THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
The Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 13-CP-41-078

Appellate Case No. 2015-001159

Walter Smith, Respondent

v.

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

AND

Brown Trucking Company and Brown Integrated Logistics, Inc., Appellants

v.

Corbett James Mizzell, III, Respondent

BRIEF OF RESPONDENT CORBETT JAMES MIZZELL, III

Robert T. King (#066237)
rking@kingandlove.com
KING, LOVE & HUPFER, LLC
PO Box 1764
Florence, SC 29503-1764
(843) 407-5525 – Tel.
(843) 407-5782 – Fax
ATTORNEY FOR RESPONDENT
CORBETT JAMES MIZZELL, III

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT PROPERLY CONSIDERED MIZZELL'S MOTION FOR SUMMARY JUDGMENT AFTER ANOTHER CIRCUIT JUDGE HAD DENIED MIZZELL'S EARLIER MOTION TO DISMISS?

II. WHETHER THE BROWN DEFENDANTS FAILED TO PRESERVE FOR APPEAL THE ARGUMENT THAT S.C. CODE ANN. § 15-38-15 ABROGATED A PLAINTIFF'S COMMON LAW RIGHT TO CHOOSE WHICH DEFENDANT TO SUE?

III. WHETHER THE COMMON LAW RIGHT OF A PLAINTIFF TO CHOOSE WHOM TO SUE SURVIVED THE ENACTMENT OF S.C. CODE ANN. § 15-38-15?

IV. WHETHER THE PLAIN LANGUAGE OF S.C. CODE ANN. § 15-38-15 PERMITS ALLOCATION AMONG NAMED DEFENDANTS ONLY?

V. WHETHER THE BROWN DEFENDANTS FAILED TO PRESERVE FOR APPEAL THE ARGUMENT THAT DUE PROCESS MANDATES THAT THE COMMON LAW RULE OF JOINT AND SEVERAL LIABILITY BE ABROGATED?

VI. WHETHER THE CIRCUIT COURT CORRECTLY CONCLUDED THAT MIZZELL WAS ENTITLED TO SUMMARY JUDGMENT AS TO THE BROWN DEFENDANTS' THIRD PARTY CLAIMS?

STATEMENT OF THE CASE

By Complaint filed April 25, 2013, Walter Smith ("Smith") instituted this personal injury action against Norman K. Tiffany ("Tiffany"), Brown Trucking Company, and Brown Integrated Logistics[1] for personal injuries sustained in a December 7, 2012 accident. (*See* R. pp. 39-46) On June 17, 2013, the Brown Defendants filed an answer and third party complaint against Corbett James Mizzell, III ("Mizzell"). (*See* R. pp. 49-60.) The Brown Defendants asserted claims against Mizzell for negligence, for declaratory judgment (i.e., a declaration of Mizzell's degree of fault), and for contribution

[1]Brown Trucking Company and Brown Integrated Logistics shall be referred to, collectively, as the "Brown Defendants."

under the *Uniform Contribution Among Tortfeasors Act*, S.C. Code Ann. § 15-38-10 *et seq.* (the "Act"). (*See* R. pp. 57-59 (¶¶ 68-81).)

Mizzell filed, initially, a motion to dismiss the third-party complaint (and to set aside the entry of default) on the ground that the third-party complaint failed to state a claim upon which relief could be granted under Rule 12(b)(6) and the joinder of Mizzell as a third-party defendant ran afoul of Rule 14. (*See* R. pp. 61-62 (hereinafter "Mizzell's Motion to Dismiss").) On November 12, 2013, that motion came before a hearing before the Honorable William H. Seals, Jr., Circuit Court Judge, who ultimately granted Mizzell's motion to set aside the entry of default and denied the motion to dismiss. (*See* R. pp. 6-9.)

On May 12, 2014, after discovery had been conducted, Mizzell filed a motion for summary judgment. (*See* R. pp. 76-78 (hereinafter "Mizzell's Motion for Summary Judgment").) That motion was ultimately heard by the Honorable R. Lawton McIntosh on March 18, 2015. (*See* R. pp. 19-31.) By order entered May 15, 2015, Judge McIntosh granted Mizzell's motion for summary judgment in its entirety. (R. pp. 19-31.)

