The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have failed to file reports showing compliance with continuing legal education requirements, or who have failed to pay the filing fee or any penalty required for the report of compliance, for the reporting year ending in February 2017. Pursuant to Rule 419(d)(2), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 22, 2017.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional

Conduct for Lawyers, Rule 407, SCACR.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

April 20, 2017

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FOR THE 2016-2017 REPORTING YEAR
AS OF APRIL 19, 2017

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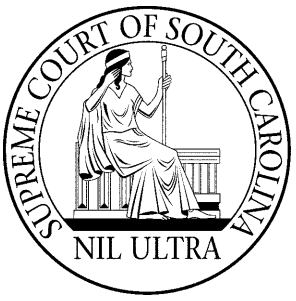

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 26, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

John William Machin, Plaintiff,

v.

Carus Corporation, Defendant.

Appellate Case No. 2015-000901

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, Padget, 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

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[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.

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[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

Walter Smith, Respondent,

v.

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

and

Brown Trucking Company and Brown Integrated Logistics, Appellants,

v.

Corbett James Mizzell, III, Respondent.

Appellate Case No. 2015-001159

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, Herns, 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

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[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 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 SCRCP." Appellants also asserted a third-party complaint under Rule 14, SCRCP, 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, SCRCP; (4) third-party negligence under Rule 14, SCRCP; 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 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, SCRCP, that the third-party complaint was not proper under Rule 14, SCRCP, 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

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[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 propsects 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 15-38-50(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, SCRCP.

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 & Envtl. 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 jurisdictions[6] 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 tort[]feasors 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

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> (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

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> (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*,

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[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, SCRCP, 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, SCRCP, 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.

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[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 defendant[14]—Brown Trucking Company, Brown Logistics, and Tiffany—no

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[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, SCRCP.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maxine Taylor, Respondent,

v.

Heirs of William Taylor, Heirs of E. Washington, Heirs of Phoebe Taylor, Heirs of Albertha Goodwine, and all persons unknown designated as a class; Richard Roe, and Beaufort County, SC, a body politic, Defendants,

Of whom Heirs of William Taylor, Heirs of E. Washington, Heirs of Phoebe Taylor, and Heirs of Albertha Goodwine are the Appellants.

Stanley Taylor, Joe A. Taylor and Martha T. Brown, Respondents,

v.

Heirs of William Taylor, Heirs of E. Washington, Heirs of Phoebe Taylor, Heirs of James Joseph Taylor, Heirs of Josephine Taylor and Georgia Champion, Appellants.

Appellate Case No. 2015-000342

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5480
Submitted December 1, 2016 – Filed April 26, 2017

REVERSED

Marc W. Fisher, Jr., of Levin Gilley & Fisher, LLC, of Beaufort, and Amy Kristan Raffaldt, of The Mace Firm, of Myrtle Beach, for Appellants.

George H. O'Kelley, Jr., of O'Kelley Law Firm, of Beaufort, for Respondents.

THOMAS, J.: This case involves a property dispute between families competing for ownership of a ten acre tract of land in Beaufort County. The master-in-equity granted title for the entire tract to Respondents Maxine Taylor, Stanley Taylor, Joe Taylor, and Martha Brown. Appellants appealed arguing (1) the master erred by finding Respondents were the title owners of the entire tract; (2) they established title to portions of the tract by adverse possession; (3) they were entitled to a presumption of a grant for portions of the tract; and (4) the boundary line was mutually recognized and acquiesced for ten years. We reverse the master's order based on Appellants' adverse possession argument.

FACTS/PROCEDURAL HISTORY

Respondents initiated this case in June 2011 by filing a complaint seeking to quiet title to lot nine on Warsaw Island in Beaufort County.[1] Respondents asserted they owned all of lot nine through various deeds. Appellants answered and counterclaimed asserting they owned at least a portion of lot nine. Alternatively, Appellants asserted they acquired ownership of a portion of lot nine by adverse possession. This case was referred to the master, and he held the first day of trial in July 2013.

