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SC SUPREME COURT

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

REPLY BRIEF OF APPELLANTS TO *AMICUS CURIAE* SOUTH CAROLINA ASSOCIATION OF JUSTICE

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ARGUMENT IN REPLY TO AMICUS SCAJ

I. THE LEGISLATURE CHANGED THE LAW

The basic question before this Court is simple: Which interpretation of legislative intent in the passage of § 15-38-15 makes more sense: **A)** the Legislature intended to allow a plaintiff *to choose* whether a defendant can seek the protection of § 15-38-15 (by virtue of a plaintiff continuing to have exclusive control over whose fault a jury can consider); or **B)** the Legislature intended to level the playing field by giving all parties an equal opportunity to present the issue of fault before a factfinder, and, thereby, to protect "defendant[s] whose conduct is determined to be less than fifty percent of the total fault"[1] from the punitive imposition of joint and several liability?

This is not a separation of powers issue. The Legislative policy of § 15-38-15, which was part of a series of reforms to our tort laws in the Economic Development, Citizens, and Small Business Protection Act of 2005, is to protect "defendant[s] whose conduct is determined to be less than fifty percent of the total fault" from the punitive imposition of joint and several liability. This policy is clearly expressed and not disputed. The point of contention here is over the procedural aspects for providing this protection. SCAJ asserts these procedures (which, if SCAJ's position is accepted, would fail to provide the protection stated in the statute *unless a plaintiff chooses to grant it*) are actual proclamations of "legislative policy." In contrast, Appellants' position on these procedural aspects is in accord with this Court's oft-repeated rules of statutory analysis:

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1 S.C. Code § 15-38-15(A)

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). ...

However, "[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, 351, 688 S.E.2d 569, 575 (2010) (citation omitted).

In ascertaining legislative intent, "a court should not focus on any single section or provision but **should consider the language of the statute as a whole**." *Mid–State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

If the statute is ambiguous, however, courts must construe the terms of the statute. *Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "A statute as a whole must receive practical, reasonable, and fair interpretation **consonant with the purpose, design, and policy of lawmakers.**" *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006).

In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter **and accords with its general purpose**. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute **should be resolved in favor of a just, equitable, and beneficial operation of the law**." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993).

Courts will reject a statutory interpretation that 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. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011) (emphasis, line breaks added); *accord, Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014) (addressing another tort reform statute)

In addition, Appellant's position is in accord with the decisions of numerous other jurisdictions, and prior decisions of this Court with respect to the equities of comparative fault. This court has the inherent power, under both the basic rules of statutory construction and due process, to interpret and implement the procedural mechanics of § 15-38-15 consistent with "the intended purpose of the statute" in a manner which "harmonizes with its subject matter and accords with its general purpose" and achieves a "resol[ution] in favor of a just, equitable, and beneficial operation of the law." *Id.*

The position asserted by SCAJ results in a plaintiff having exclusive control over whether to grant a defendant the possible protection of § 15-38-15 - "an absurd result that could not have been intended by the legislature." *Id.*

II. DUE PROCESS and VARIOUS SCENARIOS

The South Carolina Association of Justice (SCAJ) argues that the due process issues of fairness and equity raised in this case are not "true constitutional arguments." However, "due process is flexible and calls for such procedural protections as the particular situation demands."[2] These same concepts of fairness and equity were the basis for the adoption of comparative negligence in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991): "Having determined comparative negligence is the more equitable doctrine, we now join the vast majority of our sister jurisdictions and adopt it as the law of South Carolina...." If these concepts are inapplicable in issues related to the

2 *Kurschner v. City of Camden Planning Comm'n,* 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008), citing *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009), *as amended* (May 4, 2009). The case *sub judice* involves the denial of a substantial right granted by the Legislature based on an argument that is exclusively the Plaintiff's choice whether to allow it.

relative determination of fault, *Nelson* would have to be overturned. (And no one is advocating that.)

The scenarios offered by SCAJ to argue plaintiffs also face unfair results are misleading. In many of these scenarios plaintiff has full control over the circumstances – *plaintiff chooses* not to sue someone, *plaintiff chooses* to settle with someone (and chooses the terms and conditions of such), or *plaintiff fails* to meet some legal obligation (proper service, filing within the statute of limitations). In the Workers Compensation scenario, plaintiff is entitled to substantial benefits, including payment of all medical expenses, wage replacement, and compensation for permanent injury. In a Tort Claims Act case, the Legislature created a separate procedure for the limited abrogation of government immunity and provided an avenue for recovery by a plaintiff that did not exist prior to the Act.