The Brown Defendants' Notice of Appeal was filed May 28, 2015. On October 9, 2015, this Court granted a motion to certify the appeal under Rule 204(b) of the South Carolina Rules of Appellate Procedure.

STATEMENT OF FACTS

This action arises out of a motor vehicle accident occurring on U.S. 178 in Saluda County, South Carolina, on December 7, 2012. (*See* R. p. 40 (¶ 7).) On that date a tractor trailer being operated by Tiffany, an employee of the Brown Defendants, was parked along the right-hand side of the east-bound lane of U.S. 178. (*See* R. p. 40 (¶ 13);

R. p. 51 (¶ 13).) The truck was parked adjacent to the entrance/exit of a gas station parking lot. (*See* R. p. 40 (¶ 14); R. p. 51 (¶ 14); R. p. 78.)

Mizzell stopped at that gas station at approximately 6:00 a.m. (R. p. 78.) As Mizzell was exiting the gas station parking lot, his vision of on-coming traffic on U.S. 178 was blocked by Tiffany's truck. (R. p. 78) As Mizzell pulled forward to look around Tiffany's truck to see on-coming traffic, his vehicle collided with the Plaintiff's vehicle which was traveling east on U.S. 178. (R. p. 78; R. p. 41 (¶¶ 17-20).)

Mizzell's liability carrier tendered the limits of Mizzell's liability policy to the Plaintiff. (*See* R. p. 427 (¶ 3).) In return the Plaintiff signed a Covenant not to Execute in favor of Mizzell on February 8, 2013. (*See* R. p. 426 (¶ 2); R. p. 420-25.)

ARGUMENT

I. THE DENIAL OF A MOTION TO DISMISS DOES NOT ESTABLISH THE LAW OF THE CASE; THEREFORE, THE CIRCUIT COURT PROPERLY CONSIDERED MIZZELL'S MOTION FOR SUMMARY JUDGMENT.

The Brown Defendants argue, first, that the circuit court's Order granting summary judgment to Mizzell should be reversed because another circuit judge had earlier denied Mizzell's motion to dismiss. (Brief of Appellants pp. 15-18.) This argument should be rejected.

It is well-established that "the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." McLendon v. S.C. Dep't of Hwys. & Publ. Transp., 313 S.C. 525, 443 S.E.2d 539, 540 n. 2 (1994); Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 762 S.E.2d 44, 48 (Ct. App. 2014); Nix v. Columbia Staffing, Inc., 322 S.C. 277, 471 S.E.2d 718, 720 (Ct. App. 1997). While it is true that one circuit court judge may not ordinarily set

aside the order of another, this principle does not prohibit a circuit judge from granting a motion for summary judgment on grounds – even identical grounds – that had been earlier raised in a motion to dismiss denied by another judge. Nix, 471 S.E.2d at 720 (not error for trial court to grant motion to dismiss and for summary judgment on same grounds which had been raised in an earlier motion for summary judgment denied by another judge).

Here, Judge Seals's order denied Mizzell's motion to dismiss, which order did not (and could not) establish the law of the case. Mizzell was, therefore, entirely free to raise similar (or even the very same) issues in a later motion for summary judgment. That Judge McIntosh granted such a later motion for summary judgment did not amount to an improper reconsideration of Judge Seals's earlier order.

Additionally, as is thoroughly addressed in Smith's brief,[2] the issues and standards raised by Mizzell's motion to dismiss were different from those raised by his motion for summary judgment. (*Compare* R. pp. 61-62 *with* R. pp. 76-78.) Judge Seals's ruling on the motion to dismiss was, of necessity, based "solely upon allegations set forth on the face of the complaint." Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69, 73 (1999) (scope of consideration on motion to dismiss). On the other hand, when ruling on Mizzell's Motion for Summary Judgment, Judge McIntosh's review encompassed the evidentiary record to determine whether there existed any genuine issue of material fact for trial. *See* Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1990) (standard of review for motion for summary judgment).

[2]Brief of Respondent Walter Smith pp. 5-8, which Mizzell hereby adopts and incorporates herein by reference pursuant to Rule 208(b)(6), SCACR.

