

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

ONE NORTH MAIN, 2ND FLOOR (29601-2772)
POST OFFICE BOX 2048 (29602-2048)
GREENVILLE, SOUTH CAROLINA
TELEPHONE 864.240.3200
FACSIMILE 864.240.3300
WEBSITE www.hsblawfirm.com

SARAH P. SPRUILL
DIRECT DIAL NUMBER 864.240.3220
EMAIL sspruill@hsblawfirm.com

May 25, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
MAY 30 2017
SC Court of Appeals

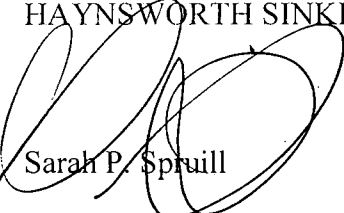
Re: *Robert J. Burke v. Republic Parking System, Inc.*
Appellate Case No. 2015-000269

Dear Ms. Kitchings:

Appellant Republic Parking System, Inc. submits this letter in accordance with Rule 208(b)(7), SCACR. Since the briefs in this case were filed, the South Carolina Supreme Court has issued *Machin v. Carus*, Op. No. 27714 (S.C. Sup. Ct. filed April 26, 2017) (Shearouse Adv. Sh. No. 17 at 18) and *Smith v. Tiffany* Op. No. 27715 (S.C. Sup. Ct. filed April 26, 2017) (Shearouse Adv. Sh. No. 17 at 37), addressing the issue of the interpretation of S.C. Code Ann. § 15-38-15 and the “empty chair defense.” These cases provide supplemental authority relating to Appellant’s Issue on Appeal Number 6. Copies of these opinions are attached for the Court’s convenience.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.


Sarah P. Spruill

SPS/jmb
Enclosures

cc: Clayton B. McCullough
Jamie A. Khan

6

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

John William Machin, Plaintiff,

v.

Carus Corporation, Defendant.

Appellate Case No. 2015-000901

RECEIVED

MAY 30 2017

SC Court of Appeals

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, Senior United States District Judge

Opinion No. 27714

Heard December 1, 2015 – Filed April 26, 2017

CERTIFIED QUESTIONS ANSWERED

John S. Nichols, of Bluestein Nichols Thompson &
Delgado, of Columbia; Frederick I. Hall, III, of the Rick
Hall Law Firm, of Lexington; and John K. Koon, of
Koon & Cook, of Columbia, for Plaintiff.

Gray T. Culbreath and Jessica A. Waller, of Gallivan
White & Boyd, P.A., of Columbia; and J. Arthur

Davidson and Sonja R. Tate, of Fulcher Hagler LLP, of Augusta, Georgia, for Defendant.

Alan Jones, of McGangus, Goudelock & Courie, of Myrtle Beach; and David C. Marshall, of Turner, Padgett, Graham & Laney, of Columbia, for amici curiae South Carolina Defense Trial Attorneys' Association and DRI - The Voice of the Defense Bar.

JUSTICE KITTREDGE: This Court accepted the following certified questions from the United States District Court for the District of South Carolina:

1. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the jury hear an explanation of why the employer is not part of the instant action?
2. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may a defendant argue the empty chair defense and suggest that Plaintiff's employer is the wrongdoer?
3. In connection with Question 2, if a defendant retains the right to argue the empty chair defense against Plaintiff's employer, may a court instruct the jury that an employer's legal responsibility has been determined by another forum, specifically, the South Carolina Workers' Compensation Commission?
4. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the Court allow the jury to apportion fault against the non-party employer by placing the name of the employer on the verdict form?

The certified questions come to this Court in the context of a pending post-trial motion in the federal court litigation. We answer these questions only in the

abstract, without any suggestion as to the resolution of the post-trial motion, which remains in the capable hands of the esteemed and learned federal judge, Joseph F. Anderson.

As detailed below, we answer Questions 1, 2, and 3 "yes," provided a defense seeks to assign fault to the plaintiff's employer. We answer Question 4 "no."

I.

Defendant Carus Corp. (Carus) is an international company that develops and sells chemical products for municipal and industrial applications. Defendant's products include a chemical called Totalox, which is an odor eliminator that, essentially, is designed as a deodorizer for sewer systems.¹ The Town of Lexington (Town) used Totalox in its sewer treatment plants. On April 13, 2010, Plaintiff John William Machin, a Town employee, was exposed to Totalox when a storage container valve broke during the delivery of Totalox to one of the Town's wastewater stations.² Plaintiff thereafter suffered reactive airways syndrome, which is also known as chemically induced asthma or obstructive lung disease.

As a result of his injuries, Plaintiff filed a workers' compensation claim and was awarded workers' compensation benefits. In August 2012, Plaintiff filed suit in federal court against Carus and several other defendants seeking recovery for his injuries which he alleged were caused by his exposure to Totalox. In addition to

¹ More specifically, Totalox provides a food source for anaerobic bacteria in sewer systems that prevents the anaerobic bacteria from producing foul-smelling hydrogen sulfide.

² As the Town's sewage treatment needs increased, so did the corresponding need for storage capacity to house Totalox. At the Town's request, Carus issued a proposal to install a large-volume storage tank at the relevant wastewater treatment site in September 2009; however, the Town declined to order the tank, opting instead to design and construct its own in-house system. The Town's employees devised a storage system using PVC pipes and fittings to connect fifteen portable containers. The Town did not consult Carus regarding the design of the storage system, and Carus had no role in determining the Town's procedures governing the container system. The valve that burst and allowed significant amounts of Totalox to escape was part of this Town-designed PVC storage system.

Carus, Plaintiff sued The Andersons (the "tolling" company that manufactured the finished Totalox product by compounding the proprietary chemical provided by Carus with its own stock of raw materials (calcium nitrate and water)); Fetter & Sons (the third-party company hired by The Andersons to deliver Totalox to the Town on the day of Plaintiff's injuries); and Terry Weiser (the delivery truck driver). Fetter & Sons and Weiser settled with Plaintiff in February 2013. Carus and The Andersons proceeded to trial in January 2015.

During pre-trial conferences, the parties argued about what, if anything, the federal court would tell the jury regarding Plaintiff's workers' compensation recovery. Ultimately, it appears the federal court held that Carus and The Andersons retained the right to make the so-called "empty chair" defense—asserting the Town's negligence was the sole proximate cause of Plaintiff's injuries; however, the parties were not allowed to mention workers' compensation, and the federal court did not instruct the jury regarding workers' compensation.

At trial, Carus took the position that Plaintiff's exposure was insufficient to have caused any permanent respiratory injury, that the other Town employees present were not injured, and that no one had previously claimed such an injury from Totalox exposure. Carus also presented evidence that it provided the Town with material safety data sheets (MSDS), on-product warning labels, and an informational data sheet, all of which warned of the dangers of exposure to Totalox and instructed that users should wear personal protective equipment, including respirators, in situations where exposure to mist could occur. Carus argued that both the Town and Plaintiff ignored these warnings and that this failure to heed warnings was the sole proximate cause of Plaintiff's injuries.

Shortly after jury deliberations began, the jury submitted the following question: "Why is the Town of Lexington not included in the lawsuit?" In response (and after lengthy discussion with the parties), the federal court informed the jury that they were to consider only the evidence presented and the court's instructions on the applicable law. While the jury continued deliberations, Plaintiff took a voluntary nonsuit as to The Andersons. The jury form was subsequently amended to remove reference to The Andersons, and the jury ultimately returned a defense verdict in favor of Carus.

Plaintiff thereafter filed a motion for a new trial arguing that the federal court erred in refusing any argument or jury instructions about workers' compensation while

allowing Carus to argue its empty chair defense placing responsibility for Plaintiff's injuries on the Town. After receiving memoranda from the parties on the issues, the federal court determined that South Carolina law is unclear as to how the motion should be resolved. The federal court then certified the above questions to this Court and took the motion for a new trial under advisement pending this Court's consideration of these certified questions.

II.

We answer the certified questions by analyzing two statutory schemes, the Workers' Compensation Act and the Uniform Contribution Among Tortfeasors Act.

A.

The Workers' Compensation Act is a comprehensive scheme created to provide compensation to employees injured by accidents arising out of and in the course of their employment. *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 69–70, 267 S.E.2d 524, 526 (1980). "The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) (citing *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 115, 580 S.E.2d 100, 107 (2003)).

The concept of workers' compensation is "founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer–employee relationship and of substituting therefor the principle of liability on the part of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of employment." *Parker*, 275 S.C. at 69–70, 267 S.E.2d at 526 (quoting *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 530–31, 115 S.E.2d 57, 66 (1960)) (internal quotation marks omitted). "The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee." *Id.* "This quid pro quo approach to [workers'] compensation has worked to the advantage of society as well as the employee and the employer." *Id.*

Section 42-1-540 of the Workers' Compensation Act is an exclusivity provision, disallowing tort suits against the employer and limiting the injured employee's rights and remedies to those provided by the Workers' Compensation Act.