In the scenario where a plaintiff has chosen not to sue someone, SCAJ asserts "the 'Plaintiff chooses' rule ... creates risks for P, not D." This is classic sophistry - any "risks" are created by the plaintiff itself – it chose not to sue someone. And a potential contribution claim often does nothing to reduce the risk to a defendant of an absent tortfeasor. If the tortfeasor is absent *because plaintiff has chosen* to settle with it, the plaintiff has eliminated any potential for contribution, and did so *under terms and conditions over which a defendant has no input or control.*

A plaintiff either has exclusive control or receives separate (and substantial) benefits in most of the scenarios asserted by SCAJ; in none, however, do defendants have any influence or control. In contrast to the position argued by SCAJ with respect to joint

and several liability (i.e., that a plaintiff gets to control whether a defendant can seek the protection of § 15-38-15), a defendant has no control over any scenario where a plaintiff may receive less than full compensation.

SCAJ also asserts the Legislature "has intervened to provide D with the benefit of a contribution claim against T" which "reflects a policy determination to shift from P to D the burden of collecting from T given the degree of D's fault in causing harm to P." But this addresses the wrong question. The material question of § 15-38-15 is not collectability; it is "the degree of D's fault in causing harm to P." This calculation determines whether "D" will be jointly & severally liable in the first place. The passage of § 15-38-15 makes degree of fault a primary consideration independent (and prior to) the issue of collectability. The existence of a possible contribution action does nothing to alleviate the increased risk of unwarranted joint and several liability when an at-fault entity is not included in the allocation of 100% of the fault.

Simply put, the Legislature changed the policy. In contrast to the prior version of the Contribution Act,[3] comparative fault is now an essential issue in the determination of liability and the imposition of joint and several liability.[4]

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3 See, e.g., S.C. Code § 15-38-30 (1988) ("In determining the pro rata shares of tortfeasors in the entire liability ... their relative degrees of fault shall not be considered....").

4 *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (A later statute generally takes precedence over an earlier one.)

III. SEPARATION OF POWERS AND GUIDANCE

A. Separation of Powers

As noted above, the fundamental error in SCAJ's position regarding legislative policy is the attempt to apply this standard to the procedural aspects of the statute in a manner which eviscerates the manifest purpose of the statute.

No one disputes the mechanics of the statute are awkwardly drafted – they are inconsistent with other provisions of the Contribution Act and are ambiguous within § 15-38-15 itself. For example, the procedure outlined by Section C requires a determination of total damages before there is any determination that any defendant is at fault. Read literally, a jury would be required to calculate damages even where no defendant is found to be at fault. SCAJ asserts these ambiguous mechanics are the inviolate policy of the Legislature. There is, however, a critical legal distinction between the policy of a statute and the procedures for implementing it. The express policy of § 15-38-15 is that only those who are primarily at fault are subject to joint and several liability. The mechanics for determining this are simply procedures, and the courts have the power – and the duty – to apply the law in a manner which carries out the Legislative intent and provides due process protection for all.[5]

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5 "If the statute is ambiguous, however, courts must construe the terms of the statute. A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011) (internal citations omitted).

B. The "plaintiff chooses" rule

If "plaintiff chooses" survives the passage of § 15-38-15, the protection against joint and several liability applies *only if the plaintiff chooses to allow it*. It is difficult to imagine a more illogical (and "absurd") result.

Like Respondents, SCAJ does not dispute that South Carolina, after the passage of § 15-38-15, is no longer an absolute joint and several liability jurisdiction. Likewise, SCAJ does not even attempt to dispute that common law absolute joint and several liability was the foundation for the "plaintiff chooses" rule. Instead, SCAJ makes the circular argument that this procedural rule somehow trumps the statute which eliminates the rule's foundation.

The only reasonable conclusion on this question is that the Legislature, by eliminating the doctrine of absolute joint and several liability, knew it was eliminating the procedural rules based upon the absolute doctrine.[6] The Legislature is presumed to know the law, and therefore is presumed to know "plaintiff chooses" was based on the doctrine of absolute joint and several liability (a point which no one has even attempted to dispute). Therefore, by expressly and clearly eliminating this common law doctrine, the Legislature is presumed to know the procedural rules based upon it would also be eliminated.

