepts of "all or nothing" fault found expression in this Court's 1991 opinion in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991), where the Court joined the vast majority of states in rejecting the doctrine of contributory negligence in favor of comparative negligence, which is based

on the due process concepts of equity and fairness in comparing relative fault. The *Nelson* Court specifically justified the shift to comparative negligence as being "the more equitable doctrine." 303 S.C. at 244, 399 S.E.2d at 784.

Soon thereafter, our courts recognized that the same logic likely called for the abandonment of the arbitrary, all-or-nothing doctrine of joint and several liability in favor of allocation based on actual relative fault. In *Fernanders v. Marks Construction of South Carolina, Inc.*, 330 S.C. 470, 499 S.E. 2d 509 (Ct. App. 1998), the Court of Appeals specifically noted "[w]ith the adoption of comparative negligence, however, retention of the doctrine of joint and several liability is less defensible." *Id.* at 330 S.C. at 476, 499 S.E.2d at 512

The *Fernanders* court additionally noted that, as of the time of its decision (1998), the majority of jurisdictions had *already* either abolished or partially abrogated the doctrine of joint and several liability in favor of allocation based on relative fault. Nevertheless, the court declined to abolish joint and several liability, noting that the Contribution Act - *as it existed at that time* - was based upon the doctrine of joint and several liability: "This court declines to expand upon the supreme court's decision in *Nelson,* particularly where the effect of that expansion would nullify a statutory provision." *Id.*, 330 S.C. at 478, 499 S.E.2d at 513.

However, the Contribution Act was changed in 2005, when the South Carolina General Assembly codified the judicial trend towards fairness and equity in the allocation of fault with the enactment of S.C. Code § 15-38-15 as part of the Economic Development, Citizens, and Small Business Protection Act of 2005. The statute expressly rejects joint and several liability for "any defendant whose conduct is determined to be

less than fifty percent of the total fault for the indivisible damages." In doing so, the legislature added South Carolina to the overwhelming majority of states who have curtailed or eliminated the antiquated common law doctrine of pure joint and several liability.[56] In fact, some states, such as North Carolina, have eliminated joint and several liability while still retaining contributory negligence.[57] (The conclusion being that some states consider joint and several liability to be more repugnant to due process than contributory negligence.)

The abrogation or elimination of joint and several liability has not been limited solely to legislative action. Some courts have recognized the need for change as a product of the due process notions of fairness and equity in the absence of clear legislative action. For example, the court in *Fabre v. Marin,* 623 So. 2d 1182, 1185 (Fla. 1993), in attempting to interpret its allocation statute, examined a number of cases and secondary sources and concluded, "[e]ven if it could be said that the statute is ambiguous, we believe that the legislature intended that damages be apportioned among all participants to the accident. The abolition of joint and several liability has been advocated for many years because the doctrine has been perceived as unfairly requiring a defendant to pay more than his or her percentage of fault."

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[56] See Appendix A - Chart reflecting a state by state survey of the joint and several liability doctrine. (Attached hereto.)

[57] See *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 470, 380 S.E.2d 100, 103 (1989) ("Where the plaintiff elects to sue only one of the joint tortfeasors, the original defendant may have others joined as additional or third party defendants."), and see, e.g., *Muteff v. Invacare Corp.*, 721 S.E.2d 379, 383-384 (N.C. Ct. App. 2012) (Contributory negligence is still a defense in North Carolina.) Note, however, the harsh effects of the contributory negligence rule are potentially diminished to some degree by the North Carolina Pattern Jury Instruction which informs the jury "the plaintiff cannot recover" if contributorily negligent. (N.C.P.I. Civil (MV) 104.10)

The court in *Brown v. Keill*, 224 Kan. 195, 203, 580 P.2d 867, 874 (1978) reached the same conclusion: "There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss."

In *McIntyre v. Balentine*, 833 S.W.2d 52 (1992), the Supreme Court of Tennessee adopted a system of comparative fault and "render[ed] the doctrine of joint and several liability obsolete." In adopting the doctrine of comparative negligence with regards to plaintiffs, the court also concluded that joint and several liability must be eliminated because "it would be inconsistent to simultaneously retain a rule...which may fortuitously impose a degree of liability that is out of all proportion to fault." *Id.* at 58.