The rights and remedies granted by this title to an employee . . . shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service[,] or death.

S.C. Code Ann. § 42-1-540 (2015).

However, by its terms, the exclusive remedy provision of the Workers' Compensation Act limits the employee's remedy only "as against his employer." Thus, where the injury is due to a third party's negligence, a plaintiff may collect workers' compensation benefits *and* sue the third party responsible for causing the injuries. *Mendenall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 562, 738 S.E.2d 251, 253 (2013). Although an employee may have a right to bring suit against a third party, the *amount* of compensation paid by the employer "shall not be admissible as evidence in any action brought to recover damages." S.C. Code Ann. § 42-1-570 (2015).

B.

The second statutory scheme at issue here is the Uniform Contribution Among Tortfeasors Act, through which the legislature abolished joint and several liability. S.C. Code Ann. §§ 15-38-10 to -70 (2005 & Supp. 2015). This Act provides the apportionment of percentages of fault is to be determined as follows:

(C) The jury, or the court if there is no jury, shall:

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

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

.....

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

S.C. Code Ann. § 15-38-15(C)–(D) (Supp. 2015) (emphasis added).

III.

Plaintiff claims that, under the Workers' Compensation Act, only the amount of compensation paid by an employer is inadmissible and that other issues involving workers' compensation are admissible. Plaintiff maintains that Carus brought into question, via the empty chair defense, the Town's alleged negligence by offering evidence that the Town was responsible for Plaintiff's injuries for: (1) using an inadequate storage system to store and offload Totalox; (2) not informing Plaintiff of the hazards associated with Totalox; and (3) not providing MSDS-based training regarding the safe handling of

the product as required by federal occupational health and safety regulations. Consequently, Plaintiff argues that fairness necessitates explaining to the jury why he did not sue the Town, along with the nature of workers' compensation and the limits on recovery under the Workers' Compensation Act. Plaintiff speculates that the jury delivered a defense verdict because the jurors reasoned that Plaintiff already received full compensation for his injuries via workers' compensation.

Carus counters that the evidence bearing on the Town's conduct and legal duties under federal occupational health and safety regulations were directly relevant to its defenses. Carus cites numerous cases from other jurisdictions that allow defendants to argue the empty chair defense notwithstanding disallowing apportionment of fault to immune, non-party employers. *See, e.g., Carriere v. Cominco Alaska, Inc.*, 823 F. Supp. 680, 692 (D. Alaska 1993) (holding that a defendant may establish through admissible evidence that he was either not negligent or was not a proximate cause of the plaintiff's injury but disallowing partial allocation of fault to the employer); *Downey v. W. Cmty. Coll. Area*, 808 N.W.2d 839, 853 (Neb. 2012) (holding that a defendant can point to the negligence of the employer and claim that the employer was the sole cause of the accident causing the plaintiff's injuries but finding the defendant may not reduce his or her own liability by seeking to have some of the fault apportioned to the employer). Carus, therefore, asserts that the federal court did not err in allowing it to argue the empty chair defense or in charging the jury regarding its defenses that sought to blame the Town for Plaintiff's injury.

Yet Carus further argues that the exclusivity of the workers' compensation remedy, Plaintiff's receipt of workers' compensation benefits, and the no-fault workers' compensation framework were wholly collateral and irrelevant to the only issue before the jury—whether Carus was legally responsible for Plaintiff's injury. Carus concludes that any jury charge or explanation addressing workers' compensation would confuse, mislead, or distract the jury from the real issue of the case.

A.

The certified questions are intertwined, particularly Questions 1, 2, and 3. The certified questions require this Court to confront the tension between

laudable and competing policy goals embedded in our workers' compensation and contribution-among-tortfeasors statutes. More to the point, the certified questions raise the specter of the seemingly irreconcilable intersection of tort-based products liability principles and South Carolina's no-fault workers' compensation framework—the dilemma between the exclusivity and limitations of workers' compensation as the remedy for on-the-job injuries, the potential for third parties to bear a disproportionate share of liability in tort, and the employer's central role in many workplace product-related injuries.³

Professor Larson understood well the dilemma presented in this situation: "Perhaps the most evenly[] balanced controversy in all of compensation law" is how to accommodate the employee's interest in full recovery, the employer's interests in limited liability and subrogation, and the third party's interest in reducing its tort liability, particularly where the employer was a cause-in-fact of the employee's injuries. 11 Lex K. Larson, *Larson's Workers' Compensation* § 121.01, at 121-4 (2015).

Because of the closeness of the issue, the number and variety of attempted solutions, both legislative and judicial, has been nothing short of breathtaking, and the end is by no means in sight. Even when deliberate legislative choices have been made, that has not necessarily been the end of the matter Indeed, few areas of law have evoked such daring displays of uninhibited judicial activism, with centuries-old doctrines being bulldozed out of the way to clear a path for an "equitable" compromise.

³ "[S]ome insurance industry studies estimate that employers are 'at fault' in approximately 50% of employees' product[-]related suits." Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 *Tenn. L. Rev.* 881, 886 (1997) (noting that employers often "select workplace products, determine the sorts of safety guards or other protective devices that are placed on the product, train and supervise employees, maintain equipment, and communicate warnings and instructions," and arguing that this degree of involvement suggests that employers are at least partially responsible for many workplace product-related injuries).

Arthur Larson, *Third-Party Action over Against Workers' Compensation Employer*, 1982 Duke L.J. 483, 485-86.

In light of these competing concerns, the task before the Court is "how to apply these two different systems in a way that gives effect to the major policies of each one without sacrificing important policies of the other," while remaining faithful to legislative intent in doing so. Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 Tenn. L. Rev. 881, 887 (1997).

Beginning with workers' compensation law, "it is generally held that an employee cannot be met with a defense that the employer's negligence contributed to the injury." Lex K. Larson, *supra*, § 120.02[3], at 120-10 (explaining the majority rule is that an employer's negligence may not be a defense to a plaintiff employee's third-party tort suit, yet noting that a growing number of states, either by judicial decision or statutory amendment, have ruled that a third party may be permitted to plead the employer's concurring negligence as a *pro tanto* defense to the extent of the workers' compensation benefits paid to the employee or to the extent of the employer's proportional fault in a comparative negligence jurisdiction). That being said, the Court must give efficacy to the terms of section 15-38-15(C) and (D) and, to the extent possible, do so in concert with the Workers' Compensation Act. We believe there is an approach which meaningfully harmonizes these statutory schemes, as set forth by the legislature, in the Workers' Compensation Act and the Contribution Among Tortfeasors Act.

In this regard, the decision of the Tennessee Supreme Court in *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252 (Tenn. 1997), is instructive. The plaintiff in *Snyder* was injured while working at a plant where machines were used to compress cotton into bales. When one of the machines stopped mid-cycle, the plaintiff stuck his arm into the machine to remove loose cotton covering a protective switch. The plaintiff's arm was inserted into the machine through an opening where a metal panel or barrier normally would have been bolted. While the plaintiff's arm was inside the machine, the machine engaged, injuring plaintiff's arm. The plaintiff maintained he had not removed the metal panel and he did not know who had. *Id.* at 253. The plaintiff filed suit in federal court against the companies that manufactured and sold the machine (collectively "defendants"), seeking recovery for his injuries based on theories of negligence, breach of warranty, and strict liability. Plaintiff claimed the defendants negligently designed

the machine, negligently failed to warn of the machine's dangers, and were liable for breach of warranties. *Id.* at 253–54.

In response, the defendants argued the machine in question was state-of-the-art and that it was neither defective nor unreasonably dangerous when it left their control. Rather, the defendants asserted that the plaintiff's employer altered or failed to maintain the machine by removing the bolted metal panel covering the opening through which the plaintiff stuck his arm, thereby constituting an intervening act of negligence that caused the plaintiff's injuries. In other words, according to the defendants, it was the employer's conduct that rendered the machine defective or unreasonably dangerous. Unsure of whether Tennessee law precluded defendants from presenting proof that the plaintiff's injuries were caused by the acts or omissions of the employer, the federal court certified two questions to the Supreme Court of Tennessee. *Id.* at 254.

In answering those questions, the Tennessee Supreme Court held that the defendants were permitted to introduce evidence at trial that the plaintiff's employer's alteration, change, improper maintenance, or abnormal use of the defendants' product was a cause in fact of the plaintiff's injuries, but the jury would not be permitted to assess fault against the non-party employer. *Id.* at 253. In reaching this distinction, the court explained:

[T]he defendants here[] wanted the jury to assess fault against the employer by arguing that the employer's actions were the proximate, or legal, cause of the plaintiff's injuries. Of course, the employer cannot be found to be the proximate, or legal, cause of the plaintiff's injuries because the employer is immune from tort liability under [the exclusivity provision of the Tennessee workers' compensation act]. By enacting [the exclusivity provision], the legislature has already determined that for policy reasons the employer may not be the legal cause of the plaintiff's injuries.