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6 If the Legislature decided to eliminate a common law crime, would they also have to specify one could no longer be arrested for it? Indicted for it? Tried for it? The rule that statutes in derogation of the common law are strictly construed cannot require such obsessively detailed drafting. Courts do not abandon logic and reason at the door of statutory interpretation.

Therefore, to reformulate the question asked initially, which interpretation of legislative intent in § 15-38-15 is more reasonable:

> A) The Legislature intended to provide protection against joint and several liability except for those primarily at fault, but intended to allow the "plaintiff chooses" rule to give a plaintiff the exclusive choice as to whether such protection could even possibly apply; or
>
> b) By eliminating absolute joint and several liability, the Legislature also intended to eliminate the procedural rules based upon it.

Section 15-38-15 eliminated absolute joint and several liability regardless of the degree of fault. In so doing, it eliminated the foundation for the procedural "plaintiff chooses" rule. Under SCAJ's analysis, however, the rule gives a plaintiff veto power over the protection of § 15-38-15.[7]

C. Rule 14, Rule 19, "defendant," and Subsection(D)

Appellants added Respondent Mizzell as a named party out of an abundance of caution because § 15-38-15(C)(3) states "the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent."

The only reasonable interpretation of § 15-38-15 as a whole is that the Legislature, by eliminating absolute joint and several liability - and, therefore, the

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7 The argument that "plaintiff chooses" trumps the statute is akin to arguing "prior to minimum wage statutes, it was 'well-settled' an employer could choose the wages to offer; therefore, although we now have minimum wage statutes, they apply only if the employer chooses to pay them."

associated "plaintiff chooses" rule - intended for all at fault entities who could be made parties to be in front of the jury for purposes of allocation of fault.[8] If a plaintiff refuses to include them, a defendant can. No other interpretation harmonizes the express intent of § 15-38-15 with the allocation of 100% of the fault "to the plaintiff and to the defendants."

However, if an at-fault entity cannot be made a party (regardless of the reason), there must be some procedural mechanism for allowing an allocation of fault under § 15-38-15 for purposes of determining whether joint and several liability will be imposed. Otherwise, the calculation of fault is artificially increased for named defendants, increasing not only actual liability but also the potential risk for unwarranted and inequitable joint and several liability. Under these circumstances, the protection of § 15-38-15 would be rendered illusory.

1. Rule 14

First, as noted in the Appellant's prior briefs, many jurisdictions where liability is based on a relative allocation of fault have allowed (or even mandated) third-party practice as the most efficient means of providing the substantive protection against joint and several liability. Second, SCAJ completely ignores section (c) of Rule 14:

> Upon motion of any party, or on its own motion, the Court may order that a party designated as a third-party defendant be joined as a plaintiff or defendant under Rules 19 or 20, when the ends of justice and efficiency in proceedings would be served thereby. In event such joinder is ordered,

8 Again, if the Legislature is presumed to know the law, it is presumed to have known that eliminating the "plaintiff chooses" rule would allow the addition of entities who are subject to suit, such as Mizzell, through Rule 14, Rule 19, or other means.

designation of such party or his pleading as "third party" shall thereafter be dropped.

Therefore, if the current version of South Carolina's Rule 14 continues to be interpreted as encompassing only derivative liability, a claim under Rule 14 should be converted to a joinder motion under Rule 19 or Rule 20.

Including a clearly culpable entity in the allocation of fault *when that allocation determines whether joint and several liability applies* undeniably serves "the ends of justice and efficiency in proceedings." In addition, the Notes to Rule 14 refer to "the liberal State practice as to joinder" and that "Rule 14 (c) is added to encourage that result [joinder] where appropriate." It is difficult to imagine where such a result is more appropriate than where joinder could dramatically impact the application of joint and several liability under the procedures outlined in § 15-38-15.

2. Rule 19

The passage of § 15-38-15 makes potentially culpable tortfeasors "indispensable" to the determination of relative fault (and the resulting potential for imposition of joint and several liability) under the procedures outlined in § 15-38-15.

Under Rule 19(a), "[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."

The rule refers to "relief ... among those already parties" – it is not limited to "plaintiffs." Therefore the "relief" must include circumstances where defendants face an artificially-increased allocation of fault (and, as a result, an increased risk of joint and several liability) if a potentially culpable entity is not joined.[9] Rule 19 provides a complete and independent basis for the "relief" requested by Appellants.[10]

3. "Defendant" Semantics

Appellants addressed this issue in their first Reply Brief. This is an attempt to create substantive distinctions where none exist. SCAJ asserts Rules 4(a), 12(b), 7(a), and 14(a) provide a "clear and well-established meaning" which distinguishes between the "defendant" and "third-party defendant." However, none of these rules provide any distinction between "defendant" and "third-party defendant" except as a matter of procedure (e.g., time for filing pleadings); there is no difference as a matter of substance.