H. G. Judd drafted the earliest plat of this area in the 1800s (Judd Plat). The Judd Plat was a very crude sketch of the lots and did not reveal any subdivisions within the lots. The next earliest map was a tax map from 1954, which was revised in 1965 (1965 Tax Map). The 1965 Tax Map shows Warsaw Road bisecting lot nine with a portion of the lot located north of the road and a portion located south of the

[1] Initially, Respondents filed separate cases, but the master consolidated them prior to trial.

road. The 1965 Tax Map also showed lot nine subdivided into parcels five, six, and 6a.[2] According to the 1965 Tax Map, parcel five consists of the Northern Portion and a strip of land along the western side of the Southern Portion. Parcels six and 6a consist of the eastern section of the Southern Portion.

During the first day of trial, David Youmans testified he had been a professional land surveyor for almost thirty years and he researched the property at issue. Youmans asserted his research showed Beaufort County taxed Appellants for parcel five. Youmans testified Beaufort County, at an unknown time, switched the location of the parcels on the tax map and, after the switch, incorrectly showed parcel six consisting of the Northern Portion and parcel five consisting of the Southern Portion. Youmans did not know when this inexplicable switch occurred. However, Youmans testified the switch occurred prior to two tax sales in the late 1990s, which purported to transfer property to Respondents' ancestor, James Taylor.

Cindy Spencer testified she was a real estate title abstractor and had been researching titles in Beaufort County for twenty-eight years. Spencer testified the tax records for this property went back to 1954 and showed Appellants as owning parcel five as shown on the 1965 Tax Map. Appellants introduced the original property card showing Appellants as the owners of parcel five. Spencer also asserted Appellants had been paying property taxes on parcel five since 1954. Spencer contended the 1954 tax record was the first document to show an owner of parcel five.

Next, Spencer testified she found the two tax sale deeds from the 1990s, which purported to convey the western and eastern portions of parcel six to James. Spencer contended James owned parcel six and 6a following the tax deeds. Spencer testified the tax deeds described parcels six and 6a as bounded on the north by the water, which indicated they were located in the Northern Portion. She testified employees of the treasurer's office write the legal descriptions for properties going to tax sale. Spencer also recognized the parcel switch, as detailed by Youmans, and asserted the property descriptions for the tax sales were based on the switched version of the parcels.

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[2] We refer to the section of lot nine located to the north of Warsaw Road as the Northern Portion and the section of lot nine located to the south of Warsaw Road as the Southern Portion.

Respondent Martha Brown testified she lived in a mobile home in the Northern Portion at the time of the trial. Martha admitted Georgia Champion, who was one of Appellants, telephoned her after she placed her mobile home in the Northern Portion and claimed the mobile home was on Champion's property. Martha asserted the property where she resided at the time of trial was the property James Taylor, Martha's father, obtained in the tax sale deeds.

Martha testified she grew up in a house on Respondent Maxine's property, which is located on the eastern side of the Southern Portion. Martha acknowledged she socialized with Champion and Champion's sister, Willie Mae Stewart, when they were children and that Champion and Stewart lived north of Warsaw Road.[3]

Respondent Maxine testified she grew up in the house Martha identified as located on the eastern side of the Southern Portion. She admitted she was unaware of her family ever farming or otherwise using the Northern Portion. Maxine claimed she owned the property in the Southern Portion with the house and obtained it in a deed of distribution from James after his death. Maxine testified she believed Respondents owned the entire tract of lot nine.