This is not to say, however, that the employer cannot be found by the trier of fact to have been a cause in fact of the plaintiff's injuries. If the rule were otherwise, the defendants would effectively be precluded from presenting a defense. A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to

introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.

Id. at 256. As to the specific facts, the *Snyder* court explained that under the plaintiff's approach, "the defendants would be restricted from presenting evidence that the plaintiff's employer altered, changed, or improperly maintained the cotton baler that injured the plaintiff by removing the metal panel that covered the area into which the plaintiff stuck his arm." *Id.* at 256 n.7. The court further explained:

The end result would be that the jury would not hear evidence of the true facts surrounding the product that caused the plaintiff's injuries but, nonetheless, be asked to determine fault and hence liability for damages. Prohibiting the introduction of such evidence could result in a defendant, who was not a cause in fact of the plaintiff's injuries, being required to pay for the harm anyway.

Id. at 256.

For those reasons, the Tennessee Supreme Court found the jury shall be permitted to consider "all evidence relevant to the actions of the employer with respect to the defendants' product in assessing whether the plaintiff has met his burden of establishing the elements necessary to recover against the defendants." *Id.* at 253. The court further explained:

Put another way, the jury may consider all evidence relevant to the event leading up to the incident that injured the plaintiff. *The defendants may not, however, ask the jury to assign fault to the employer. That is, the defendants may not take the legal position that the employer's actions were the legal cause of the plaintiff's injuries.* The jury should be instructed that it may consider the actions of the employer only in assessing whether the plaintiff has met his burden of establishing the elements necessary to recover against the defendants. Also, the jury should be instructed that it may not, in making that determination, assess fault against the employer. Finally, the trial judge should give an instruction that lets the jury know that the

employer's legal responsibility will be determined at a later time or has already been determined in another forum.

Id. at 257 (emphasis added).

In so holding, the *Snyder* court emphasized that distinguishing between cause in fact and proximate cause "is not merely an exercise in semantics." *Id.* at 256 n.6. The court explained:

The terms are not interchangeable. Although both cause in fact and proximate, or legal, cause are elements of negligence that the plaintiff must prove, they are very different concepts. Cause in fact refers to the cause and effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss. Thus, cause in fact deals with the "but for" consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct. In contrast, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. Proximate or legal cause is a policy decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, [and] precedent

Id. (citations omitted).

As Tennessee jurisprudence has continued to evolve, the Tennessee Supreme Court has acknowledged the advent of comparative fault and recognized that doctrine is "designed to create a tighter fit between liability and fault." *Carroll v. Whitney*, 29 S.W.3d 14, 19 (Tenn. 2000). However, the Tennessee Supreme Court has nevertheless continued to reaffirm its decision in *Snyder*, emphasizing that the refusal to allow a jury to find an employer to be a proximate cause of a plaintiff's injuries is a rule "uniquely applicable to the allocation of fault to an employer when the employer's liability is governed by the Workers[] Compensation Law." *Id.* at 19 (holding a jury may attribute fault to immune non-parties outside the workers' compensation context). The Tennessee Supreme Court has observed that the continued efficacy of *Snyder* is justified by the fact that, absent *Snyder*'s holding, plaintiffs would be subject to a double reduction of their recovery against third parties who contributed to their on-the-job injuries. *Troup v. Fischer Steel*

Corp., 236 S.W.3d 143, 147 (Tenn. 2007) (explaining the first reduction would occur when the jury apportioned fault to the employer and the second would occur when the workers' compensation insurance carrier exercised its right to subrogation against the plaintiff's recovery from the third party).

B.

We find the *Snyder* approach to be workable and aligned with South Carolina law. Borrowing from *Snyder* and its framework, we answer the first three certified questions as follows:

A defendant may introduce relevant evidence regarding the claim(s) asserted in the Complaint, including any viable defense included in the Answer. If no defense seeks to assign fault to the plaintiff's employer, there shall be no reference, discussion, evidence, or legal argument relating in any manner to the matter of workers' compensation. If, however, a defendant asserts a defense that assigns fault for the plaintiff's injuries to the plaintiff's employer, the defendant shall, under the well-established "empty chair" defense, have the right to present such evidence and require the fact-finder to consider whether the employer's actions were the cause of the plaintiff's injuries. Of course, the employer cannot be found to be the proximate, or legal, cause of the plaintiff's injuries because the employer is immune from tort liability under the exclusivity provision of the South Carolina Workers' Compensation Act. By enacting the exclusivity provision, the legislature has already determined that the employer may not be legally responsible in tort for the plaintiff's injuries.

This is not to say, however, that the employer cannot be found by the fact-finder to have been responsible for the plaintiff's injuries. If the rule were otherwise, the defendants would effectively be precluded from presenting a defense. A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line

which would make discussion of the case to be tried difficult, if not impossible.

Under no circumstances may reference to the amount of workers' compensation benefits be made at trial. S.C. Code Ann. § 42-1-570. Upon a party's request, or if responsive to a question from the jury, the jury shall be charged on the applicable law. We suggest the following instruction:

The plaintiff is prohibited from suing his employer in this court. At the time of the incident, the plaintiff was employed and the incident occurred during the course and scope of his employment. This is governed by workers' compensation laws, and an employer's responsibility, if any, for an employee's injuries will be determined, or has been determined, in another forum. A workers' compensation claim is not before you and you shall not give it any consideration in reaching a verdict in this case. However, the matter of the employer's alleged fault in causing the injury has been raised by the defendant, and it is proper for you to consider the employer's actions, but only insofar as you assess and determine whether the plaintiff has met his burden of proving the elements of the claim(s) necessary to recover against the defendant.

C.

The interplay of the certified questions is evident, as the foregoing discussion foreshadows our answer to the final question—whether the jury may be permitted to apportion fault against a non-party employer by placing the name of the employer on the verdict form. We answer the question in the negative, and we do so as a function of interpreting section 15-38-15 and honoring legislative intent.

Carus presents an argument with equitable appeal, that is, because South Carolina abolished joint and several liability in 2005, allocation of a percentage of fault to the non-party employer is necessary to ensure that a defendant, if held liable, will be required to pay only damages commensurate with its degree of fault. We do not minimize Carus's compelling policy argument, which the dissent adopts, but we are ultimately bound by legislative intent.

In this regard, Carus argues that subsection (D) of section 15-38-15 should be construed to allow the jury to attribute fault to the non-party employer by placing the name of the employer on the verdict form. *See* S.C. Code Ann. § 15-38-15(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." (emphasis added)). We find a plain reading of subsection (D), in concert with subsection (C), requires that we reject this argument.

Specifically, subsection (C) refers to "two or more defendants," "each defendant," and "the defendants." *See id.* § 15-38-15(C) ("The jury, or the court if there is no jury, shall . . . specify the amount of damages; [] determine the percentage of fault, if any, of [the] plaintiff and the amount of recoverable damages[; and] . . . where there is a verdict . . . for damages against *two or more defendants* for the same indivisible injury, death, or damage to property, specify in a separate verdict . . . the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct. . . 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 . . . 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." (emphasis added)). There is no basis in our law for a plaintiff or a defendant to add the plaintiff's employer as a party defendant.

In contrast, subsection (D) refers to a "potential tortfeasor." In prescribing the allocation of fault among parties and the format of the jury form, if the legislature intended to allow non-parties to be included on the jury verdict form, it would have used terms other than "defendant" and "defendants" in drafting subsection (C), just as it used the different term—potential tortfeasor—in subsection (D). The legislature's use of two separate terms makes clear that it intended two separate meanings. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); *Eagle Container Co. v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895–96 (2008) ("'Words in a statute must be construed in context,' and 'the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.'" (quoting *S. Mut. Church Ins. Co. v.*

S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991))).

Giving the words "defendant" and "defendants" a plain and ordinary reading, we find that subsection (C) allows only a "defendant" or "defendants" to be listed on the jury form and included in the allocation of fault. Moreover, given the legislature's use of the term "defendant" in subsection (C), it is reasonable to conclude that a "potential tortfeasor" under subsection (D) cannot include the plaintiff's employer. To be sure, the legislature could characterize a plaintiff's employer in a way that would permit inclusion of the employer on the verdict form, but the exclusivity provision of the Workers' Compensation Act forecloses the possibility of an employer ever being a "potential tortfeasor." To construe a "potential tortfeasor" as including the plaintiff's employer would create an irreconcilable conflict with the language and purpose of our Workers' Compensation Act and would be inconsistent with this Court's obligation to harmonize statutory schemes whenever such a construction is consistent with legislative intent. *See Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 173, 763 S.E.2d 426, 432 (2014) (explaining the proper construction of two statutes is that which "harmonizes the two statutes and is consistent with the intent of the legislature").