For these reasons, the Brown Defendants' arguments that an earlier ruling on a motion to dismiss somehow insulated them from summary judgment are unavailing. It was entirely appropriate for the circuit court to entertain, and ultimately grant, Mizzell's Motion for Summary Judgment.

II. THE BROWN DEFENDANTS' ARGUMENT THAT S.C. CODE ANN. § 15-38-15 STATUTORILY ABROGATED A PLAINTIFF'S COMMON LAW RIGHT TO CHOOSE WHICH DEFENDANT TO SUE WAS NOT MADE TO THE CIRCUIT COURT AND IS THUS NOT PRESERVED FOR APPEAL.

The Brown Defendants next argue, for the first time on appeal, that the common law right of a plaintiff to choose his defendants, "an anachronism of the common law doctrine of pure joint and several liability," was statutorily abrogated by the enactment of S.C. Code Ann. § 15-38-15. (Brief of Appellants at pp. 19-22.) This argument has not been preserved for appeal.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004); *see also* Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 (1997) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724 (2000) ("the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). The purpose for this rule has been explained thusly:

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *See* Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an

> appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case. *See* Brown v. Singletary, 226 S.C. 482, 85 S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial); State v. Warren, 207 S.C. 126, 134, 35 S.E.2d 38, 41 (1945) (same).

I'On, LLC, 526 S.E.2d at 724.

The Brown Defendants did not once argue statutory abrogation to the circuit court. Their contention that section 15-38-15 abrogated a plaintiff's right to choose was not raised – even implicitly, much less explicitly – in their memorandum in opposition to Mizzell's Motion for Summary Judgment (*see* R. pp. 179-81) or during oral arguments at the motions hearing (*see* R. p. 285, line 13 - p. 312, line 13). Moreover, the Brown Defendants did not file a Rule 59 motion seeking to proffer such an argument to the circuit court. They may not, now, raise this argument for the first time on appeal.

For these reasons, the Brown Defendants' argument that a plaintiff's "right to choose" has been statutorily abrogated is not preserved for appeal and should not be considered by this Court.

III. THE RIGHT OF A PLAINTIFF TO CHOOSE HIS DEFENDANT SURVIVED PASSAGE OF S.C. CODE ANN. § 15-38-15.

Even assuming that the Brown Defendants' argument of statutory abrogation was preserved for appeal, it is unavailing as section 15-38-15 neither implicitly nor explicitly abrogated the common law right of a plaintiff to choose his defendants.

The sole right of a plaintiff "to determine which co-tortfeasor(s) she will sue" is a "well-established" and "firmly entrenched" feature of South Carolina's common law.

Chester v. S.C. Dep't of Publ. Safety, 388 S.C. 343, 698 S.E.2d 559, 560 (2010) (*and cases cited therein*). When enacting legislation, the General Assembly is presumed to be "aware of the common law," Grier v. Amisub of S.C., Inc., 397 S.C. 532, 725 S.E.2d 693, 696 (2012), and "to know of the effect of changes to legal doctrine," Fernander v. Marks Constr. of S.C., Inc., 330 S.C. 470, 499 S.E.2d 509, 513 (Ct. App. 1998). Statutes which are "in derogation of common law rights are strictly construed and not extended in application thereof beyond the clear legislative intent." Davenport v. Summer, 273 S.C. 771, 259 S.E.2d 815, 816 (1979); *see also* Grier, 725 S.E.2d at 696 ("statutes in derogation of the common law are to be strictly construed").

Here, the Brown Defendants contend that section 15-38-15 statutorily abrogated a plaintiff's right to choose his defendants. If such a reading of the statute is correct, it would be in clear derogation of a plaintiff's common law rights, and therefore the statute must be "strictly construed" and not extended "beyond the clear legislative intent." That statute provides, in full:

> (A) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.
>
> (B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).
>
> (C) The jury, or the court if there is no jury, shall:

(1) specify the amount of damages;

