Allocation of Fault to Nonparties

Has the Time for Legislative Change Arrived?

By Suzanne Chapman

Lawyers who have practiced in complex, multi-party litigation in this state are familiar with the challenges posed by the seeming inconsistencies within the South Carolina Contribution Among Joint Tortfeasors Act ("the Act").[1] While the Act allows defendants to argue the "empty chair defense,"[2] jurors may only apportion fault to the plaintiff and the *defendants*[3] – not to the "empty chair" – and the total of the percentages of fault must be one hundred percent.[4] Put simply, this allows jurors to consider the fault of nonparties and even to decide that liability rests partially or solely with a nonparty; however, jurors cannot allocate fault to those nonparties on a jury verdict form. The defendants present at trial are then left holding the proverbial bag of full liability and the consequential responsibility of payment for damages that the jurors would have otherwise attributed to some other person or entity.

But did you know that the Senate and the House are currently considering companion bills[5] to amend the Act that would allow jurors to allocate fault to nonparties?

Apportionment Under the Current Act

With the 2005 amendments to the South Carolina Contribution Among Tortfeasors Act, the legislature made allocation of fault central to the determination of a defendant's liability to a plaintiff and abrogated pure joint and several liability for tortfeasors who are less than fifty percent at fault.[6]

As the Act is currently written, the jury (or the court if there is no jury) apportions the percentages of fault for damages resulting from personal injury, wrongful death, or damage to property[7] as follows. First, the fact-finder specifies the amount of recoverable damages.[8] Then, the fact-finder determines the percentage of fault, if any, of the plaintiff and of the defendant(s).[9] Assuming the plaintiff is eligible to recover damages under applicable rules concerning comparative negligence,[10] then the plaintiff is entitled to collect the amount of damages specified by the fact-finder against the defendant(s).

In cases where indivisible dam-

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ages are determined to be caused by more than one defendant, joint and several liability applies to a defendant whose conduct is determined to be fifty percent or more of the total fault.[11] A defendant whose conduct is determined to be less than fifty percent of the total fault is only liable for that percentage of the indivisible damages determined by the fact-finder.[12]

The process by which the fact-finder allocates the total fault for the indivisible damages is set forth in subsection (C)(3) of the Act. Where there is a verdict for damages against two or more defendants for the same indivisible injury, any defendant may move for the fact-finder to specify in a separate verdict the percentage of liability that is attributable to each defendant.[13] The fact-finder then determines the percentage of liability attributable to the plaintiff, if any, and "to each defendant."[14] In total, the percentages of liability "must be one hundred percent."[15]

On its face, this process seems sensible and fair. The problem arises, though, when other potential tortfeasors contributed to the alleged injury or damage but are not defendants in the case.

Under subsection (D), which codifies the empty chair defense, a defendant has the right to assert that another potential tortfeasor is wholly or partially liable for the alleged injury or damages.[16] The defendant retains this right whether or not those other potential tortfeasors are a party to the action.[17]

Subsection D appears to protect defendants at trial from taking the full brunt of responsibility for injuries and damages that are arguably the fault of another person or entity. So, what is the problem?

The Problem

By way of simple example, consider the following scenario. In a single-family construction defect action, Plaintiff Homeowner sues two Defendants, the general contractor and a subcontractor, for negligence in the original construction of Plaintiff's home. During the trial of the case, Defendant Subcontractor takes the position that Defendant General Contractor furnished the plans and specifications; the plans and specifications were defective; and, despite its best efforts to warn the general contractor of the problems with the plans, the general contractor gave the subcontractor explicit instructions to throw caution to the wind and build the house in conformance with the defective plans anyway. On the stand, the general contractor admits that the subcontractor brought the problems with the plans to its attention during original construction and that it instructed the subcontractor to follow the defective plans.

At the close of the trial, the jury specifies the amount of damages as $500,000. The jury then determines that Plaintiff was not responsible for any of the damages at the house and apportions fault between the two Defendants as follows: 85% to the general contractor and 15% to the subcontractor. Under the Act, the general contractor is thereby jointly and

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severally liable for the $500,000 verdict, and the subcontractor is only liable for $75,000, or 15%, of the total $500,000.

Now, assume all of the same facts – except imagine that the general contractor settled with Plaintiff prior to trial. Defendant subcontractor, now the sole defendant appearing at trial, utilizes the "empty chair defense" and presents all the same evidence against the general contractor. Defendant subcontractor argues that the general contractor contributed to Plaintiff's injury and is responsible for the majority of the damage to Plaintiff's house. The jury agrees.