And finally, we respectfully reject Carus's reliance on a recent decision from the Supreme Court of Georgia, *Walker v. Tensor Machinery, Ltd.*, 779 S.E.2d 651 (Ga. 2015), which reached a contrary result. Interpreting the relevant provisions of Georgia law, the court held in *Walker* that "a trier of fact [may] assign[] fault to a nonparty employer that has immunity under the exclusive remedy provisions of the Workers' Compensation Act." *Id.* at 656. Notably, the court in *Walker* based its decision on a Georgia statute which "directs the trier of fact to 'consider the fault of *all persons or entities* who contributed to the alleged injury or damages.'" *Id.* at 652 (emphasis added) (quoting OCGA § 51-12-33(c) (expressly allowing for assessment of fault against a nonparty "regardless of whether the person or entity was, or could have been, named as a party to the suit")). In light of this crucial language in Georgia's statutory apportionment scheme, the result in *Walker* is understandable.

In stark contrast, our legislature's use of the narrower term "defendant" in section 15-38-15(C) of the South Carolina Code evinces a legislative intent to allow allocation of fault among only the parties to a lawsuit—not against nonparties.

Thus, we find that, under section 15-38-15(D), a nonparty may be included in the allocation of fault only where such person or entity is a "potential tortfeasor," which, under our law, excludes the plaintiff's employer who is immune from suit under section 42-1-540 of the Workers' Compensation Act.

IV.

The certified questions raise difficult issues, to be sure. We have answered the questions based on our discernment of legislative intent, for these matters are largely policy decisions for our legislature. See *Widenhouse v. Colson*, 405 S.C. 55, 58, 747 S.E.2d 188, 190 (2013) ("The primary source of the declaration of the public policy of the state is the General Assembly" (quoting *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925)) (internal quotation marks omitted)). We trust the General Assembly will respond to this opinion if it disagrees with our interpretation of the statutes.

CERTIFIED QUESTIONS ANSWERED.

BEATTY, C.J., HEARN, J., and Acting Justice Jean H. Toal, concur. Acting Justice Costa M. Pleicones, dissenting in a separate opinion.

ACTING JUSTICE PLEICONES: I respectfully dissent. As explained in *Smith v. Tiffany*,⁴ I would hold that in order to give effect to the intent of the General Assembly in enacting the 2005 amendments to the South Carolina Contribution Among Tortfeasors Act, we must permit a jury or fact-finder to make a fair and logical apportionment of 100% of fault. In my opinion, such fair apportionment requires allowing the defendant to argue to the fact-finder that fault lies with an otherwise immune third-party, and allowing the fact-finder to apportion **fault** to that party, regardless of that party's immunity from **liability**. Further, in my view, the fact that the immune third-party's liability has been determined in another forum is irrelevant to the General Assembly's policy decision that in a tort lawsuit, the fact-finder must apportion 100% of the fault among all potentially responsible parties. In short, I would answer Certified Question One "No," as I would allow the employer to be a party to the action solely for the purpose of apportioning fault. For the reasons discussed above, I would answer Certified Questions Two and Four "Yes." And finally, I would answer Certified Question Three "No," as I find the question not germane to the apportionment of fault among all potentially responsible parties.

⁴ Op. No. 27715 (Sup. Ct. filed April 26, 2017).

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

RECEIVED

Walter Smith, Respondent,

MAY 30 2017

v.

SC Court of Appeals

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

Appeal from Saluda County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27715
Heard May 18, 2016 – Filed April 26, 2017

AFFIRMED

T. McRoy Shelley, III, and Steven T. Moon, both of
Rogers Townsend & Thomas, PC, of Columbia for
Appellants.

Allan P. Sloan, III, and Kristen B. Fehsenfeld, both of Pierce, Hems, Sloan & Wilson, LLC, of Charleston, Ralph Kennedy, of Kennedy Law Firm, LLC, of Batesburg-Leesville and Robert T. King, of King, Love & Hupfer, LLC, of Florence, for Respondents.

Bert G. Utsey, III, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Walterboro and John S. Nichols of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, for Amicus Curiae The South Carolina Association for Justice.

JUSTICE KITTREDGE: Appellants appeal from a trial court order granting Respondent Corbett Mizzell summary judgment, thereby dismissing Appellants' third party complaint.¹ We affirm.

The underlying dispute arises from a motor vehicle accident in December 2012 in Saluda County in which Respondent Walter Smith was injured. Smith settled with Mizzell for the policy limits of Mizzell's liability coverage in exchange for a covenant not to execute. Smith then sued Appellants, claiming Appellants' negligence was a proximate cause of the accident. The issue before this Court stems from Appellants' efforts to have Mizzell added as a defendant. In the South Carolina Contribution Among Joint Tortfeasors Act (Act), the legislature abrogated pure joint and several liability for tortfeasors who are less than fifty percent at fault. The Act directs the fact-finder to apportion one-hundred percent of the fault between the plaintiff and "each defendant whose actions are the

¹ Appellants also appeal a trial court order granting Respondent Walter Smith's motion to quash Appellants' notice of deposition of Smith. We decline to address this issue because a discovery order is ordinarily not immediately appealable, and the issue "lack[s] a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review." *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (recognizing courts may accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review, but declining to do so where the issues appealed lack a sufficient nexus); *see also Grosshuesch v. Cramer*, 377 S.C. 12, 31, 659 S.E.2d 112, 122 (2008) (noting discovery orders are interlocutory and not immediately appealable).

proximate cause of the indivisible injury." S.C. Code Ann. § 15-38-15(C)(3) (Supp. 2016).

Appellants urged the trial court to construe the Act, with a helping hand from our rules of civil procedure, to permit the addition of Mizzell as a defendant. The trial court rejected Appellants' various arguments and, in granting Mizzell summary judgment, applied the Act as written. In affirming the trial court, we are likewise constrained by the plain meaning of the unambiguous language in the Act. While we appreciate the equity-driven argument of Appellants, we must honor legislative intent as clearly expressed in the Act, lest we run afoul of separation of powers.

I.

This case arises out of an automobile collision that occurred on U.S. 178 in Saluda County in December 2012. Defendant Norman Tiffany was a commercial driver employed by Brown Trucking Co. (Brown Trucking) and Brown Integrated Logistics, Inc. (Brown Logistics), which owned and operated Tiffany's commercial vehicle. On the morning of the accident, Tiffany's commercial vehicle was disabled and parked along the shoulder of U.S. 178, adjacent to the exit of a gas station. Mizzell had stopped at the gas station, and as he attempted to exit the parking lot, his view of oncoming traffic was obstructed by Tiffany's truck positioned alongside the highway. According to Mizzell, because the truck was obstructing his view, he "eased forward to get a better view of oncoming traffic," and at that point his vehicle collided with the vehicle of Respondent Walter Smith who was traveling down U.S. 178.

Mizzell's liability carrier tendered the limits of Mizzell's liability policy to Smith. In return, Smith signed a covenant not to execute in favor of Mizzell. Thereafter, Smith filed suit against Tiffany, Brown Trucking, and Brown Logistics, alleging his injuries were proximately caused by Tiffany's negligent positioning of the commercial motor vehicle which completely obstructed the view of vehicles attempting to exit the gas station. Smith alleged that since Tiffany was acting within the course and scope of his employment at the time of the accident, Brown Trucking and Brown Logistics were liable under the doctrine of respondeat superior. In addition to claiming Tiffany was negligent, Smith's complaint also alleged three other causes of action specifically against Brown Trucking and Brown Logistics: (1) negligent entrustment; (2) negligent hiring, supervision, and retention; and (3) negligent maintenance. Essentially, Smith alleged Brown Trucking and Brown Logistics were negligent in entrusting Tiffany with a commercial motor vehicle despite knowing Tiffany lacked proper training,

experience, and knowledge of state and federal laws governing the parking and standing of commercial motor vehicles and that Brown Trucking and Brown Logistics were negligent in failing to ensure the commercial motor vehicle Tiffany drove was properly inspected and maintained to ensure the vehicle's hazard equipment functioned appropriately.

In their answer, Brown Trucking and Brown Logistics (collectively "Appellants") raised, in a shotgun approach, numerous affirmative defenses seeking to have Mizzell added as a defendant, including "Fault of Others" and "Failure to Join Indispensable Party/Rule 19 SCRPC." Appellants also asserted a third-party complaint under Rule 14, SCRPC, naming Mizzell as a third-party defendant. The gist of Appellants' third-party claims was that Mizzell was responsible for a significant portion of the plaintiff's injuries and that Appellants were therefore entitled to a determination of Mizzell's proportion of the fault, even though Mizzell had already settled with the plaintiff and was immune from further liability. Appellants' third-party complaint offered several alternative theories to justify apportioning fault to Mizzell: (1) a declaratory judgment cause of action seeking a determination as to Mizzell's portion of liability; (2) a standalone cause of action under section 15-38-15 of the Act seeking apportionment of fault to Mizzell; (3) joinder of Mizzell as an indispensable party under Rule 19, SCRPC; (4) third-party negligence under Rule 14, SCRPC; and (5) the due process clauses of the United States and South Carolina constitutions. Appellants concede Mizzell did not breach any duty of care owed to them; rather, Appellants assert they are entitled to apportionment based on an independent contribution claim against Mizzell.