Appellant Georgia Champion testified she grew up living with her grandparents, Rufus and Mary Taylor, in a house located in the Northern Portion (Rufus House). Champion testified she lived in the Rufus House until she graduated high school in 1972. She asserted Rufus and Mary owned the Rufus House and raised hogs, cows, pigs, and did other farming in the Northern Portion. Champion claimed they had a hog pen in the same area as the mobile home Martha Brown placed in the Northern Portion. Champion testified Rufus died in 1972 and the family began renting the Rufus House. Subsequently, according to Champion, there was a fire at the Rufus House and no one lived there after that. Champion did not testify regarding exactly when the fire occurred. She contended she moved back to the area in 1997 and asked a local fire department to burn down what was left of the Rufus House. Champion claimed she decided to leave the remnants of the Rufus House as a memory for her children and grandchildren. She testified the remnants remain there to this day. Champion asserted there was also a water meter on the

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[3] Martha's testimony is unclear as to whether she was asserting Champion and Stewart lived in the Northern Portion or on another unrelated property that was north of Warsaw Road.

Northern Portion, which marked the property as owned by Appellants. Champion testified she had not abandoned the property even though the trees had grown up. She asserted she cleaned up any trash on the property and cut grass and brush during the summer months.

Champion testified she became aware of Martha's plans to place a dwelling on the Northern Portion when Martha began clearing the land. Champion asserted she and other family members went to Martha to inform her Appellants owned that land. Also, Champion testified Appellants had been paying taxes for the Northern Portion "since forever." She asserted Respondents and James never farmed or used any of the property in the Northern Portion.

Willie Mae Stewart testified Georgia Champion was her sister and she was also raised by her grandparents, Rufus and Mary Taylor, in the Rufus House. Stewart asserted she lived in that house from birth in 1956 until 1972 when her grandmother passed away. Stewart testified Appellants farmed in the Northern Portion while she was growing up. She also claimed Appellants farmed in the Southern Portion. Stewart testified there were still stakes, which formed part of Appellants' cow pasture, in the marsh above the Northern Portion. According to Stewart, when her grandmother died and she moved out of the Rufus House, Appellants began renting the house. Stewart asserted the metal roof from the Rufus House was still there at the time of trial despite the fire. Stewart testified Appellants owned property in lot seven[4] as well as in lot nine.

Connie Cooper testified Rufus was her uncle and when she was young she visited them every summer. Cooper claimed the Rufus House was located on lot nine and Appellants farmed the property and raised animals. Cooper testified she and Georgia Champion were approximately the same age. Cooper also testified the remnants of the Rufus House remained, including the metal roof. Cooper's sister, Joan Hillyard, also testified she visited Appellants at the Rufus House on lot nine. Hillyard recalled Appellants farming the land on lot nine and testified the remnants of the Rufus House remained on the property. Isaac Taylor testified Rufus was his father. Isaac claimed the Rufus House was on lot nine and Rufus farmed the land in the Northern Portion. Charles Gardner testified he was related to Rufus as well,

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[4] Lot seven was the subject of a prior quiet title action that resulted in a deed awarding title to Appellants for lot seven. Lot seven is located on lot nine's western border.

and he testified he helped Appellants farm the land and the Rufus House was located on lot nine.

Marjory Kemp testified she was part of the group of Appellants as well and she remembered the Rufus House being on lot nine. Kemp also remembered the fire that damaged it. Kemp asserted she accompanied Georgia Champion to inform Martha Brown her mobile home was on Appellants' property. Kemp contended she handled paying the taxes on the Northern Portion for Appellants. She testified regarding a property record card showing Appellants as the owners of parcel five consisting of six acres. One of the records has a notation to "take house off for 1985 taxes."

Thomas Brown testified his family owned property close to lot nine and he grew up socializing with Champion, Stewart, Maxine, and Martha. Brown asserted he lived in that area until he graduated high school in 1966. Brown claimed Appellants farmed and raised animals in the Northern Portion and James and Respondents farmed in the Southern Portion near James's house.

After Brown's testimony, both parties rested their case. However, the master decided to leave the record open for additional evidence regarding how the parcels became switched in the tax records and the location of the Rufus House.

