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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Columbia Division

Joseph F. Anderson, Jr., United States District Judge

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Appellate Case No. 2015-000901

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John William Machin..... Plaintiff,

v.

Carus Corporation..... Defendant.

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# MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION AND DRI – THE VOICE OF THE DEFENSE BAR AS TO CERTIFIED QUESTION #4

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Pursuant to Rule 213, SCACR, the South Carolina Defense Trial Attorneys' Association ("SCDTAA") and DRI – The Voice of the Defense Bar ("DRI") hereby move for leave of this Court to file a brief as amici curiae in this matter. For the Court's convenience, a copy of the amici curiae brief is enclosed herewith for contemporaneous, conditional filing. SCDTAA and DRI seek this filing for the following reasons:

1. This appeal involves four certified questions, including one which may decide whether or not non-parties can be included on jury verdict forms for the purpose of making accurate and true allocations of fault.

2. Members of the SCDTAA consist of defense attorneys practicing law in South Carolina representing individuals, entities, and insurance carriers in all aspects of litigation. The mission of the SCDTAA is to promote justice, professionalism, and integrity in the civil justice system. In doing so, the SCDTAA also seeks to promote fairness, consistency, and efficiency in civil litigation.

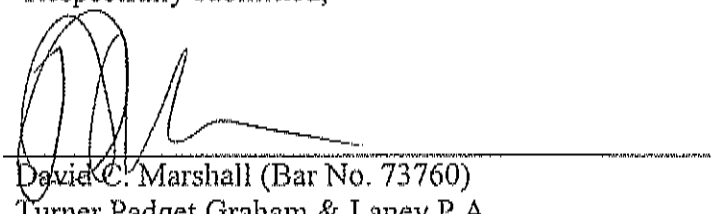
3. DRI is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clientele, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

4. The resolution of Certified Question #4 impacts the mission of both the SCDTAA and DRI to promote justice, efficiency, and fairness in the civil justice system. Allowing non-parties to be included on verdict forms for the purpose of making true and accurate allocations of fault fundamentally affects justice, fairness, and efficiency in our court system.

5. The SCDTAA and DRI believe their submission of the proposed amici curiae brief would be desirable and helpful to the Court. The brief outlines and analyzes case law not previously considered by the Court and provides additional analysis of the policy considerations and potential ramifications of the Court's decision.

(Signature page to follow.)

Respectfully submitted,

October 16, 2015 By: 

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CERTIFICATE OF COUNSEL

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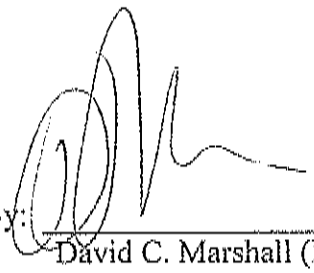
The undersigned certifies that the BRIEF OF AMICI CURIAE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION AND DRI – THE VOICE OF THE DEFENSE BAR AS TO CERTIFIED QUESTION #4 complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

(Signature page to follow.)

October 16, 2015

By: 

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PROOF OF SERVICE

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I certify this 16th day of October 2015 that I have served copies of the Motion For Leave To File Brief Of Amici Curiae South Carolina Defense Trial Attorneys' Association And DRI – The Voice Of The Defense Bar As to Certified Question #4, Brief of Amici Curiae South Carolina Defense Trial Attorneys' Association And DRI – The Voice Of The Defense Bar As to Certified Question #4, and Certificate Of Counsel upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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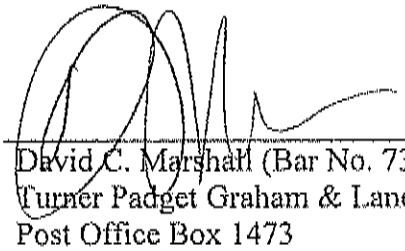
October 16, 2015 By: 

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ATTORNEYS' ASSOCIATION AND
DRI – THE VOICE OF THE DEFENSE BAR

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. 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?

II. 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?

III. 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?

IV. 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?

## STATEMENT OF INTEREST

The South Carolina Defense Trial Attorneys' Association ("SCDTAA") was formally organized on November 14, 1968, with a mission to promote justice, professionalism, and integrity in the civil justice system by bringing together attorneys dedicated to the defense of civil actions. Members of SCDTAA consist of defense attorneys practicing law in South Carolina representing individuals, entities, and insurance carriers in all aspects of civil litigation.

DRI – The Voice of the Defense Bar ("DRI") is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clientele, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as

amicus curiae in cases that raise issues important to its membership, clientele, and the judicial system.