Mizzell filed a motion for summary judgment as to Appellants' third-party claims. Specifically, Mizzell contended he was entitled to judgment as a matter of law on Appellants' third-party claims because he neither owed nor breached any duty to Appellants as third-party plaintiffs. Mizzell further contended that section 15-38-50 of the Act discharged him as a settling tortfeasor from liability for contribution to any other tortfeasor.

The trial court granted summary judgment and dismissed the third-party claims against Mizzell. As to the third-party negligence claim, the trial court found Mizzell was entitled to judgment as a matter of law because there was no evidence that Mizzell breached any duty owed to Appellants or that Appellants suffered any damages purportedly caused by Mizzell. The trial court further found there was no basis for adding Mizzell as a party, reasoning that Mizzell's inclusion in the action was not necessary for the just adjudication of Smith's claims under Rule 19, SCRPC, that the third-party complaint was not proper under Rule 14, SCRPC, and

that Appellants' due process rights were not violated by the inability to join Mizzell or include him on the verdict form for purposes of allocation. This direct appeal followed.

II.

On appeal, Appellants contend the trial court erred in failing to permit Mizzell to be named as a party and included on the verdict form so as to enable the jury to include Mizzell in the apportionment of fault for the accident. Appellants contend their claim derives from the statutory language added to the Act in 2005. At the outset, we note Appellants do not contend that any provision of the Act is ambiguous.

It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question. *See Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning."); *see also Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) ("The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will." (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))). Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning. "[T]here is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning" unless a statutory provision is ambiguous. *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) (citing *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994)); *see also Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (observing that unless a statute is ambiguous, "the application of standard rules of statutory interpretation is unwarranted"). Only "[w]here the language of an act gives rise to doubt or uncertainty as to legislative intent" may the construing court "search for that intent beyond the borders of the act itself." *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) (citing *Lite House, Inc. v. J.C. Roy Co.*, 309 S.C. 50, 53, 419 S.E.2d 817, 819 (Ct. App. 1992)).

In light of these well-established rules of statutory interpretation, we are unwilling to accept Appellants' invitation to look outside the text of the Act to justify the assumption that the legislature's use of differing terms—"defendants" and "potential tortfeasors"—in section 15-38-15 was not deliberate or that those words mean anything other than what they say. *See Hodges*, 341 S.C. at 87, 533 S.E.2d

at 582 ("If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute." (citing *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956))); *see also* *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[T]he words found in the statute [must be given] their 'plain and ordinary meaning'" and "if the words are unambiguous, we must apply their literal meaning." (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007))).

We acknowledge that achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the Act. We disagree that fair apportionment was the *only* underlying policy goal. Indeed, when the Act is read as a whole, with each section and subsection given effect, it is apparent that the legislature was not solely attempting to protect nonsettling defendants. Rather, the legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) ("[T]he Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010))); *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) ("[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." (quoting *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006))); *see also* S.C. Code Ann. § 15-38-50(2) (2005 & Supp. 2016) (providing that a settling tortfeasor, by virtue of his good-faith settlement with the claimant, is not liable for contribution to any other tortfeasor).

Specifically, the Act sets forth in section 15-38-15(B) and (C) a detailed method for apportioning fault "among defendants." Further, and perhaps in recognition of the perceived inequity complained of by Appellants, the General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts. *See Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012) (holding a nonsettling defendant's right to setoff arises by operation of law, and it is not within the discretion of the trial court to apply setoff). Thus, a critical feature of the statute is the codification of the empty chair defense—a defendant "retain[s] the right to assert another potential tortfeasor, whether a party or not,

contributed to the alleged injury or damages"—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being "empty").²

When the statutory provisions are construed as a whole—the legislature's use of the differing terms "defendants" in subsections (B) and (C) and "potential tortfeasor, whether or not a party" in subsection (D) with the mandatory offset in subsection (E)—the clear intent of the General Assembly is not ambiguous and does not allow for the result sought by Appellants.³ Rather, were we to accept Appellants' argument, and vary from the provisions of the Act *in this case* to

² In minimizing the significance of the empty chair defense, which the General Assembly itself deemed substantial enough to warrant codification, the dissent's allegations of inequity presuppose that the fact-finder will return a verdict for the plaintiff. The dissent ignores that the plaintiff's burden to plead and prove her case remains. Smith must not only prove Appellants' negligence, but also that such negligence was a proximate cause of the accident. A defense verdict remains a viable option, and we reject the suggestion that the empty chair defense is an exercise in futility. In any event, this is the approach sanctioned by the General Assembly in the Act.

³ Although the trial court did not specifically rule upon Appellants' claim that a standalone cause of action for apportionment exists under section 15-38-15(C), based on the considerable litigation surrounding that issue in state and federal courts throughout South Carolina, we take this opportunity, in the interest of judicial economy and for the benefit of the bench and bar, to reject the argument that section 15-38-15(C) creates a standalone cause of action for apportionment of fault to a non-party. Further, because Appellants' brief includes only conclusory references to "due process considerations of fairness and equity" and sets forth no substantive legal argument or supporting citations to authority (even to the due process clauses themselves), we do not consider Appellants' argument that the trial court erred in finding their due process rights were not violated by the inability to join Mizzell or include him on the verdict form for purposes of allocation. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding an assertion to be abandoned where appellant failed to provide arguments or supporting authority therefor and explaining mere allegations are insufficient to demonstrate trial court error). Nevertheless, we note "unfairness in result is no sure measure of unconstitutionality." *Foster v. California*, 394 U.S. 440, 448 (1969) (quoting *United States v. Augenblick*, 393 U.S. 348, 352 (1969)).

purportedly enhance the prospects of a more equitable result *in this case*, we would create a host of concerns, for Appellant's desired result would require (1) a plaintiff to maintain a suit against someone with whom he has already settled; (2) a settling defendant to defend a lawsuit he has already settled; (3) this Court to ignore the legislature's express acknowledgement in section 15-38-15(D) that not all potential tortfeasors will necessarily be parties to the suit; and (4) would create a conflict with other provisions of the Act, including sections 15-38-15(E) and 15-30-50(1), which address a nonsettling defendant's right to setoff. The most prominent obstacle to Appellants' approach is separation of powers, for we must defer to the will of the legislature as expressed in the Act. If the policy balance struck by the legislature in Act is to be changed, that prerogative lies exclusively within the province of the Legislative Branch.

III.

While we have not had occasion to address the precise question prior to today, today's result is dictated by the Act. The General Assembly in the Act struck the balance among competing policy concerns it deemed appropriate. We defer to the policy decisions of the General Assembly. For example, in *Riley v. Ford Motor Co.*, we noted that a nonsettling defendant may not "fashion[] and ultimately extract[] a benefit from the decisions of those who do [settle]." 414 S.C. at 197, 777 S.E.2d at 831 (explaining "[i]f the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle").

If our mission were simply to achieve equity on a case by case basis, we would not necessarily disagree with Appellants and the dissent. But wherever the balance is struck, one can easily imagine scenarios where the result may be inequitable. The point remains—absent a constitutional prohibition, where the General Assembly has spoken and established policy, separation of powers demands that courts honor the legislative policy determination. Moreover, Appellants' proposed result, advanced by the dissent, would turn the Act on its head to benefit nonsettling defendants at the expense of plaintiffs and those who do settle. That is not the balance the General Assembly struck in the Act. In honoring separation of powers, we adhere to the principle that a court must not reject the legislature's policy determinations merely because the court may prefer what it believes is a more equitable result.

As explained by this Court in *Machin v. Carus Corp.*, --- S.C. ---, --- S.E.2d --- (2017), a plain reading of the words "defendant" and "defendants" in section 15-38-15(C) reveals the legislature's intent to allow "only a 'defendant' or 'defendants' to be listed on the jury form and included in the allocation of fault." *Id.* at ---, --- S.E.2d at ---. In reaching this conclusion, we examined the recent decision of *Walker v. Tensor Machinery Ltd.*, 779 S.E.2d 651 (Ga. 2015), in which the Supreme Court of Georgia held that a jury may assess a percentage of fault to an immune nonparty. Critical to the *Walker* analysis was the language in the relevant Georgia statute, which provides "[i]n assessing percentages of fault, the trier of fact shall consider the fault of *all persons or entities* who contributed to the alleged injury or damages, *regardless of whether the person or entity was, or could have been, named as a party to the suit.*" Georgia Code Ann. § 51-12-33(c) (emphasis added). In light of this language, as we observed in *Machin*, the result in *Walker* is understandable based on the Georgia statute. However, in stark contrast to the Georgia statute, our legislature determined that fault may be allocated only to "the plaintiff and to the defendants" and requires that "the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent." S.C. Code Ann. § 15-38-15(C)(3). Thus, guided by the language of the Act and with respect for the legislature's prerogative, this Court held that fault may not be apportioned to an immune nonparty under the Act. *Machin*, --- S.C. at ---, --- S.E.2d at ---.