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

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

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

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

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

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

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

S.C. Code Ann. § 15-38-15. The statute does alter, in a limited manner, the common law principle of joint and several liability[3] by clearly and plainly providing that where "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*... ." S.C. Code Ann. § 15-38-15(A) (*emphasis added*). The General Assembly made even clearer its intention to alter joint and several liability in such a limited circumstance by providing the precise mechanism by which it is to be determined whether one defendant among multiple defendants is exempt from the common law rule of joint and several liability. *See* S.C. Code Ann. § 15-38-15(B) ("Apportionment of percentages of fault *among defendants* is to be determined as specified in subsection (C)" (*emphasis added*)); *see also* S.C. Code Ann. § 15-38-15(C) (jury "shall...(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*...specify in a separate verdict...the percentage of liability...that is attributable to *each defendant*" (*emphasis added*).) Thus, by its express terms, the current version of the Act did, clearly and unmistakably, alter common law joint and several principles for a limited class of defendants only: those found to be less than 50% at fault as compared to the plaintiff and to co-defendants. *See* Branham v. Ford Motor Co., 390 S.C. 203, 701

[3]*See* Fernander, 499 S.E.2d at 512 ("The concept of joint and several liability is deeply grounded in tort law").

S.E.2d 5, 22 n.21 (2010) (noting that the Act alters joint and several principles for a "'less than fifty percent' at-fault defendant").

Contrary to the Brown Defendants' assertions, however, there is nothing contained in the plain language of the statute which indicates that the General Assembly sought to alter the "well-established" and "firmly entrenched" common law right of a plaintiff to choose which tortfeasors to sue. *See* Brown v. S.C. Dep't of Health & Envtl. Contr., 348 S.C. 507, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute"). The statute neither expressly nor implicitly mandates that a plaintiff sue all potential tortfeasors, nor does it confer a right of a defendant to compel a plaintiff to name all potential tortfeasors, nor does it provide any mechanism by which such outcomes are to be achieved. The statute's sole references to non-party, potential joint tortfeasors as opposed to "defendants," come in subsection (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," and in subsection (E) which provides that "[n]otwithstanding 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)." Susbection (D) simply preserves a defendant's common law "empty chair" defense, while subsection (E) preserved a defendant's right to an equitable set-off for settlements paid by other potential tortfeasors. *See* Fagnant v. K-Mart Corp., No.: 4:11-cv-00302-RBH at *8-9 (D.S.C. Dec. 31, 2013) (*unpubl.*) (R. pp. 428-31); *see*

also Chester, 698 S.E.2d at 559 (defendant retains right under S.C. Code Ann. § 15-78-100 to equitable setoff).

In Chester, *supra*, this Court considered, and rejected, a similar argument that the General Assembly intended to abrogate a plaintiff's common law right to choose his defendants when it enacted S.C. Code Ann. § 15-78-100(c) of the *South Carolina Tort Claims Act.* That provision, much like section 15-38-15 at issue in this case, altered the common law doctrine of joint and several liability for governmental entity defendants by providing that "[i]n all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined." S.C. Code Ann. § 15-78-100(c).[4] In reversing the trial court's order compelling the plaintiff to join other, alleged joint tortfeasors as defendants so as to allow for liability allocation under section 15-78-100(c), this Court held:

> We are 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.

[4]The Brown Defendants attempt to attach significance to the fact that section 15-78-100(c) of the Tort Claims Act "provides for proportionate liability" but does not refer to "joint and several liability," whereas section 15-38-15 "specifically curtails joint and several liability." (Brief of Appellants p. 21, n.42.) This is a distinction without any difference: the clear effect of section 15-78-100(c) is to abrogate, in a limited manner, joint and several liability by providing that where both a governmental entity and other joint tortfeasors are "named as party defendants," liability must be specifically apportioned between/among the named defendants. Both statutes change the common law doctrine of joint and several liability by providing mechanisms for specific allocations of fault between/among multiple defendants. They are, therefore, closely analogous.

Id., 698 S.E.2d at 560-61. Thus, this Court reaffirmed the common law right of a plaintiff to choose his defendants, even in the face of a legislative enactment altering pure joint and several liability principles. *See id.*

There simply is no indication – much less a clear expression – that in enacting section 15-38-15, the General Assembly intended to abrogate, or even alter in any way, a plaintiff's common law right, of which the legislature is presume to have known, to determine which tortfeasors to sue. Had the legislature intended to abrogate that right, it could have and would have done so with a clear legislative expression. Since it did not, the Brown Defendants' argument should be denied, and the circuit court's entry of summary judgment in favor of Mizzell should be affirmed.