In April 2014, the master held a second day of trial. Justine Standifer[5] testified she had been a real property transfer clerk in the Beaufort County Assessor's Office for over thirty years. Standifer asserted she researched parcels five and six and determined their locations were switched "one for each other" at some unknown time. She explained parcel five originally was located in the Northern Portion with a small area of parcel five located in the Southern Portion and parcel six and 6a were located in the Southern Portion. At an unknown time, the parcels were switched on the tax maps to show parcel six and 6a located in the Northern Portion and parcel five in the Southern Portion. Standifer testified the 1965 Tax Map showed the parcels as they were originally situated. She acknowledged a switch of the parcels' locations on the tax map would not change who actually owned the properties.

[5] Standifer also goes by the first name Debbie.

Additionally, Standifer testified regarding property record cards from 1954. She testified one property record card showed Appellants as owning parcel five and the other property record card showed Phoebe Taylor, who was an ancestor of Respondents, owning parcel six. Next, Standifer testified regarding an appraisal sheet from 1985 that showed Appellants owned parcel five. She explained the assessor's office generated the appraisal sheet to remove the Rufus House from the tax records following the fire.

Barry Rea testified he worked for the Beaufort County Geographical Information Systems Department, which makes maps from aerial photographs. Rea prepared an aerial photograph of the subject area with the parcels overlaid as the tax records showed the parcels at the time of trial. Rea asserted the aerial photograph showed a building located in the Northern Portion, in what the tax records at the time of trial showed as parcel six.

Connie Cooper, who also testified on the first day of trial, asserted she visited the property with the attorneys, Champion, and Respondents between the two trial days. Cooper testified the group found the remnants of the Rufus House within the Northern Portion. Cooper identified several photographs of the Rufus House. Cooper acknowledged the trees and brush had grown up around the remnants since it burned.

Kimberly Chesney testified she worked for the treasurer in Beaufort County. Chesney testified the tax sales at issue in this case occurred in 1995 and 1997. Chesney asserted the notices for the tax sales went to Phoebe Taylor in care of James Taylor and James was the buyer for both sales. Chesney explained the treasurer conducts tax sales but obtains the property descriptions from the assessor. The descriptions for the ensuing deeds also come from the assessor. Chesney testified Phoebe was the delinquent taxpayer for these tax sales and they were for parcel six. Chesney contended if parcels five and six had not been switched on the tax maps and parcel six came up for tax sale, the treasurer would have sold the Southern Portion, rather than the Northern Portion.

The master issued his order in favor of Respondents in February 2015. The master found a 1937 deed granted title to Phoebe Taylor for all of lot nine. He found the 1960 deed granted title to James for the Southern Portion. Upon James's death, title for the Southern Portion passed to Maxine, and she remains sole owner of the Southern Portion. Despite acknowledging Beaufort County mistakenly switched

the locations of the parcels on the tax maps and ordering the county to correct the mistake, the master found James obtained title to the Northern Portion by way of the two tax sales and James's heirs, other than Maxine, obtained title to the Northern Portion when James died. The order acknowledged Appellants' adverse possession claim but determined they presented "[n]o evidence of such" during trial. This appeal followed.

STANDARD OF REVIEW

> The determination of title to real property is legal in nature. Moreover, an adverse possession claim is an action at law. Thus, an action to quiet title to real property, primarily involving the determination of title to real property based on adverse possession, should be characterized as an action at law. Because an adverse possession claim is an action at law, the character of the possession is a question for the jury or fact finder. Therefore, appellate review is limited to a determination of whether any evidence reasonably tends to support the trier of fact's findings.

Jones v. Leagan, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct. App. 2009) (per curiam) (citations omitted).