The mission of SCDTAA and DRI to promote justice in the legal system is the cornerstone reason for their interest and participation in this case as amici curiae. The answer to the Question #4 as certified by the Court will substantially impact the ability of participants in the judicial system to obtain fair and equitable results as envisioned by South Carolina's apportionment of fault statute. Amici curiae's interest in promoting equitable allocation of fault in the resolution of civil actions, including allocation to non-parties if appropriate, is in keeping with their mission to promote a fair, consistent, and efficient civil justice system. Accordingly, SCDTAA and DRI offer this amici curiae brief regarding Certified Question #4.

## STATEMENT OF THE CASE

The Court accepted four certified questions from the United States District Court for the District of South Carolina. SCDTAA and DRI understand the underlying facts of the case involve the issue of potentially allocating fault to a non-party employer and including the employer on the verdict form for such allocation. SCDTAA and DRI anticipate the parties will set forth detailed statements of the facts underlying the present lawsuit. Rather than summarizing the facts as they are known to them, SCDTAA and DRI instead adopt the Statement of the Case that has or will be submitted by the Defendant.

## ARGUMENT

Certified Question #4 in this matter invokes issues of fairness, equity, and reasonableness central to the amici curiae's mission of promoting justice,

professionalism, and integrity in the civil justice system. Non-parties should be included on verdict forms for the purpose of making accurate and true allocations of fault. Such apportionment is envisioned by the plain language of the apportionment statute and promotes justice in the civil judicial system. It provides a more accurate system of accountability that furthers justice in much the same way that abolition of pure joint and several liability did in 2005. Accordingly, SCDTAA and DRI respectfully ask the Court to answer Certified Question #4 in the affirmative.

## I. When a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, the Court should allow the jury to apportion fault to the non-party employer by placing the name of the employer on the verdict form.

### *A. Omitting Non-Parties from Apportionment Would Be Unjust to Defendants.*

The South Carolina Uniform Contribution Among Tortfeasors Act ("the Apportionment Act") abolished pure joint and several liability in South Carolina. S.C. Code Ann. § 15-38-10, *et seq.* The Apportionment Act codified a system of fault allocation that furthers ideas of judicial fairness first employed in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). In *Nelson*, the Supreme Court rejected the all-or-nothing doctrine of contributory negligence for the more nuanced and equitable doctrine of comparative negligence. In the aftermath of *Nelson*, South Carolina courts noted the problematic nature of applying pure joint and several liability in the context of the comparative negligence framework:

> Before the adoption of comparative negligence a plaintiff's contributory negligence completely thwarted recovery. The fairness of the rule of joint and several liability was much more apparent; as between a defendant who was less at fault than a co-defendant and a plaintiff who was completely innocent, it was reasonable to place the loss on the wrongdoing defendant.

> With the adoption of comparative negligence, however, retention of the doctrine of joint and several liability is less defensible.

*Fernanders v. Marks Constr.*, 330 S.C. 470, 476, 499 S.E.2d 509, 512 (Ct. App. 1998).

Following judicial recognition of the issues created by marrying the doctrines of comparative negligence and pure joint and several liability, the South Carolina General Assembly enacted the Apportionment Act in 2005. The result was a rejection of joint and several liability for "any defendant whose conduct is determined to be less than fifty percent ***of the total fault*** for the indivisible damages." S.C. Code Ann. § 15-38-15(A) (emphasis added). Under this system, any defendant whose conduct is determined to be less than fifty percent ***of the total fault*** must only pay the percentage of those damages equal to its percentage of fault as determined by the jury or the trier of fact. *Id.* By statute, such a defendant is not liable and cannot be required to pay for damages caused by others.

It is evident from the adoption of the Apportionment Act that the goal of the legislature was to create a system that would provide fair and equitable results regarding civil defendants' liability for causing or contributing to indivisible damages to another. Indeed, the title of the statute reads, "Liability of defendant responsible for less than fifty percent ***of total fault***." S.C. Code Ann. § 15-38-15 (emphasis added). By its terms, the statute is intended to protect defendants who are responsible for less than 50% ***of the total fault*** from the harsh injustice of joint and several liability. *See Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) ("it is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature") (citing *Lindsay v. Southern Farm Bureau Casualty Ins. Co.*, 258 S.C. 272, 188 S.E.2d 374 (1972)). To disallow apportionment of fault to nonparties would

thwart that intent. *Cf.* W.P. Keeton, et al., *Prosser And Keeton On The Law Of Torts* § 67, at 475-76 (5th ed. 1984) ("[T]he failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault.").