"Defendant" is a generic term which includes "third-party defendants" (and defendants of all stripe, regardless of how added) in multiple rules, statutes, and case law. Under SCAJ's position, a "third-party defendant" would have no rights or obligations under any law that did not specifically use the term "third-party defendants," and those who add "third-party defendants" would not have to comply with the numerous rules,

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9 This is glaringly obvious where, as is the case here, an admittedly culpable entity is not included in the allocation of fault.

10 As noted in Appellants' original Reply brief (and, indirectly, in Judge Seal's Order denying the motion to dismiss) the application of Rule 19 under § 15-38-15 (i.e., a case not involving governmental entities) was simply not an issue before the Court in the *Chester* case. (*Chester* does not cite Rule 21 for some reason, but it appears that rule alone would have been applicable to prevent dismissal of that action.)

statutes, and case law that simply uses the term "defendants." Our justice system is not (and cannot be) so pedantic.

4. Subsection (D)

As stated previously, the elimination of absolute joint and several liability regardless of fault (and the associated "plaintiff chooses" rule) by the passage of § 15-38-15 allows (and perhaps requires) culpable entities to be made parties for purposes of allocation of fault. For culpable entities who cannot be made parties, Subsection D, in conjunction with Rule 49, provides an avenue for a calculation of fault which gives effect to the manifest purpose of § 15-38-15.

Although it does include the word "retain," Subsection D is much broader than the common law "empty chair" defense: "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." Therefore, Subsection (D) is much broader than the "all or nothing" defense at common law – it allows the assertion of a non-party's fault to any degree ("any or all").

If, as SCAJ suggests, the only effect of Subsection D is the same common law "all or nothing" empty chair defense, this section would be superfluous. (Defendants already had that right.) Subsection D has to have some effect. (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."). Therefore, there must be some procedural mechanism to allow for the allocation of fault to these other potential tortfeasors.

Although not the only potential mechanism, using Rule 49, SCRCP, "Special Verdicts And Interrogatories," would allow a factual determination of the percentage of fault for each named party as well as any non-party. Such a procedure would impose no liability on a non-party but would provide the protection against joint and several liability mandated by § 15-38-15.

D. Settlement & Judicial Efficiency

As other jurisdictions have recognized,[11] a system of liability actually based on conduct is not only more equitable, but is more likely to lead to settlements (and settlements commensurate with that conduct) than to the protracted and highly-contested litigation where defendants are selected ("held hostage") based not on conduct, but on the perceived size of their wallet. Including all culpable entities who are potentially liable for any or all of a plaintiff's damages also prevents a multitude of additional litigation.[12]

CONCLUSION

The South Carolina Legislature has adopted comparative fault and has limited the imposition of joint and several liability based on the outcome of that determination. As cited in our prior briefs, jurisdictions which have progressed to comparative fault allocations (whether judicially or via statute) have interpreted or created procedural rules

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11 See pp.7-8 in Appellants' Reply Brief to Respondents.

12 Contribution allocations, for example, are decided in one proceeding (like it is in the Federal courts), and it eliminates the potential defense from those who were not parties to the original action that "one hundred percent" of the fault has already be allocated; therefore there can be no contribution claim.

consistent with the manifest purpose of such evolution and "in favor of a just, equitable, and beneficial operation of the law."[13]

The position advocated by SCAJ and Respondents leads to this result: Plaintiff, and Plaintiff alone, gets to choose whether a defendant can seek the protection against joint and several liability granted by S.C. Code § 15-38-15. This is an absurd result, inconsistent with the clear purpose of the statute, and contrary to the basic concepts of equity and fairness.

Interpreting § 15-38-15 to encompass the right to have fault allocated to others (either by joinder or via special verdict) is an essential component necessary to fulfill the manifest purpose of the statute: only those who are primarily at fault should be jointly & severally liable.

Respectfully submitted,

June 13, 2016

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13 "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993) (cited in *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011).)

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PROOF OF SERVICE

I certify that I have served a copy of the **Reply Brief of Appellants to Amicus South Carolina Association for Justice** on all parties by depositing a copy of it in the United States Mail, postage prepaid, on June 13, 2016, addressed to their respective attorneys of record:

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