In *Floyd v. Carlisle Construction Co.*, 758 S.W.2d 430, 432 (1988), the Supreme Court of Kentucky likewise held that the adoption of comparative negligence required apportionment of fault between joint tortfeasors, and the liability of joint tortfeasors "is limited by the extent of [their] fault." Two years later, in a case involving a defendant who settled before trial, the court confirmed *Floyd* had eliminated joint and several liability. *Stratton v. Parker*, 793 S.W.2d 817, 820 (1990). ("[T]he extent of the liability of each [tortfeasor] is a several liability and is limited to the degree of fault apportioned to each.")

The court in *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct App. 1982) was bluntly definitive: "Joint and several liability is not to be retained in our pure comparative negligence system on a theory of one indivisible wrong. The concept of one indivisible wrong, based on common law technicalities, is obsolete, and is not to be applied in comparative negligence cases in New Mexico." The

court examined cases from other jurisdictions and concluded this decision was more in line with "the concept on which pure comparative negligence is based - that fairness is achieved by basing liability on a person's fault." Additionally, the court found "there is no...justification for laying the entire burden of an accident caused by one tortfeasor labelled as 'defendant,' whether or not served, upon another 'defendant.'" *Id.* at 158, 646 P.2d at 585. The court cited with approval cases which adopted a pure comparative allocation for all persons involved in an accident, finding "the primal concept that ... the extent of fault should govern the extent of liability remains irresistible to reason and all intelligent notions of fairness." *Id.* at 156, 646 P.2d 579, 583.

There is no shortage of law review articles and treatises collecting and analyzing the issue of joint and several liability, and there are some states who have clung to it, but there is no dispute the vast majority of jurisdictions have recognized modern economic realities, including social safety nets (which were limited when pure joint and several liability was the prevailing doctrine), as well as the basic due process concepts of fairness and equity in not imposing liability greatly in excess of actual fault, and have therefore either eliminated or abrogated the doctrine. (See, e.g., Amity S. Edmonds, *Tort Liability in South Carolina: Does Section 15-38-15 Truly Limit Joint and Several Liability or Is It A Mere Illusion in the Realm of Phantom Tortfeasors?*, 5 Charleston L. Rev. 679 (2011) ("It is fundamentally unfair to hoist the entire burden of a phantom or absent tortfeasor on a marginally negligent co-defendant... However, if South Carolina courts fail to allow apportionment of fault to nonparty or settling defendants, the ostensible protection provided to defendants within the Act from the harsh injustice of joint and several liability could all but vanish without a trace...")

Admittedly, the subsections of S.C. Code § 15-38-15 are not entirely compatible, and the statute does not smoothly dovetail with existing provisions of the Contribution Act. Of course, statutes are not always excellent examples of clarity and consistency; however, the Court in *Bass v. Isochem*, 365 S.C. 454, 471-72, 617 S.E.2d 369, 378 (Ct. App. 2005) summarized the path to follow in such a case:

> An ambiguity in a statute should be resolved **in favor of a just, beneficial, and equitable operation of the law**. In construing a statute, the court looks to the language as a whole in light of its manifest purpose. A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of the words. Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.
>
> 365 S.C. 454, 471-72, 617 S.E.2d 369, 378 (internal citations omitted) (emphasis added)

It is clear the legislative intent of S.C. Code § 15-38-15 was to embrace "the primal concept that ... the extent of fault should govern the extent of liability." (*Bartlett, supra*) It is altogether just and fitting we should do so. South Carolina law already provides the tools necessary to implement fault allocation consistent with §15-38-15 and due process. As stated earlier, third-party practice, using the Declaratory Judgment Act (S.C. Code Ann. §15-53-10 *et seq.*,) as well as Rules 14 and 19, is a reasonable and practical method of implementing § 15-38-15, addressing any procedural or substantive issues applicable to certain parties, and implements the protection of § 15-38-15 and due process rights of certain defendants against unwarranted joint and several liability).

Appellants followed this method here, and the dismissal of Mizzell was improper.

III. THE CIRCUIT COURT ERRED IN BLOCKING THE DEPOSITION OF PLAINTIFF SMITH BASED ON THE POSSIBILITY HE MIGHT BECOME ANXIOUS AND PROVIDE INACCURATE RESPONSES[58]

Discovery in civil cases is very broad. Rule 26, SCRCP. In *Hollman v. Woolfson*, 384 S.C. 571, 577-78, 683 S.E.2d 495, 498 (2009), a case involving the request for discovery of medical information from non-party patients, the Court laid out these standards:

> Rule 26(b)(1), SCRCP, provides, unless otherwise limited by order of the court, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...." If 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." Rule 26(c), SCRCP... 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.
>
> (internal citations omitted)

Therefore, the burden is on a Plaintiff to first "show[] a particularized harm which will be caused by allowing the discovery." If a Plaintiff meets this burden, a Defendant can take the deposition if it shows the "the information sought is 'relevant and necessary' to the case."