IV. BY ITS PLAIN LANGUAGE, SECTION 15-38-15 ALLOWS FOR ALLOCATION OF FAULT AMONG NAMED DEFENDANTS ONLY.

The Brown Defendants next argue that the text of section 15-38-15 demands inclusion of all potential tortfeasors for the purpose of fault allocation. (Brief of Appellants pp. 23-33.) This seems to be little more than a variation on their argument, addressed above, that the Plaintiff's right to choose his defendants is of no effect, and that it can be overridden at a defendant's whim. This argument ignores the plain and ordinary meaning of the statute, and should be unavailing.

"An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." Brown, 560 S.E.2d at 414. It is the province of the courts to interpret laws, not to legislate:

> It is perhaps unnecessary to say that Courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws.

Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162, 163-64 (1987).

As discussed in detail above, the provisions of the Act allowing for fault allocation apply, by the statute's plain language, to "defendants." *See, e.g.,* S.C. Code Ann. § 15-38-15(B) ("Apportionment of percentages of fault *among defendants* is to be determined as specified in subsection (C)" (*emphasis added*)); *see also* S.C. Code Ann. § 15-38-15(C) (jury "shall...(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*...specify in a separate verdict...the percentage of liability...that is attributable to *each defendant*" (*emphasis added*).) These provisions do not extend to the universe of potential joint tortfeasors. Similarly, the limited exception to joint and several liability extends only to situations where "indivisible damages are determined to be proximately caused by *more than one defendant*" and then only as 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." S.C. Code Ann. § 15-38-15(A). As discussed above, it is the Plaintiff's right to determine which tortfeasors to sue, and the Act simply provides no mechanism for the forced inclusion of non-party potential tortfeasors.

Though section 15-38-15 has received little attention from our state's appellate courts, it was considered by a federal district court in an unpublished order issued in the Fagnant, *supra* (R. pp. 428-31), case. In granting Mizzell's motion for summary judgment, the circuit court found the Fagnant court's analysis to be "instructive and persuasive." (R. p. 25.) In that case the named defendants challenged the plaintiff's voluntary dismissal of a co-defendant, a potential joint tortfeasor, arguing that the dismissed party was an indispensible one for the purposes of fault allocation under section 15-38-15. The defendants argued, in the alternative, that the dismissed party should be included on the verdict form for allocation purposes under section 15-38-15. Relying on Chester, *supra*, the district court first determined that the dismissed party, a mere potential joint tortfeasor, was not an indispensible party under Rule 19 whose joinder should be compelled. *Id.* at *5-6 (R. p. 429-30). Relying on the plain language of the statute, the district court then rejected the argument that the dismissed party should be included on the verdict form for potential allocation under section 15-38-15, stating:

> A review of section 15-38-15 reveals that only subsections (D) and (E) refer to other potential tortfeasors. *See* S.C. Code Ann. § 15-38-15(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)."). All other subsections only refer to "defendants." This distinction is significant because only subsections (A), (B), and (C) affected substantive changes in the law as it existed at the time. Also telling is how the special verdict procedure outlined in subsection (C)(3) only provides for jury findings regarding the allocation of fault when there are "two or more defendants" who were previously found liable. The subsection provides no accommodation for non-party tortfeasors.

Id. (R. p. 430-31). The court also noted that the statute must be read in light of the common law principle, of which the legislature is presumed to have been aware at the time of the statute's passage, that a plaintiff has a right to choose which tortfeasor to sue. *Id.* (R. p.

431). Thus, the district court concluded that allocation under section 15-38-15 was available only as to named defendants, not unnamed joint tortfeasors. *Id.* (R. p. 431).

Here, Brown's arguments for inclusion of Mizzell as a party-defendant (or, more properly, a third-party defendant) suffer from the same fatal flaws as did the defendants' arguments in Fagnant. First, by its plain language the Act allows for apportionment of fault among only "defendants." Mizzell, however, is not a "defendant," but instead occupies the position of a third-party defendant who has been included over the Plaintiff's objections; therefore, there can be no apportionment between Mizzell and Brown. As the circuit court found, "Brown's attempted forced inclusion of Mizzell, either as a potential third-party defendant or as an unnamed party to be included on the verdict form, does offense to, and is merely an attempted end-run around, the Plaintiff's well-established right to choose which joint tortfeasor to sue." (R. pp. 26-27.)