With these principles in mind, if a defendant, like the one in this case, is prevented from placing the name of an at-fault non-party on a verdict form for the jury to conduct a true and meaningful allocation of total fault, the result will fundamentally undermine the pursuit of fairness and equity in our civil justice system. Simply put, a defendant in such position would be exposed to the liability of any at-fault non-parties and forced to absorb an unfair, disproportionate share of damages that is not reflective of a true allocation of total fault. Such result would undermine the intent of the Apportionment Act by unjustly making defendants jointly and severally liable for the fault of non-parties because the jury would be prevented from conducting a true allocation of fault. The entire purpose of the statute was to abolish joint and several liability for defendants responsible for less than fifty percent of the total fault, in favor of obtaining true and accurate apportionments of fault. The fact that relevant non-parties may be immune from liability (based upon the workers' compensation exclusive remedy provision or other applicable law) should not prohibit their inclusion on verdict forms to achieve true and just allocations of fault by the finder of fact in accordance with the Apportionment Act.

If at-fault non-parties are not allowed to be placed on verdict forms for allocation of fault, application of the Apportionment Act would create illogical and fundamentally unfair results, contrary to the plain purpose of the statute. Assuming a non-party is at

least partially at fault for a plaintiff's damages, but the jury's allocation of fault is limited to only the named defendants, there will not be a true or accurate allocation of the actual, total fault that caused the plaintiff's damages. Rather, by omitting an at-fault non-party from the verdict form, the jury is forced to redistribute the non-party's percentage of fault among the named defendants in its one-hundred-percent fault allocation. In other words, if a jury wishes to assign a percentage of fault to a non-party, it would be required to distribute that percentage among only the named defendants, resulting in a manifest distortion of the named defendants' true liability, contrary to the purpose of the Apportionment Act.

The injustice of excluding non-parties on verdict forms is easily demonstrated. For instance, assume a plaintiff sustained $1 million of damages attributable 5% to Party A, 5% to Party B, and 90% to Non-Party C. A fair and accurate apportionment of total fault requires consideration of all three parties:

| Party | Actual fault | Allocated fault | Allocated liability |
|---|---|---|---|
| Party A | 5% | 5% | $50,000 |
| Party B | 5% | 5 % | $50,000 |
| Non-Party C | 90% | 90% | $900,000 |

However, if Non-Party C is not included on the verdict form, and the allocation of fault is limited to only the named defendants, then the jury would be left to redistribute Non-Party C's liability to the named defendants and assign 50% fault each to Party A and Party B, subjecting them each to increased, disproportionate shares of liability:

| Party | Actual fault | Allocated fault | Allocated liability |
|---|---|---|---|
| Party A | 5% | 50% | $500,000 |
| Party B | 5% | 50 % | $500,000 |
| Non-Party C | 90% | 0% | $0 |

If there were only one named defendant in this hypothetical, responsible for 5% of the actual total fault, that sole defendant would be subjected to 100% liability for the entire amount of damages if other at-fault non-parties are excluded from allocation under the Apportionment Act. Such a result is in no way fair or equitable.

Interpreting the Apportionment Act to omit nonparties from jury verdict forms for allocation of fault leads to the unjust result that the trier of fact must arbitrarily allocate non-party fault among the parties who actually litigate a case to verdict. This was clearly not the intent of the Apportionment Act. Disallowing nonparties who contributed to the plaintiff's damages from appearing on jury verdict forms and, instead, arbitrarily allocating their fault among only the named defendants are contrary to the purpose, design, and policy of the legislative effort to eliminate the imposition of joint and several liability on defendants who are less than fifty percent responsible for the total fault. Fairness and justice to all parties is achieved only through an accurate apportionment of fault, which can only be achieved if non-parties who contributed to the plaintiff's damages are included on verdict forms.

### *B. The Plain Language of the Statute Supports Inclusion of Non-Parties on Verdict Forms.*

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *In re Campbell,* 379 S.C. 593, 599, 666 S.E.2d 908,

911 (2008). All rules of statutory construction are subservient to the one that legislative intent must prevail if it reasonably can be discovered in the language used. *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 365, 366 (1994). If a statute has plain and unambiguous language that provides a clear and definite meaning, then other rules of statutory interpretation should not be employed, "and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). In analyzing the plain meaning of a statute, the words used "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the operation of the statute." *Greenville Hospital System v. Provident Life & Accident Ins. Co.*, 330 S.C. 436, 442, 499 S.E.2d 232, 235 (Ct. App. 1998) (quoting *Koenig v. South Carolina Dept. of Public Safety*, 325 S.C. 400, 403-04, 480 S.E.2d 98, 99 (Ct. App. 1996)).

Using these guidelines, the plain language of the Apportionment Act leads inexorably to the conclusion that the legislature intended for at-fault non-parties to be included on verdict forms. The Apportionment Act includes the following language:

> (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 § 15-38-15(D) (emphasis added).