IV.

And finally, we reject the implication that a rule of civil procedure somehow trumps the Act. Appellants rely on Rules 14 and 19, SCRCP, to support the addition of Mizzell to the underlying litigation and inclusion on the verdict form.

Rule 14 provides "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him* for all or part of the plaintiff's claim against him." Rule 14(a), SCRCP (emphasis added). Consequently, a non-party is subject to impleader only if there is a basis to assert he is liable to the named defendant(s) for all or part of the plaintiff's claim. The question becomes: is Mizzell subject to liability to Appellants for all or part of Smith's claim against Appellants? Under these circumstances, the legislature has answered the question in the negative.

The analysis is straightforward. Mizzell is not subject to liability for any part of Smith's claims based on the covenant not to execute he obtained from Smith. The covenant not to execute included language protecting Mizzell from any further

liability to Smith in excess of the agreed-upon settlement amount. Even though, by its terms, a covenant not to execute discharges the settling tortfeasor's liability only as to the plaintiff, in section 15-38-50 the legislature expanded the scope of a settling tortfeasor's immunity to include protection from liability to nonsettling tortfeasors. Specifically, section 15-38-50 provides that "[w]hen a release or 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 . . . *it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.*" (emphasis added). Thus, by the terms of the covenant not to execute, Mizzell has no additional liability to Smith, and Mizzell is also immune from any liability to non-settling alleged tortfeasors Tiffany, Brown Trucking, and Brown Logistics by virtue of section 15-38-50. Absent any potential liability to either the plaintiff or to nonsettling defendants, impleader under Rule 14 is not proper. *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) ("The outcome of the principal claim must impact the third-party defendant's liability; however, no right exists to implead a third-party defendant who is *directly* liable to the plaintiff.").

Moreover, there is no basis for joinder of Mizzell under Rule 19, SCRCP, which provides in relevant part:

(a) Persons to Be Joined if Feasible. A person . . . shall be joined as a party in the action if

- (1) in his absence *complete relief cannot be accorded among those already parties*, or
- (2) he claims an interest relating to the subject of the action

.....

(emphasis added).⁴ It is the italicized language in subsection (a)(1) upon which Appellants rely. Specifically, Appellants contend that by refusing to include Mizzell in the apportionment of fault under section 15-38-15(C), the percentage of fault allocated to and among the nonsettling defendants would be distorted and may result in the unwarranted imposition of joint and several liability. This result, Appellants claim, is contrary to the legislative intent underlying section 15-38-

⁴ Notably, the dissent does not offer any discussion of Rule 19 itself or any explanation of how the analysis under Rule 19 has somehow been altered to now encompass a mere joint tortfeasor as a necessary party to a suit.

15(A), which abrogated joint and several liability for any defendant whose conduct is determined to be less than fifty percent of the total fault. Thus, Appellants claim Mizzell is a necessary party and must be joined as a party defendant under Rule 19.

Prior to the 2005 revisions to the Act, it was well-established that "[a]dditional parties are not necessary to a complete determination of [a] controversy unless they have rights which must be ascertained and settled before the rights of the parties to the suit can be determined." *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949) (quoting *Phillips v. Clifton Mfg. Co.*, 204 S.C. 496, 502, 30 S.E.2d 146, 148 (1944)). "If the defendant and the parties sought to be brought in were joint tort-feasors, the decisions of this Court are clear to the effect that [the] defendant would have no right to bring in as an additional defendant a joint tort-feasor who was not made a party by the plaintiff." *Simon v. Strock*, 209 S.C. 134, 138, 39 S.E.2d 209, 211 (1946). Accordingly, mere joint tortfeasors are not necessary or indispensable parties to an action under Rule 19, SCRPC.

Throughout the years, this Court has offered various reasons for refusing to allow defendants to bring in alleged joint tortfeasors a plaintiff has opted not to sue. Perhaps most often cited is the "plaintiff chooses" rule: "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 in a single action." *Simon*, 209 S.C. at 138, 39 S.E.2d at 211. "The election or option referred to is given to the plaintiff and not to the defendant." *Id.* at 138, 39 S.E.2d at 211. "To allow a defendant against the will of the plaintiff to bring in other joint tortfeasors as defendants would deny the plaintiff the right to name whom he should sue." *Doctor*, 215 S.C. at 335, 55 S.E.2d at 69. The "plaintiff has the choice of designating the party who she claims committed the tort alleged in the complaint." *Simon*, 209 S.C. at 139, 39 S.E.2d at 211. "She should not be required to sue someone against whom she makes no claim." *Id.* Indeed, this right of the plaintiff to choose her defendant has been recognized in South Carolina jurisprudence for almost two hundred years. *Little v. Robert G. Lassiter & Co.*, 156 S.C. 286, 287, 153 S.E. 128, 128 (1930).

Despite the frequency with which courts have cited the plaintiff chooses rule as a basis for refusing improper joinder over the last two centuries, our courts have also offered various other justifications for refusing to join parties whom the plaintiff has opted not to sue, including that the plaintiff's complaint includes no allegations of any liability on the part of the unnamed parties, that the unnamed parties do not claim any interest in the controversy, and that the defendant may be found liable to the plaintiff regardless of whether the unnamed joint tortfeasors are made parties.

Robbins v. First Fed. Sav. Bank, 294 S.C. 219, 223, 363 S.E.2d 418, 421 (Ct. App. 1987); *see also Simon*, 209 S.C. at 139–40, 39 S.E.2d at 211. We have also held that parties who are not subject to liability by virtue of settlement or statutory immunity are not properly added as party defendants. *Chester*, 388 S.C. at 346, 698 S.E.2d at 560 (noting the "strong public policy favoring the settlement of disputes"); *Simon*, 209 S.C. at 140, 39 S.E.2d at 211. We have also found joinder is not necessary where the named defendant will not be subject to multiple or inconsistent obligations and the rights of the non-party will not be impaired if he is not joined as a party defendant. *Robbins*, 294 S.C. at 223, 363 S.E.2d at 421.

Notably, our courts have also observed a number of times that joinder of an unnamed potential tortfeasor is unnecessary based on common law principles of joint and several liability—namely, that an unnamed joint tortfeasor is not a necessary party to the suit "[s]ince a joint tort-feasor is severally liable for the entire damage." *S.C. Dep't of Health & Env'tl. Control v. Fed-Serv Indus., Inc.*, 294 S.C. 33, 362 S.E.2d 311 (Ct. App. 1987) (explaining "the joint tort-feasor with joint and several liability remains merely a permissive party").

It is this particular justification that Appellants claim was eviscerated by the 2005 amendments to the Act. Although this argument was not specifically raised to or ruled upon by the trial court, Appellants now argue that because pure joint and several liability is no longer recognized in all instances, the absence of Mizzell as a party defendant precludes their ability to receive a fair trial and renders the court unable to "accord complete relief" among those already parties. Thus, Appellants contend Mizzell is a necessary party and must be joined under Rule 19.

To accept this argument would be inconsistent with this Court's decision in *Chester v. South Carolina Department of Public Safety*, in which we unanimously reaffirmed—*after* the 2005 amendments to the Act—the well-established right of the plaintiff to choose "which co-tortfeasor(s) she will sue." 388 S.C. at 346, 698 S.E.2d at 560. In reaffirming the plaintiff chooses rule in *Chester*, we explained, "[w]e are not persuaded that the General Assembly, in enacting § 15-78-100(c) . . . intended to abrogate the tort plaintiff's right to choose her defendant." *Id.* Indeed, "statutes in derogation of the common law are to be strictly construed," and therefore this Court found it was constrained to construe the scope of the newly enacted statute entitling a Tort Claims Act defendant to a proportionate verdict as not restricting common law principles beyond the clear intent of the legislature. *Id.*; *see also Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (observing "a statute restricting the common law will 'not be extended beyond the clear intent of the legislature'" (quoting *Crosby v. Glasscock Trucking*

Co., 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). This Court is similarly constrained to strictly construe the scope of the 2005 amendments to the Act insofar as they alter the common law. We find nothing in the text of the Act that evinces a clear legislative intent to abrogate two centuries of common law establishing a plaintiff's right to choose which tortfeasors, if any, she will sue. We additionally note the legislature did not overrule or otherwise respond to *Chester* by amending either the Act or the Tort Claims Act. We conclude that absent explicit and unmistakable legislative intent to abrogate this well-established right, a joint tortfeasor remains merely a permissive party and joinder under Rule 19 is not required for complete relief to be accorded.