Moreover, as the circuit court noted, the plain language of the Act demonstrates that the General Assembly contemplated the existence of joint tortfeasors who are not joined as parties and provided a defendant with remedies thereto. First, the Act allows a defendant in the Brown Defendants' position to assert an "empty chair" defense under section 15-38-15(D). *See* Fagnant, at *9 (R. p. 431). Second, as to potential joint tortfeasors who have settled with the plaintiff, as Mizzell has done in this case, the Act provides that a defendant is entitled an offset for any settlement amounts paid. *See* S.C. Code Ann. § 15-38-50 ("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...it reduces the claim against the others"); Fagnant, at *9 (R. p. 431) (plain language of the Act codified the right of a defendant to "receive a

setoff for any settlement obtained from a joint and several tortfeasor") (*citing* Chester, 698 S.E.2d at 560)). Finally, a named defendant "who has paid more than his pro rata share of the common liability" would possess a claim for contribution against other potential joint tortfeasors. S.C. Code Ann. § 15-38-20(B); *see also* S.C. Code Ann. § 15-38-40 (action for contribution).[5]

There is nothing in the plain text of the Act which permits a defendant to forcibly implead an unnamed party either as a named defendant (or, as in this case, a third-party defendant) or to include him as a line item on a verdict form. The Act expressly provides defendants in the Brown Defendants' position with multiple remedies, not a single one of which supports the inclusion of Mizzell as a party. *See* Chester, 698 S.E.2d at 560-61 ("trial judge erred in holding that under Rule 19, SCRCP, he could require appellant to join other co-tortfeasors in order to afford the respondents their potential right to proportionate liability under § 15-78-100(c)"). The circuit court's entry of summary judgment in Mizzell's favor should, therefore, be affirmed.

V. THE BROWN DEFENDANTS' ARGUMENT THAT THE COMMON LAW RULE OF JOINT AND SEVERAL LIABILITY SHOULD BE ABROGATED WAS NOT MADE TO THE CIRCUIT COURT, AND IS THUS NOT PRESERVED FOR APPEAL.

The Brown Defendants next argue, for the first time on appeal, that joint and several liability is nothing more than a harsh vestige of a by-gone age which should be abrogated in favor of "outcomes that are proportionate to a party's actual culpability." (Brief of Appellants pp. 33-39.) This argument, too, has not been preserved for appeal.

[5]A right of contribution does not exist in this case since Mizzell settled with Smith on a covenant not to execute. *See* S.C. Code Ann. § 15-38-50 (release "given in good faith...(2) discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor"). The Brown Defendants have admitted that they do not contend that Smith's covenant not to execute given to Mizzell in exchange for policy limits was done in bad faith. (*See* R. p. 299, lines 12-20.)

An issue or argument may not be raised for the first time on appeal, but must be presented to and ruled upon by the trial court before an appellate court will review them. I'On, LLC, 526 S.E.2d at 724. Here, the Brown Defendants failed to present this argument to the circuit court for a ruling. As with their argument on statutory abrogation of a plaintiff's right to choose, the argument that due process requires abrogation of joint and several liability was not raised – implicitly or explicitly – in their memorandum in opposition to Mizzell's Motion for Summary Judgment (*see* R. pp. 179-81), nor was it raised during oral arguments at the motions hearing (*see* R. p. 285, line 13 – p. 312, line 13). Moreover, the Brown Defendants did not file a Rule 59 motion seeking to proffer such an argument to the circuit court. It may not be raised for the first time on appeal.

Even if the argument is properly preserved, in requesting that joint and several liability be judicially abolished, the Brown Defendants have asked that this Court step outside of its constitutional role and assume the role of a legislative body. "Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute...The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws." Barnwell, 393 S.E.2d at 163-64. Here, the General Assembly has seen fit to address the doctrine of joint and several liability, and has provided limited exceptions to its application. *See, e.g.,* S.C. Code Ann. § 15-38-15. It is not the role of this Court to announce, even if it were so inclined, that the General Assembly did not go far enough and that it should have, instead, delivered the doctrine's coup de grâce.