ANALYSIS

Appellants argue they met all of the elements for an adverse possession claim for the statutory period of ten years for parcel five as it was shown on the 1965 Tax Map. Respondents argue Appellants "offered no convincing evidence" at trial to show adverse possession. Respondents claim Appellants cannot rely on the Rufus House as evidence because "it was destroyed and abandoned for many years, probably before 1972." Respondents assert the adverse possession claim fails because Appellants did not identify the "extent of the claim." Respondents also argue adverse possession requires an intent to dispossess the owner, which Appellants did not have. Respondents assert Appellants failed to show possession for the statutory period because there was a "gap" of twenty-five years between 1972 and 1995. We agree with Appellants and reverse because they presented

clear and convincing evidence of adverse possession and Respondents offered no contrary evidence to reasonably support the master's finding.

"The party asserting adverse possession must show continuous, hostile, open, actual, notorious, and exclusive possession for a certain period of time." *Id*. In South Carolina, the statutory period for adverse possession is ten years. S.C. Code Ann. § 15-67-210 (2005); *Jones*, 384 S.C. at 10, 681 S.E.2d at 11. A party asserting ownership by adverse possession must show he has met the elements by clear and convincing evidence. *Jones*, 384 S.C. at 10–11, 681 S.E.2d at 11.

To claim title by adverse possession, a party must show the extent of his possession even when entering under color of title. *Clark v. Hargrave*, 323 S.C. 84, 87, 473 S.E.2d 474, 476 (Ct. App. 1996) (per curiam). Color of title alone is not evidence of adverse possession, and "it does not follow that adverse possession can be proved by less evidence when the entry is under color of title than when it is not." *Id*. at 87, 473 S.E.2d at 477 (quoting *Butler v. Lindsey*, 293 S.C. 466, 470, 361 S.E.2d 621, 623 (Ct. App. 1987)). However, color of title is evidence of the extent of the claim and should be considered with the other facts in the case. *Woodle v. Tilghman*, 252 S.C. 138, 144–45, 165 S.E.2d 702, 705 (1969) (internal quotation omitted). Color of title need not be a deed; "[i]t is anything which shows the extent of [the] occupant's claim." *Id*. at 145, 165 S.E.2d at 705. "It is by no means necessary that the paper should be in the form of a deed. A bond or even a receipt would be sufficient." *Id*. "The principle purpose of color of title in adverse possession proceedings is not to show actual grant of land or interest therein, but to designate [the] boundary of possessor's claim." *Id*.

For possession to be open and notorious, "the legal owner need not have actual knowledge the claimant is claiming property adversely, [but] the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it." *Jones*, 384 S.C. at 13–14, 681 S.E.2d at 13. "[A]cts of ownership of open land for purposes of adverse possession need not include actual residency or occupancy." *Id*. at 14, 681 S.E.2d at 13. "Moreover, activities that do not involve the creation of permanent structures on the land can be sufficiently open and notorious as to put the legal owner on notice that his land is being adversely possessed." *Id*.

For possession to be continuous, a party "claiming adverse possession must have personally held the property for ten years." *Id*. at 15, 681 S.E.2d at 14.

"Occasional and temporary use or occupation does not constitute adverse possession. However, the rule requiring continuity of possession does not mean the person in possession must be actually on the land during the whole of the statutory period." *Id*. at 16, 681 S.E.2d at 14 (citation omitted).

To show the possession was hostile, the adverse claimant is required to show only that his possession was actual, exclusive, open, notorious, and without the consent of the title owner. *Knox v. Bogan*, 322 S.C. 64, 70, 472 S.E.2d 43, 47 (Ct. App. 1996). The mistaken belief rule, which requires the possessor to be aware he does not have title and intend to dispossess the true owner, is not applicable in disputes over entire tracts of land. *Id*.; *see also Perry v. Heirs at Law & Distributees of Gadsden*, 316 S.C. 224, 226, 449 S.E.2d 250, 251 (1994) (per curiam) (finding the mistaken belief rule does not apply in a dispute over an entire tract of land, rather it applies in a boundary line dispute). Thus, for the possession to be hostile when an entire tract of land is at issue, the adverse claimant need not show a conscious intent to dispossess the true owner. *McDaniel v. Kendrick*, 386 S.C. 437, 442–43, 688 S.E.2d 852, 855 (Ct. App. 2009). The claimant may establish hostile possession by showing he occupied the property without the title owner's consent even if he occupied the property under the mistaken belief that it belonged to him. *Id*.