But this time, when the jury gets ready to apportion 85% of the fault to the general contractor, they can't. Because the general contractor is not listed on the jury verdict form. Remember, according to the express wording of the Act, the jury must apportion 100% of the fault between the plaintiff and "each *defendant* whose actions are the proximate cause of the indivisible injury."[18] As a settled nonparty, the general contractor is no longer a *defendant* and, consequently, can no longer be included in the allocation of fault.

The result? The only two parties on the jury verdict form are Plaintiff and Defendant Subcontractor. And the allocation of fault between them must add up to 100%. So, rather than allocating 15% of the fault to Defendant Subcontractor, the jury must now decide between a defense verdict and an allocation of 100% of the fault to the subcontractor.[19]

Is this result, which seems patently inequitable, really what the Legislature intended when it amended the Act in 2005?

Our Supreme Court has answered, yes.

Smith v. Tiffany

In *Smith v. Tiffany*, the Supreme Court held that a settled nonparty could not be added to the lawsuit or included on the jury verdict form for purposes of allocation of fault.[20] The underlying dispute arose from a motor vehicle accident between Walter Smith and alleged at-fault driver, Corbett James Mizzell.[21] Mizzell was attempting to exit a gas station when he pulled out onto U.S. 178 and collided with Walter Smith, who was traveling down U.S. 178.[22] According to Mizzell, he was unable to see Smith's vehicle because his view was obstructed by a commercial truck, which was disabled and parked on the shoulder of the road.[23] The commercial truck had been parked there by driver Norman Tiffany and was owned and operated by Brown Trucking Co. and Brown Integrated Logistics, Inc.[24]

Smith settled with Mizzell's liability carrier for full policy limits in exchange for a covenant not to execute, then filed suit against Tiffany, Brown Trucking, and Brown Logistics.[25] In their answer, the Brown Defendants raised numerous affirmative defenses and asserted a third-party complaint against Mizzell, seeking to have Mizzell added as a defendant. Defendants took the position that Mizzell was responsible for Smith's injuries and that the jury should be able

to consider Mizzell's proportion of the fault, even though Mizzell had already settled and was immune to further liability.[26] They argued that refusing to add Mizzell would distort the percentage of fault allocated to them on the jury verdict form and result in the unwarranted imposition of joint and several liability.[27] But the trial court granted summary judgment and dismissed the third-party claims against Mizzell.[28] A direct appeal followed.[29]

On appeal, the Supreme Court considered Appellants' arguments that 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 apportion fault to him for the accident.[30] Relying on its decision in *Machin v. Carus Corp.*,[31] the Supreme Court explained that a plain reading of the words "defendant" and "defendants" in the Act revealed the legislature's intent to disallow nonparties to be listed on the jury form for purposes of allocation of fault.[32] The Court further rejected Appellants' arguments that that Rules 14 and 19, SCRCP, supported the addition of Mizzell to the underlying litigation and to the jury verdict form.

At the outset of its opinion, the Court noted Appellants did not contend that the provisions of the Act were ambiguous.[33] And the Court expressly rejected Appellants' invitation to look outside of the language of the Act to reject what the Court considered to be the legislature's clear intention for apportioning fault "among defendants."[34] In acknowledgment of the separation of powers, the Court explained "a court must not reject the legislature's policy determinations merely because the court may prefer what it believes is a more equitable result."[35] The Court further noted that, perhaps because of the perceived inequity complained of by Appellants, the General Assembly attempted to protect non-settling defendants by codifying the empty chair defense and granting the right to offset the value of any settlement received prior to the verdict.[36] However, in a final nod to the perceived inequities in the outcome of the Act, the Court averred, "Is the policy decision advanced by Appellants, and adopted by the dissent, equitable and defensible? Absolutely."[37] Yet the Court insisted that the prerogative to change the policy balance struck by the Act "lies exclusively within the province of the Legislative Branch."[38]

According to some in the General Assembly, the time for that legislative change is now.

Proposed Changes to the Act

Companion bills currently pending in the House and Senate propose to modify sections 15-38-15, 15-38-20, 15-38-40, and 15-38-50 of the Act, "so as to include persons or entities for the purposes of allocation of fault."[39] House Bill 3933 was first introduced by House Representative Marvin "Mark" Smith and a number of co-sponsors on February 9, 2023.[40] At the time of this article's publication, the House Bill has fifty co-sponsors. A companion bill, Senate Bill 533, was introduced by Senate President Thomas Alexander and 23 co-sponsors on February 14, 2023.[41] Both the House and Senate referred the bills to their respective Judiciary Committees,[42] where the bills continued to reside at the end of the 2023 South Carolina General Assembly legislative session.