VI. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THERE EXISTED NO GENUINE ISSUE OF MATERIAL FACT.

Finally, the circuit court's order should be affirmed as it properly determined that there existed no genuine issue of material fact and that Mizzell was entitled to judgment as a matter of law under Rule 56.

First, in order to maintain a negligence claim against Mizzell, the Brown Defendants must have been able to "establish three essential elements: (1) a duty of care owed by the [third-party] defendant to the [third-party] 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, 720 (Ct. App. 1996). At the motions hearing, the Brown Defendants conceded to the circuit court that Mizzell had neither breached any duty owed to the Brown Defendants nor caused the Brown Defendants any specific injury. (*See* R. p. 22; *see also* R. p. 292, lines 3-5 ("We're not saying that he was negligent towards the defendants, Tiffany and Brown, but that he was negligent in causing the accident"); R. p. 294, lines 13-18 ("THE COURT:...There was no duty that had been violated as to him [Tiffany]; correct? MR. SHELLEY: Yeah. But the contribution claim would be that they were also negligent towards the plaintiff. THE COURT: As to the plaintiffs, okay."); R. p. 311, lines 8-9 ("We're not asserting an independent negligence claim."); R. p. 312, lines 7-13 ("MR. KING:...It is not premised upon any wrongful acts that Mizzell committed toward the third-party plaintiffs. There is no claim for damages by the third-party plaintiffs against Mizzell. Does that summarize-- MR. SHELLEY: Yeah. I think that's what we've all been saying.") It appears, now, that they may be attempting to challenge these admissions. (*See* Brief of Appellant p. 18.) The Brown Defendants argued that their sole reason for asserting a negligence claim was to support their claim that Mizzell was negligent toward Smith and that there should

be a special allocation of fault under the Act: "We're not asserting an independent negligence claim...the contribution claim would be based upon the allegation that he [Mizzell] was also negligent to the plaintiff." (R. p. 311, lines 9-21; *see also* R. p. 312, lines 3-13 ("MR. KING:...And I think we probably all agree there is no contribution claim. This is an allocation issue not a contribution issue...It is not premised upon any wrongful acts that Mizzell committed toward the third-party plaintiffs. There is no claim for damages by the third-party plaintiffs against Mizzell. Does that summarize-- MR. SHELLEY: Yeah. I think that's what we've all been saying."). Had the Brown Defendants believed that the circuit court incorrectly construed their representations made at the hearing, their recourse was have been to file a Rule 59 motion to allow the circuit judge an opportunity to reconsider rather than remain silent and raise the issue on appeal.

Even so, the indisputable evidence in the record establishes both that Mizzell did not breach any duty owed to the Brown Defendants and that the Brown Defendants did not sustain any damages. While Mizzell and Smith were involved in an accident, it is undisputed that neither Mizzell's vehicle nor the Plaintiff's vehicle collided with Tiffany's (a driver for the Brown Defendants) truck. (*See* R. p. 339, line 17 - p. 340, line 15; R. p. 344, line 24 - p. 346, line 14.) It is equally undisputed, as the circuit court correctly found, that the Brown Defendants did not incur any cognizable damages – e.g., property damage, bodily injury, down time of the truck, etc. – resulting from accident. (*See* R. p. 339, line 17 - p. 340, line 15; R. p. 344, line 24 - p. 346, line 14.) The Brown Defendants' sole allegation – despite having agreed at the motion hearing that they asserted no direct claim for negligence against Mizzell – is that they incurred legal fees

and costs because they have been sued in this case. (Brief of Appellant p. 18; *see also* R. p. 59 (¶ 81).) However, absent a contractual or statutory provision otherwise, however, attorney's fees are not a recoverable element of damages. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659, 660 (1993). As this Court has stated:

> Where the rights, or asserted rights, of parties are in conflict, it is inevitable that each party desiring to protect his rights must give time and attention to that end. To do so is not generally an element of damage, although it may be in some situations where loss of earnings is involved, which is not the case here. Nor do recoverable damages include the expense of employing counsel, except when so provided by contract or statute, which is not the case here.