In the Order preventing the deposition of the Plaintiff, the circuit court judge provided two grounds for concluding Plaintiff would suffer a particularized harm if he is deposed: 1) Plaintiff "has been described by his treating neurologist as

[58] Appellants request the Court consider this issue in its discretion, to provide guidance to the parties and trial court and, in the interest of judicial efficiency, to avert the need to address this issue on appeal should a verdict be rendered against Defendants.

'neuropsychologically fragile' and his underlying brain injury[59] would likely cause him to become frustrated, withdrawn, and agitated during and for a period after the deposition," and 2) "Plaintiff has a documented inability to truthfully communicate information." The circuit court judge then concluded with this statement: "The Court will not compel a deposition of an individual who is mentally incapacitated and incapable of providing accurate information for the benefit of the Defendants who allegedly caused the mental incapacitation." Putting aside the circular and legally indefensible final conclusion,[60] the evidence does not support a finding of particularized harm in this case.

The only evidence of <u>any</u> harm comes from Plaintiff's litigation expert Dr. White that a deposition could cause ***short-term*** adverse effects such as agitation and insomnia. Research reveals no case where short-term agitation or insomnia has been found to be a sufficient "particularized harm" to deny the deposition of any witness, much less that of a Plaintiff. It is not surprising most witnesses (at least those who are not professional witnesses) would have short-term agitation and even insomnia because of a deposition. This is an expected, generalized "harm." If potential short-term agitation, anxiety, and/or insomnia is a sufficient "particularized" harm, the vast majority of depositions would never be taken.

Further, Dr. White opined these short-term adverse effects *might* occur *if* the deposition was confrontational. He defined "confrontational" as "an interaction between two people that's uncomfortable" but admitted that not all depositions are confrontational (and, in fact, that Appellant's counsel was "very professional" in taking his deposition).

As to the second ground for "particularized harm," Dr. White himself admitted that the possibility a witness might give inaccurate information is <u>not</u> a sufficient reason to prevent a deposition.

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[59] Plaintiff asserts he has a brain injury caused by this accident which should prevent his deposition. This assertion arose after he had retained counsel, had settled with Mizzell, had filed suit, had responded to written discovery, and had met with two of his litigation experts (who provided reports based on their interview of him).

[60] It is clearly an error of law to prevent discovery into an allegation based on the assumed truth of that allegation.

Q: Is it still your opinion that a deposition would be detrimental and inappropriate for Mr. Smith?
A: Yes, sir.

Q: Based on what?
A: Based upon his inability to give accurate information and the fact that he has exhibited a tendency to be somewhat neuropsychologically fragile. **And, as I mentioned in the report, that a confrontational deposition would tend to in my opinion agitate him and could have short term adverse consequences.**

Q: Okay. **So, the basis is -- is first of all, his inability to give accurate information?**
A: I -- that's not the reason -- I happen to know that's not a reason for not deposing someone so ---
Q: Okay.
A: --- it's based upon what I believe to be the idea that his neuropsychiatric condition is fragile and there would be **short term consequences** particularly as a result of **confrontations** is typically involved in deposition. Patients with these types of problems can become easily agitated and that agitation can carry on in a sort of perseverative type way beyond the interview even though they're not cognitively aware of it, can affect sleep patterns and so forth.

Q: All right, so when you say he's neuropsychologically fragile, is that what you're describing he could become agitated --there could be short term effects with sleeping or things of that nature is that what mean?
A: Inability to sleep, right.

(R. p. 350, line 23 - p. 352, line 7 (Deposition of White) (emphasis added)

Therefore, the only evidence of "particularized" harm in this case is the testimony of Plaintiff's expert that if Plaintiff is subjected to a confrontational deposition, it might "tend to" cause short term agitation and a temporary disruption of sleep patterns, and that Plaintiff might give inaccurate information. If this were sufficient to prevent depositions, it would be impossible to depose the vast majority of personal injury plaintiffs. There is nothing "particularized" or unusual about this possibility.