As an initial matter, subsection (D) identifies a specific group of entities to which the provision applies. These entities are "potential tortfeasors, whether or not a party." *Id.* The inclusion of the phrase "whether or not a party" indicates a clear intent on behalf of the legislature to protect the rights of party defendants from having to bear a disproportionate percentage of fault for the alleged injuries or damages. This provision

explicitly refines the language in subsection (A) dealing with "plaintiffs" and "defendants." The statute thus provides an avenue for party defendants to assert to the jury that a non-party "contributed to the alleged injury or damages."

The Apportionment Act does not specifically define the term "tortfeasor." However, the term has been defined within the legal context as "[o]ne who commits a tort; a wrongdoer." BLACK'S LAW DICTIONARY 1627 (9th ed. 2009). In the instant case, the evidence presented by both parties indicates that the non-party employer plainly falls into the category of a potential wrongdoer or, alternatively, one who has potentially committed a tort. Although an employer is immune from tort liability due to the exclusive remedy provision of the Workers' Compensation Act, and the undersigned amici curiae are not suggesting or arguing for any change in that system, there is no indication from the statute that subsection (D) excludes non-parties with immunity to liability.[1]

Further, this subsection provides that a party defendant retains the right to allege that non-party, potential tortfeasors "contributed to the alleged injury or damages *and/or* may be liable for any or all of the damages alleged by any other party." *Id.* (emphasis added). The inclusion of the conjunction "or" is critical to this analysis, as it precludes a reading that would require the non-party to be exposed to any liability. Instead, this

[1] Plaintiff relies heavily upon *Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) for the proposition that employers under the Workers' Compensation Act are not "jointly and severally liable in tort" for employees' injuries and, therefore, employers and third-party defendants are not joint tortfeasors. *See* Brief of Plaintiff, p. 20. It is critical to note, however, that *Gordon* was decided before enactment of S.C. Code § 15-38-15, when pure joint and several liability still existed. Section 15-38-15 provides the blueprint necessary for apportioning fault that was absent when *Gordon* was decided. Further, even if *Gordon* remains good law, it is limited to the contribution context, although there is an argument that the Apportionment Act impliedly overrules *Gordon* with respect to allocation of fault, if not responsibility for payment. Certainly, *Gordon* is not applicable to the allocation of fault envisioned by § 15-38-15.

phrase indicates that the legislature has preserved the right for party defendants to assert that non-parties "contributed to the alleged injuries or damages."

To read subsection (D) as providing anything other than non-party fault allocation renders the provision superfluous. Defendants obtain no value from asserting that a non-party contributed to the injuries or damages if they cannot seek the benefit of such argument or evidence during the jury's allocation of fault. The ability to plead non-party fault as a defense is already preserved in the State's common law. *See, e.g., O'Neal v. Carolina Farm Supply, Inc.*, 279 S.C. 490, 309 S.E.2d 776 (Ct. App. 1983) (finding no error in defendant's jury argument that non-party was responsible for plaintiff's damages and affirming jury instruction regarding same).

Moreover, if a defendant is not allowed to have the jury apportion fault to nonparties, then the right to assert that non-parties contributed to the alleged injury under subsection (D) is worthless, and any assertion that a nonparty "contributed to" or "may be liable for" (distinguished from "responsible to pay") the damages would be futile. This could not have been the General Assembly's intent, as courts must "presume in construing a statute that the Legislature did not intend to perform a futile thing." *Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999).

Lastly, subsection (D) does not work to expose non-parties otherwise immune from liability to any additional liability for damages. It is critical to note that subsection (D) would not result in judgments being entered against non-parties, thus preserving such parties' immunity from liability. Thus, the Apportionment Act would not subject employers or governmental entities to liability as an alternative or workaround to the

Workers' Compensation Act or South Carolina Tort Claims Act. Instead, subsection (D) would simply allow party defendants to be protected against disproportionate fault allocation as intended by the legislature. For this reason, the Court should answer Certified Question #4 in the affirmative.

## CONCLUSION

A defendant's ability to allocate fault to culpable non-parties is essential to the just administration of our civil justice system. The late Hon. Potter Stewart stated, "Fairness is what justice really is." Fairness requires a defendant to bear only her due share of responsibility for the harm visited upon another. Perverse results may occur in a system which allows the least responsible party to bear the full weight of a verdict merely because she was served with process and hauled into court, while the primary wrongdoer escapes mention because he is elusive, bankrupt, procedurally immune, or the Plaintiff simply chooses not to make him a party. A plain statutory reading of the Apportionment Act supports the notion that the legislature intended to eliminate, not perpetuate this unfairness. For the reasons set forth herein, this Court should answer Certified Question #4 in the affirmative.

(Signature page to follow.)

Respectfully submitted,

October 16, 2015 By: _____

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