Collins Music Co. Inc. v. FMW Corp., 355 S.C. 446, 586 S.E.2d 128, 131 (2003). Thus, while there is evidence that Mizzell may have breached a duty owed to Smith and caused him damages, there is no evidence that Mizzell breached any duty owed to the Brown Defendants and cause them damages; therefore, the circuit court properly granted summary judgment as to the Brown Defendants' negligence claim.

Second, since Mizzell obtained in good faith a covenant not to execute from Smith, he is not subject to a contribution claim from any other alleged tortfeasor, including the Brown Defendants. *See* S.C. Code Ann. § 15-38-50(2) (settlement "discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor"). This point was indeed conceded by the Brown Defendants which possess no claim for contribution against Mizzell. (*See* R. p. 301, line 17 - p. 302, line 3 ("We would not be able to obtain any money in contribution; okay?...We're allowed to have allocation.").) The circuit court, therefore, properly granted summary judgment as to the third-party claim for contribution against him.

Finally, for the reasons recited in detail above, the circuit court properly found that there was no genuine issue of material fact and that Mizzell was entitled to judgment as a matter of law as to the Brown Defendants' claim against him for allocation (including their request for a "declaration" of Mizzell's fault or liability).

CONCLUSION

For the foregoing reasons, as well as all others appearing in the record, Rule 220(c), SCACR, the Circuit Court's order granting summary judgment to the third-party defendant, Corbett James Mizzell, III, should be affirmed.

ROBERT T. KING #066237
rking@kingandlove.com
KING, LOVE & HUPFER, LLC
PO Box 1764
Florence, SC 29503-1764
(843) 407-5525 - Tel
(843) 407-5782 – Fax
ATTORNEY FOR RESPONDENT
CORBETT JAMES MIZZELL, III

April 12, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 13-CP-41-078

Appellate Case No. 2015-001159

Walter Smith,.....Respondent

v.

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

AND

Brown Trucking Company and Brown Integrated Logistics, Inc.,.....Appellants

v.

Corbett James Mizzell, III,.....Respondent.

CERTIFICATE OF COUNSEL

I, Robert T. King, attorney for Respondent Corbett James Mizzell, III, hereby certify that the Brief of Respondent Corbett James Mizzell, III, complies with Rule 211(b) of the South Carolina Appellate Court Rules.

April 12, 2016

Robert T. King

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
The Hon. R. Lawton McIntosh, Circuit Court Judge

RECEIVED
APR 15 2016
S.C. SUPREME COURT

Case No. 13-CP-41-078

Appellate Case No. 2015-001159

Walter Smith,.....Respondent

v.

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

AND

Brown Trucking Company and Brown Integrated Logistics, Inc.,.....Appellants

v.

Corbett James Mizzell, III,.....Respondent.

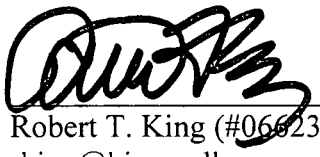
CERTIFICATE OF SERVICE

I, the undersigned, of the law office of King, Love & Hupfer, LLC, as attorneys for Corbett James Mizzell, III, do hereby certify that I have served the BRIEF OF RESPONDENT CORBETT JAMES MIZZELL, III, this April 14, 2016, by depositing the same in a U.S. Postal Box in envelopes, sufficient postage prepaid, properly addressed to the following:

ALAN P SLOAN III ESQ
KRISTEN B FEHSENFELD ESQ
PIERCE HERNS SLOAN & WILSON LLC
PO BOX 22437
CHARLESTON SC 29401-2437

STEVEN T MOON ESQ
THOMAS McROY SHELLEY III ESQ
ROGERS TOWNSEND & THOMAS PC
PO BOX 100200
COLUMBIA SC 29210-0200

RALPH KENNEDY ESQ
KENNEDY LAW FIRM
PO BOX 2559
BATESBURG-LEESVILLE SC 29070-2559



Robert T. King (#066237)
rking@kingandlove.com
KING, LOVE & HUPFER, LLC
PO Box 1764
Florence, SC 29503-1764
(843) 407-5525 - Tel
(843) 407-5782 – Fax
ATTORNEY FOR RESPONDENT
CORBETT JAMES MIZZELL, III