If, however, the Court finds the evidence of a particularized harm is sufficient, "the opposing party has the burden of showing the information sought is "relevant and necessary" to the case." *Hollman v. Woolfson, supra.*

Here, the Defendants seek to depose the Plaintiff regarding his background, his memory of the accident (if any), his medical treatment, his current status and activities, and other inquiries unquestionably relevant to the suit he filed. The deposition is also necessary for the preparation of a defense. Part of Plaintiff's damages claim is that he lacks certain cognitive skills and suffers from physical limitations. His experts testify about their observations of these. Defendants cannot properly prepare a defense as to damages, and particularly cannot prepare to cross-examine his experts, if we are not allowed to take his deposition and make certain observations about his ability to understand and communicate.

Therefore, the circuit court erred in ruling the Defendants cannot depose the Plaintiff.

CONCLUSION

As an initial and dispositive matter, the circuit court erred in granting summary judgment on the same legal ground which had been rejected by a prior circuit court judge in the prior ruling on Mizzell's motion to dismiss.

If the Court reaches the merits of the ruling, the basis for granting summary judgment to Mizzell on the allocation claims was in error because the rule that a plaintiff has the sole power to choose the defendant(s) is based upon the obsolete doctrine of pure joint and several liability. The doctrine cannot survive the passage of S.C. Code § 15-38-15, and due process concepts of fairness and equity in the comparison of fault reinforce this conclusion.

S.C. Code § 15-38-15 clearly evidences the legislature's intent to provide a right

for certain defendants to be free from the punitive imposition of pure joint and several liability. Considering the statute as a whole, the purpose is to limit the exposure of a tortfeasor to the extent of their actual culpability. If enforcement of this "right" is left solely to the discretion of a plaintiff - that is, if only plaintiffs can decide whether South Carolina remains a pure joint and several liability state (and on a case-by-case basis) – then it is no right at all.

Finally, Defendants should be permitted to depose the Plaintiff. The Order quashing the notice of Plaintiff's deposition is not supported by the evidence and no particularized harm has been established. Fundamental fairness requires the testimony be taken. If issues arise with respect to the deposition, the trial court has the ability to address them, but the proper process is to permit the deposition to proceed. The deposition of the Plaintiff is both relevant and necessary to the just adjudication of this matter.

For the foregoing reasons, the Appellants respectfully request this Court: reverse the Order of the Circuit Court granting summary judgment to Mizzell, reverse the Order quashing the notice of Plaintiff's deposition, and remand this case to the circuit court for further proceedings.

Respectfully submitted,

April 13, 2016

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
The Honorable R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2015-001159

Walter Smith, ...Plaintiff/ Respondent

v.

Norman K. Tiffany, Individually, Brown Trucking Company;
and Brown Integrated Logistics, ...Defendants/Appellants

AND

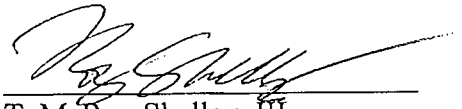
Brown Trucking Company and Brown Integrated Logistics, ...Third-Party Plaintiffs/Appellants

v.

Corbett James Mizzell, III, ...Third-Party Defendant/Respondent.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that this Final Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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APPENDIX A

Joint or Several Liability - Current State Survey

State	Type	Judicial or Legislative
Alabama	Joint and several	*Matkin v. Smith*, 643 So.2d 949
Alaska	Several w/ exceptions	Alaska Stat. Ann. § 09.17.080 (West 1997)
Arizona	Several	Ariz. Rev. Stat. Ann. § 12-2506(A) (2001)
Arkansas	Several w/ exceptions	Ark. Code Ann. § 16-55-201 (West 2003)
California	Modified joint and several (economic damages only)	*American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899
Colorado	Several w/ exceptions	Colo. Rev. Stat. Ann. § 13-21-111.5 (West 2007)
Connecticut	Several w/ exceptions	*Russell v. Tomlinson*, 2 Conn. 206
Delaware	Joint and several	*Medical Center v. Mullins*, 637 A.2d 6
D.C.	Joint and several	*Mozie v. Sears Roebuck*, 623 A.2d 47
Florida	Several w/ exceptions	Fla. Stat. Ann. § 768.81 (West 2011)
Georgia	Several w/ exceptions	Ga. Code Ann. § 51-12-33 (West 2005)
Hawaii	Several w/ exceptions	Haw. Rev. Stat. § 663-10.9 (West 1999)
Idaho	Several w/ exceptions	Idaho Code Ann. § 6-803 (West 2003)
Illinois	Modified joint and several (25% or more)	*Best v. Taylor Machine Works*, 689 N.E.2d 1057
Indiana	Several	Ind. Code Ann. § 34-51-2-8 (West 1998)
Iowa	Modified joint and several (50% or more)	Iowa Code Ann. § 668.4 (West 1997)
Kansas	Several w/ exceptions	*Brown v. Keill*, 580 P.2d 867
Kentucky	Several w/ exceptions	*Stratton v. Parker*, 793 S.W.2d 817
Louisiana	Several w/ exceptions	La. Civ. Code Ann. art. 2323 (1996)
Maine	Joint and several	Me. Rev. Stat. Ann. tit. 14, § 156 (1999)
Maryland	Joint and several	*Owens-Illinois v. Armstrong*, 604 A.2d 47
Massachusetts	Joint and several	Mass. Gen. Laws Ann. ch. 231B, § 1 (1962)
Michigan	Several w/ exceptions	Mich. Comp. Laws Ann. § 600.2956 (West 1996)
Minnesota	Several w/ exceptions	Minn. Stat. Ann. § 604.02 (West 2003)
Mississippi	Several w/ exceptions	Miss. Code Ann. § 85-5-7(2) (West 2004)
Missouri	Modified joint and several (51% or more)	Mo. Ann. Stat. § 537.067(1) (West 2005)
Montana	Modified joint and several	Mont. Code Ann. § 27-1-703(1) (West