V.

In sum, based on the unambiguous language in the Act, we affirm the trial court's dismissal of Appellants' third party complaint. Our decision is the result of determining and honoring legislative intent. We respectfully reject Appellants' invitation to adopt a result that comports with their sense of equity. We construe the statute in a manner to give effect to the policy decision made by the legislature. Is the policy decision advanced by Appellants, and adopted by the dissent, equitable and defensible? Absolutely. Could the legislature have drafted the statute to achieve the result desired by Appellants? Absolutely. But the policy decision belongs to the legislature, and the legislature has crafted the provisions of the Act as it sees fit. We are a court, not a legislative body. That a court may disagree with a legislative body's policy decisions or believe a perceived "more fair" outcome exists is of no moment.

AFFIRMED.

BEATTY, C.J., FEW, J., and Acting Justice James E. Moore, concur. Acting Justice Costa M. Pleicones, dissenting in a separate opinion.

ACTING JUSTICE PLEICONES: I respectfully dissent. As discussed *infra*, I disagree with the majority's suppositions regarding the policy underlying the South Carolina Contribution Among Tortfeasors Act ("the Act").⁵ In my opinion, in an action filed pursuant to the Act, a defendant may join an allegedly culpable non-party under Rule 19, SCRCP, where the non-party is otherwise immune from contribution. Accordingly, I would reverse the trial judge's grant of summary judgment.

HISTORY OF THE ACT

Prior to the Act, the longstanding general rule was that no right of contribution between joint tortfeasors existed, as courts "are not open to wrongdoers to assist them in adjusting the burdens of their misconduct, and that the law will not lend its aid to one who founds his cause of action on a delict." *See Atlantic Coast Line Railroad Company v. Whetstone*, 243 S.C. 61, 69, 132 S.E.2d 172, 175 (1963) (citing *Merryweather v. Nixan*, [1799] 8 T.R. 186, 101 (Eng. Rep. 1337)); *M & T Chemicals, Inc. v. Barker Indus., Inc.*, 296 S.C. 103, 106, 370 S.E.2d 886, 888 (Ct. App. 1988) ("[T]he nonexistence of the right to contribution among joint tortfeasors is a matter long thought to have been settled as the law of this state" (citation omitted)). Contribution is defined as the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007) (citing *Black's Law Dictionary* 353 (8th ed. 2004)); S.C. Jur. Contribution § 5 (2015).

However, in 1988, the General Assembly enacted the Act, which abrogated the common law rule against contribution. Specifically, the Act granted joint tortfeasors the right to seek contribution if they paid more than their pro rata share of a common liability. *See* 1988 S.C. Acts No. 432, § 5.

Shortly after its enactment, this Court found the purpose of the Act was to ameliorate the unfairness resulting from the common law bar to contribution. *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 470, 443 S.E.2d 395, 397 (1994)), *superseded by statute on other grounds as stated in Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 628 S.E.2d 38 (2006) (citing S.C. Code Ann. § 15-38-20(B) (Supp. 1993)); *cf.* 7 S.C. Jur. Contribution § 4 (2016) ("In the United States the great majority of jurisdictions have recognized that the rule denying contribution among joint tortfeasors was not well founded and, therefore, have abrogated the common law doctrine."). As noted by the

⁵ *See* S.C. Code Ann. §§ 15-38-10 to -70 (2005 & Supp. 2015).

Supreme Court of the United States, "when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability." *Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 87–88 (1981) (footnotes omitted). Thus, while South Carolina retained the concept of pure joint and several liability, which allowed the plaintiff to collect damages from any or all of the joint tortfeasors, after 1988, the Act permitted the defendant(s) sued by the plaintiff to collect contribution from other named and unnamed tortfeasors. See § 15-38-40 (2005).

In 1991, the Court, like the General Assembly, took action to modernize South Carolina's tort law, joining the vast majority of its sister jurisdictions⁶ in adopting comparative negligence. Prior to 1991, under the law of contributory negligence, if the negligence of the plaintiff contributed in the slightest degree to the plaintiff's injury and damage, then she was not entitled to recover. *McMaster v. S. Ry. Co.*, 122 S.C. 375, 115 S.E. 631, 632 (1923). Comparative negligence, in contrast, allows a plaintiff to recover damages not attributable to her own fault notwithstanding the plaintiff's contribution to the injury. *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 86, 508 S.E.2d 565, 573 (1998). The Court found comparative negligence more fair than the archaic rule of contributory negligence, allowing the common law to further evolve in favor of equitable tort doctrines. See *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).

Although this Court adopted the doctrine of comparative negligence, the plaintiff remained able to choose her defendant(s) from any of the allegedly culpable parties, as the doctrine of pure joint and several liability was unchanged. This Court has defined pure joint and several liability as follows:

If two or more persons owe to another the same duty, and by their common neglect of that duty, he is injured, doubtless, the tort is joint, and upon well-settled principles each, any, or all of the tort[]feasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and

⁶ By 1984, South Carolina was one of only seven states that still recognized the doctrine of contributory negligence as applicable to negligence actions generally. *Langley v. Boyter*, 284 S.C. 162, 172, 325 S.E.2d 550, 556 (Ct. App. 1984), *opinion quashed by* 286 S.C. 85, 332 S.E.2d 100 (1985).

disconnected, and the neglect of each was without concert, if such several neglects occurred and united together in causing injury, the tort is equally joint, and the tortfeasors are subject to a like liability.

Matthews v. Seaboard Air Line Railway, 67 S. C. 499, 46 S. E. 335 (1903) (citations omitted).

In more simplistic terms, pure joint and several liability allows a plaintiff to decide from which defendant she would like to seek payment of her damages, which is the foundation of the "plaintiff chooses" rule discussed *infra*. In summary, after 1991: a plaintiff was not barred from recovery by her own negligence; the plaintiff could choose from which defendant to seek payment of her damages; and, in general, a defendant who was successfully sued by a plaintiff could, in turn, seek contribution from a non-party joint tortfeasor.

In 2005, the General Assembly fundamentally altered the concept of joint and several liability when it amended the Act and made allocation of fault central to the determination of an individual defendant's liability to a plaintiff. *See* 2005 S.C. Act Nos. 27, § 6; 32, § 16. Broadly, the 2005 amendment statutorily abrogated pure joint and several liability for tortfeasors who are less than 50% at fault. *See* § 15-38-15; *see also Branham v. Ford Motor Co.*, 390 S.C. 203, 235–36, 701 S.E.2d 5, 22 (2010).

Specifically, the 2005 amendments require that in an action to recover damages resulting from, *inter alia*, personal injury or damage to property, the fact-finder must apportion 100% of fault between the plaintiff, and "each defendant whose actions are the proximate cause of the indivisible injury" *See* § 15-38-15. The Act first requires the fact-finder determine the amount of recoverable damages. *See* § 15-38-15(C)(1). The fact-finder must then determine the percentage of fault, if any, of the plaintiff. *See* § 15-38-15(C)(2).⁷ Finally, the Act

⁷ Sections 15-38-15(B)–(C)(2) (Supp. 2015), stating:

- (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:

requires that where the verdict is against two or more defendants for the same indivisible injury, upon a post-verdict motion by a defendant, the fact-finder is *required to apportion 100% of the fault* between the plaintiff and the defendants. See § 15-38-15(C)(3).⁸ Further, and in my opinion critical to the analysis, the Act

(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[.]”

⁸ Sections 15-38-15(C)(3)–(E) (Supp. 2015), stating:

(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).

requires that if a defendant is less than fifty percent at fault, *he is only liable to the plaintiff for the percentage of the damage he individually caused*; however, *if the defendant is fifty percent or more at fault, he is jointly and severally liable for the total damage to the plaintiff*. See § 15-38-15(A).⁹ Thus, the 2005 amendments to

(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).

⁹ See § 15-38-15(A) (Supp. 2015):

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

the Act abrogate pure joint and several liability for less culpable tortfeasors, and require 100% apportionment of fault to determine whether a defendant is subjected to joint and several liability.

In abrogating the common law doctrine of pure joint and several liability, as well as the bar to contribution among joint tortfeasors, the General Assembly has established that the public policy of South Carolina favors fair apportionment of liability among joint tortfeasors where the common law did not. The General Assembly and the Court have taken steps to modernize tort law—first by removing the bar to contribution, then by adopting comparative negligence, and finally by abrogating pure joint and several liability—requiring that the Court continue to examine our common law rules in light of these changes. As explained below, in my opinion, this evolution requires that the common law "plaintiff chooses" rule yield to the public policies expressed by the General Assembly in the Act.