In relevant part, the proposed changes expand the fact-finder's ability to apportion fault beyond the plaintiff and the "defendants" to "all persons or entities, including plaintiffs, defendants, and nonparties, who proximately caused the damages."[43] Specifically, changes to subsection (C)(3), which sets forth the process by which the jury must apportion percentages of fault, replace the words "each defendant" with "each such person or entity, including defendants and nonparties," thereby allowing the fact-finder to attribute fault to nonparties on the special jury verdict form.

New provisions added to subsection (C)(3) would allow the fact-finder to consider allocation of fault to a nonparty if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives written notice that a nonparty was wholly or partially at fault for the plaintiff's injury.[44] However, proposed subsection (C)(3)(c)(iv) makes clear that findings of fault against nonparties shall not subject a nonparty to liability in that action and may not be introduced as evidence of liability in any action.[45]

The proposed bills protect the codified "empty chair defense" in subsection (D).[46]

While the full list of proposed changes to Section 15-38-15 is beyond the scope of this article, it is also interesting to note that one proposed change would delete subsection (F) in its entirety.[47] Currently, that subsection provides that subsections (A) through (E) do not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent or intentional; or whose conduct involves the use, sale or possession of alcohol or drugs.[48]

Conclusion

It remains to be seen whether the House or Senate or both will amend the companion bills or ultimately take them up. But if the bills were to pass and be signed into law by the governor, it would have a significant impact on defendants' ability to limit their liability and potential exposure at trial. Civil practitioners should carefully monitor the progress of this bill through the 2024 South Carolina General Assembly legislative session. And, if the activist mood strikes, a phone call to your local representative may be worth the time it takes to explain the importance of the proposed changes to your trial practice.

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Endnotes

[1] S.C. Code Ann. § 15-38-10, *et seq.*
[2] § 15-38-15(D).
[3] § 15-38-15(C)(3).
[4] *Id.*
[5] S.0533, 125th Sess. (S.C. 2023-2024); H.3933, 125th Sess. (S.C. 2023-2024).
[6] *See* 2005 S.C. Act Nos. 27, § 6; 32, § 16; S.C. Code Ann. § 15-38-15.
[7] S.C. Code Ann. § 15-38-15(A).
[8] § 15-38-15(C)(1).
[9] § 15-38-15(C)(2).
[10] *Id.*
[11] § 15-38-15(A).
[12] *Id.*
[13] § 15-38-15(C)(3).
[14] *Id.*
[15] *Id.*
[16] § 15-38-15(D).
[17] *Id.*
[18] § 15-38-15(C)(3).
[19] As the Supreme Court points out in *Tiffany*, non-settling defendants do have the right to offset the value of any settlement received prior to the verdict. *See* discussion *infra* Section *Smith v. Tiffany* and note 36. However, the right to offset poses its own unique challenges for a non-settling defendant; namely, the offset amount is determined by the terms of the settlement (to which the defendant was not a party and may not have the ability to access), which may be artfully crafted by savvy Plaintiff attorneys to prevent the offset. This challenge is exacerbated in suits with multiple settling defendants, multiple non-settling defendants, and multiple causes of action.
[20] 419 S.C. 548 (2017).
[21] *Id.* at 553.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 554.
[27] *Id.* at 562.
[28] *Id.* at 555.
[29] *Id.*
[30] *Id.*
[31] 419 S.C. 527, 799 S.E.2d 468 (2017).
[32] *Tiffany*, 419 S.C. at 560.
[33] *Id.* at 555.
[34] *Id.* at 557.
[35] *Id.* at 559.
[36] *Id.* at 557.
[37] *Id.* at 565.
[38] *Id.* at 559.
[39] S.0533; H.3933.
[40] H.3933.
[41] S.0533.
[42] *Id.*; The Senate Committee on Judiciary then referred it to Subcommittee: Reps. Malloy (ch), Hutto, Campsen, Matthews, Talley, Garrett, and M. Johnson.
[43] *Id.* at § 15-38-15(B); H.3933 § 15-38-15(B).
[44] § 15-38-15(C)(3)(c)(i).
[45] § 15-38-15(C)(3)(c)(iv).
[46] § 15-38-15(D).
[47] § 15-38-15.
[48] S.C. Code Ann. § 15-38-15(F).