In this case, we reverse the master's finding that Appellants failed to prove the elements of adverse possession because there was no evidence to reasonably support his finding. Appellants established each element of adverse possession by clear and convincing evidence with regard to parcel five as it was shown on the 1965 Tax Map, and Respondents failed to offer any contrary evidence that could have reasonably supported the master's finding.

First, Appellants showed the extent of their claim. Appellants' possession of parcel five was under color of title, which designated the extent of their claim. Appellants testified they believed they owned parcel five, and it was undisputed that Appellants paid the taxes on parcel five going back to 1954. The 1954 property card and the 1985 appraisal sheet showed Appellants owned parcel five. Considering the 1954 property card, the 1965 Tax Map, the 1985 appraisal sheet, the undisputed testimony that Appellants paid the taxes for parcel five, and Appellants' avowed belief that they owned parcel five, we find Appellants occupied parcel five under color of title. These documents were evidence of the extent of Appellants' claim, and the 1965 Tax Map showed the boundaries of the

land they intended to possess. *See Clark*, 323 S.C. at 87, 473 S.E.2d at 476 ("It is axiomatic that a party claiming title by adverse possession must show the extent of his possession."); *Woodle*, 252 S.C. at 145, 165 S.E.2d at 705 ("The principle purpose of color of title in adverse possession proceedings is not to show actual grant of land or interest therein, but to designate [the] boundary of possessor's claim."). Thus, Appellants identified the extent of their claim, and we disagree with Respondents' contention to the contrary.

Next, clear and convincing evidence showed Appellants met the ten year statutory time period, at a minimum, between 1956 and 1972. The property tax card showed Appellants paid taxes on parcel five beginning no later than 1954. Willie Mae Stewart testified she lived in the Rufus House on parcel five from her birth in 1956 until 1972 when her grandmother passed away. Stewart asserted she and Appellants farmed and raised livestock on parcel five throughout her time living in the Rufus House. Georgia Champion also testified she lived in the Rufus House on parcel five from birth until 1972. Champion echoed Stewart's claim that Appellants farmed and raised livestock on parcel five. Other members of Appellants' family made similar assertions. Significantly, Thomas Brown, an unrelated third party, testified he lived in the area until 1966 and remembered Appellants farming and raising animals on parcel five.

Furthermore, the indisputable evidence confirmed the Rufus House was located on parcel five. The aerial photographs showed the remnants of the Rufus House located within parcel five as it was situated on the 1965 Tax Map. Also, the parties visited the location between the two trial days and confirmed the location of the Rufus House. The foregoing evidence clearly and convincingly showed Appellants were in actual and continuous possession of parcel five from 1956 to 1972, which exceeded the ten year statutory time period.

Additionally, Appellants met their burden of showing possession of parcel five was open and notorious. As discussed above, the evidence showed Appellants lived on parcel five and farmed the property from at least 1956 through 1972. Appellants' acts of living and farming parcel five were sufficient to charge Respondents with knowledge of Appellants' possession of the property. *See Jones*, 384 S.C. at 13–14, 681 S.E.2d at 13 ("[T]he legal owner need not have actual knowledge the claimant is claiming property adversely, [but] the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it.").

With regard to exclusivity, Appellants' possession of parcel five was exclusive during the statutory period. Respondent Maxine testified she was unaware of Respondents ever farming or otherwise using the Northern Portion. Georgia Champion asserted Respondents never farmed or used any of the property in the Northern Portion. Also, Thomas Brown testified Respondents farmed the land in the Southern Portion near James's house, which was on the eastern side of the Southern Portion and in parcel six or 6a. Thus, Appellants showed by clear and convincing evidence their possession of parcel five was exclusive.