	(50% or more)	1997)
Nebraska	Modified joint and several (economic damages only)	Neb. Rev. Stat. Ann. § 25-21,185.10 (West 1992)
Nevada	Several w/ exceptions	Nev. Rev. Stat. Ann. § 41.141(4)-(5) (West 1989)
New Hampshire	Modified joint and several (50% or more)	N.H. Rev. Stat. Ann. § 507:7—e(I)
New Jersey	Modified joint and several (60% or more)	N.J. Stat. Ann. § 2A:15-5.3 (West 1995)
New Mexico	Several w/ exceptions	*Bartlett v. New Mexico Welding Supply Inc.*, 646 P.2d 579
New York	Modified joint and several (economic damages if 51% or more at fault)	N.Y. Civ. Prac. L&R 1601(1996)
North Carolina	Joint and several	*State Farm v. Holland*, 380 S.E.2d 100
North Dakota	Several w/ exceptions	N.D. Cent. Code § 32-03.2-02 (West 1993)
Ohio	Modified joint and several (economic damages if 50% or more at fault)	Oh. Rev. Code Ann. § 2307.22 (West 2002)
Oklahoma	Several	Okla. Stat. tit. 23, § 15 (2011)
Oregon	Several	Or. Rev. Stat. Ann. § 31.610
Pennsylvania	Modified joint and several (60% or more)	42 Pa. Cons. Stat. Ann. § 7102 (West 2011)
Rhode Island	Joint and several	*Cooney v. Molis*, 640 A.2d 527
South Carolina	Modified joint and several (50% or more)	S.C. Code Ann. § 15-38-15 (2005)
South Dakota	Modified joint and several (50% or more)	S.D. Codified Laws § 15-8-15.1 (1987)
Tennessee	Several w/ exceptions	*Banks v. Elks Club of TN 1102*, 301 S.W.3d 214
Texas	Several w/ exceptions	Tex. Civ. Prac. & Rem. Code Ann. § 33.013 (West 2007)
Utah	Several	Utah Code Ann. § 78B-5-818 (West 2008)
Vermont	Several w/ exceptions	Vt. Stat. Ann. tit. 12, § 1036 (West 1979)
Virginia	Joint and several	Va. Code § 8.01-443 (West 1977)
Washington	Several w/ exceptions	Wash. Rev. Code Ann. § 4.22.070 (West 1993)
West Virginia	Modified joint and several (Medical professional liability and only if more than 30% at fault)	W. Va. Code Ann. § 55-7B-9 (West 2015)
Wisconsin	Modified joint and several	Wis. Stat. Ann. § 895.045 (West 2011)

	(51% or more)	
Wyoming	Several	Wyo. Stat. Ann. § 1-1-109(e) (West 1994)

*This table was updated in November 2015 from one provided in Jean Macchiaroli Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 Tex. L. Rev. 1701, 1751 (1995).

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AND

Brown Trucking Company and Brown Integrated Logistics, Appellants,

v.

Corbett James Mizzell, III, Respondent.

Appellate Case No. 2015-001159

PROOF OF SERVICE

I certify that I have served a copy of the **Final Brief** and of the **Final Reply Brief of Appellants** by depositing a copy of each in the United States Mail, postage prepaid, on April 13, 2016, addressed to their respective attorneys of record:

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