INCOMPATIBILITY WITH THE PLAINTIFF CHOOSES RULE

In granting Mizzell's motion for summary judgment, the trial judge ruled Brown Trucking's attempt to join Mizzell to the lawsuit was impermissible, as it was an "attempted end-run" around the common law "plaintiff chooses" rule. Having examined the legislative public policies behind the Act, in my opinion, in order to permit the fact-finder in a tort action subject to the Act to apportion fault as required as well as accurately and fairly, the common law "plaintiff chooses" rule must yield.

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.

The General Assembly made a policy decision when it amended the Act in 2005, statutorily abrogating the doctrine of pure joint and several liability for defendants who the fact-finder deems are less than 50% at fault. The common law "plaintiff chooses" rule stands as an obstacle to that policy decision where the plaintiff fails to name as a defendant an allegedly culpable joint tortfeasor who is immune from contribution. *See* § 15-38-15(A); § 15-38-50. In my view, if the "plaintiff chooses" rule is permitted to stand, it would thwart the public policy of the Act. *See Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 263 (2013) (holding included within the legislative power is the sole prerogative to make policy decisions).

As noted by the majority, in requiring apportionment under the Act, the General Assembly utilized the term "defendants," as opposed to "joint tortfeasors." In my opinion, permitting a named defendant to join as a third-party defendant an alleged joint tortfeasor who is immune from contribution gives effect to the intent of the General Assembly, satisfying the literal language of the Act. However, in a matter involving joint tortfeasors who are subject to contribution, in my opinion, the "plaintiff chooses" rule remains compatible with the purpose of the Act, as a defendant burdened with more than its fair share of liability may seek relief under § 15-38-40.¹⁰ *See* §15-38-40(B).

Specifically, after the conclusion of a lawsuit under the Act, § 15-38-40 allows a defendant to seek contribution against other "judgment" defendants or tortfeasors not named to the lawsuit. However, where an allegedly culpable tortfeasor(s) is immune from contribution and not named as a defendant by the plaintiff, the sole ability a named defendant has to be held liable *for only their fair share of damages*,

¹⁰ My position is not one of statutory interpretation; instead, I merely find that the "plaintiff chooses" rule may not stand as an obstacle to the clear legislative intent, which requires an accurate and fair apportionment of the fault so that a less culpable tortfeasor is not held responsible for more than its fair share. In order to effectuate that mandate, joinder allows a named defendant to ensure all other potential tortfeasors are "defendants," as required by statute for the purpose of allocation. Allowing the most culpable parties to be impleaded for the purpose of apportionment in no way results in inequity to the plaintiff or the named defendants—quite the opposite, it ensures neither the plaintiff nor the originally named defendants will be burdened with an artificial allocation of fault. I simply discuss the legislative history to support what I find to be the clear intent of the language of the Act: to fairly and rationally apportion 100% of the fault.

is to join the missing party to the initial lawsuit filed under the Act. Such are the circumstances in the case before us.

In my opinion, the "plaintiff chooses" rule cannot be invoked to impede the purpose of the Act. I therefore would reverse the trial judge's ruling that refused to allow Brown Trucking to join Mizzell as a defendant under Rule 19, SCRPC, on the ground that such an order would violate the "plaintiff chooses" rule.¹¹

APPLICATION

The narrow legal question before this Court is whether, under Rule 19, SCRPC, a defendant may join an allegedly culpable non-party who is immune from contribution in order to achieve a fair apportionment of damages under the Act.¹²

Here, the plaintiff chose to sue only alleged tortfeasors—Brown Trucking Company, Brown Logistics, and Tiffany—who were not physically involved in the accident giving rise to the plaintiff's injuries. In exchange for a covenant not to execute, the plaintiff settled with the automobile insurer of a joint tortfeasor whose fault allegedly caused the accident—Mizzell. Any recovery in the plaintiff's lawsuit would be the burden of appellants alone as Mizzell's settlement agreement renders him immune from contribution.

¹¹ I would overrule *Chester v. South Carolina Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010), as well as its progeny, to the extent they suggest the "plaintiff chooses" rule survives the 2005 amendments to the Act in all circumstances.

¹² As noted by the trial judge, the Act "has received little attention from our state's appellate courts"; however, the issues created by the language of the apportionment statute have been a repeated topic of discussion in the scholarly journals of this state. 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); Joshua D. Shaw, *Limited Joint and Several Liability Under Section 15-38-15: Application of the Rule and the Special Problem Posed by Nonparty Fault*, 58 S.C. L. REV. 627 (2007).

As demonstrated by the facts of this case, precluding a defendant from joining as an additional defendant an allegedly culpable third-party who is immune from contribution would deny the fact-finder the ability to accurately and fairly apportion fault. The trial judge and majority find unfairness to be ameliorated by the "empty chair" provision found in Section 15-38-15(D) of the Act.¹³ The facts of this case demonstrate why that procedural provision does not remedy this problem. Where a tortfeasor(s) not named by the plaintiff is immune from contribution—it serves no purpose to allow a defendant to argue liability lies with that tortfeasor(s) where the fact-finder is required to apportion 100% of liability only between the parties before it. *See* S.C. Code Ann. §§ 15-38-15(D) (Supp. 2015); 15-38-40.

The implications under the facts of this case are far reaching. First, Mizzell's absence subjects the plaintiff and appellants to an irrational allocation of fault. Specifically, the allocation of 100% fault amongst the parties, absent Mizzell, would result in an apportionment not based on actual fault, but rather, solely based on the forced artificial calculation of 100% apportionment without the seemingly most culpable party. Second, the allocation of fault could unfairly expose Brown Trucking Company, Brown Integrated Logistics, and Tiffany, to joint and several liability. Third, Mizzell is statutorily immune from contribution due to the covenant not to execute, meaning the named defendants are without financial recourse from the alleged tortfeasor responsible for the plaintiff's injuries. *See* § 15-38-50(2) ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or the same wrongful death: it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.").

To illustrate further, if the fact-finder allocated fault at 33.3% to each named defendant¹⁴—Brown Trucking Company, Brown Logistics, and Tiffany—no

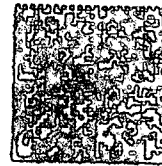
¹³ Section 15-38-15(D) states, "A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code Ann. § 15-38-15(D) (Supp. 2015).

¹⁴ I recognize that pursuant to S.C. Code Ann. § 15-38-15(C)(3)(a), were the allegations contained within Smith's complaint based solely in vicarious liability, a trial court would be required to treat appellants as one party; however, in this case, Smith alleges Brown Trucking engaged in negligent entrustment of the tractor-trailer to Tiffany, as well as negligent hiring, supervising, and retention of Tiffany, rendering § 15-38-15(C)(3)(a) potentially inapplicable.

appellant would face joint and several liability. However, if Tiffany were removed, and the ratios remained the same, the percentage of fault allocated to each Brown Trucking Company and Brown Logistics would rise to 50%, and each would be subjected to joint and several liability. *See* § 15-38-15(A). Even if the fact-finder were to find Smith and the named defendants each 50% at fault, this allocation would distort reality because a seemingly major contributor to the accident is not factored into the liability determination. Stated differently, Mizzell's absence from this lawsuit deprives the fact-finder of the ability to allocate fault rationally, and subjects appellants, as well as the plaintiff, to a flawed allocation of fault, which in turn could cause unfair exposure to joint and several liability with no recourse to seek contribution.

As the facts of this case demonstrate, not allowing Brown Trucking to join Mizzell as a defendant puts the fact-finder in a position of having to allocate a disproportionate amount of fault to either the plaintiff, or appellants (who were not physically involved in the accident). I find such a result contrary to the policy expressed by the General Assembly in the 2005 amendments to the Act, which seeks to protect less culpable defendants from being burdened with more than their fair share of liability.

Accordingly, in order to give effect to the public policy decisions of the General Assembly, I would hold a defendant may join other potential joint tortfeasors who are immune from contribution under Rule 19, SCRPC.

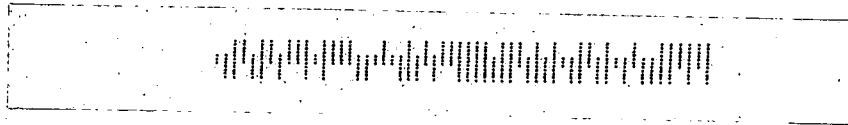


UNITED STATES POSTAGE
FIRST CLASS PERMIT NO. 29601 GREENVILLE, SC
02 1M \$ 02.45⁰⁰
0004283819 MAY 25 2017
MAILED FROM ZIP CODE 29601

RECEIVED

MAY 30 2017

SC Court of Appeals



Haynsworth
Sinkler Boyd, PA.

ATTORNEYS AND COUNSELORS AT LAW

POST OFFICE BOX 2048
GREENVILLE, SOUTH CAROLINA 29602-2048

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201