Furthermore, Appellants' possession of parcel five was hostile. As discussed above, Appellants' possession was actual, exclusive, open, and notorious. Appellants' possession was also without Respondents' consent. *See Knox*, 322 S.C. at 70, 472 S.E.2d at 47 (explaining an adverse possessor may carry his burden on hostility by showing his possession was actual, exclusive, open, notorious, and without consent of the title owner). There was no evidence in the record indicating Appellants possessed parcel five with Respondents' permission or consent. Thus, Appellants met their burden with regard to hostility.

Accordingly, after a thorough review of the record, we find there was no evidence reasonably tending to support the master's finding that Appellants presented no evidence of adverse possession. Appellants showed by clear and convincing evidence their possession of parcel five was actual, open, notorious, hostile, exclusive, and continuous between, at a minimum, 1956 and 1972, which satisfied the ten year statutory period. Appellants established the elements of adverse possession no later than 1972. By establishing the elements of adverse possession as of 1972, Appellants acquired complete and proper title as of 1972 for parcel five as it was shown on the 1965 Tax Map. *See Jones*, 384 S.C. at 19, 681 S.E.2d at 16 (finding a showing of adverse possession of land for the time period prescribed by the statute not only bars the remedy, but practically extinguishes the right of the party having true paper title, and vests a perfect title in the adverse holder (citing *Sumner v. Murphy*, 20 S.C.L. (2 Hill) 488 (1834))); 3 AM. JUR. 2D *Adverse Possession* § 298 (1986) (explaining title acquired by adverse possession is new and independent title by operation of law, is not in privity in any way with any former title and is as effective as a formal conveyance by deed or patent, and such title is "a good, actual, absolute, complete, and perfect legal title in fee simple, carrying all of the remedies attached thereto"); *Jones*, 384 S.C. at 16, 681 S.E.2d at 14 (finding a transfer of possession in 1998 from the adverse possessor to a third party did not defeat the adverse possession claim when it was litigated beginning in

2005 because the ten year statutory period was complete in 1997). Thus, we reverse and find Appellants had title as of 1972 to parcel five as shown on the 1965 Tax Map.

To the extent Respondents argue Appellants abandoned parcel five and the abandonment defeated the adverse possession claim, we disagree. There was no evidence Appellants abandoned the property between 1956 and 1972. Abandonment in the context of defeating an adverse possession claim refers to abandonment during the statutory period. As noted above, once Appellants met the elements of adverse possession and the statutory period was complete no later than 1972, Appellants acquired perfect title to parcel five. Once Appellants acquired perfect title to parcel five, they could not subsequently lose title by abandonment. However, even if abandonment after the statutory period could defeat the adverse possession claim, Appellants did not abandon parcel five. Appellants testified they continued to pay taxes on parcel five. Appellants claimed they began renting the Rufus House on parcel five in 1972 and continued to rent it until a fire damaged the house. There was no evidence showing when the fire occurred. However, there was further activity with the property in 1985. Justine Standifer testified regarding a 1985 appraisal sheet that showed Appellants owned parcel five and removed the Rufus House from the tax records, presumably because of the fire. Also, Georgia Champion testified she returned to the area permanently in the late 1990s and employed the local fire department to complete the burning of the house. Champion asserted she continued to cut grass and brush around the property during summer months. Accordingly, to the extent Respondents claim Appellants' adverse possession claim failed because of abandonment, we disagree.

With regard to the master's finding that section 12-51-160 of the South Carolina Code (2014) prohibited a challenge to the tax sales, we find the master erred. Due to the inexplicable switch of the parcel locations, the true owners of parcel five did not receive notice of the tax sales, and Beaufort County used inaccurate property descriptions. Interestingly, the master found the parcel switch occurred and ordered Beaufort County to correct their records but still found the tax sales, with improper notice and incorrect property descriptions, validly conveyed title for the Northern Portion to James Taylor. Under these circumstances, Appellants could challenge the tax sales in excess of the two year statute of limitations in section 12-51-160. *See King v. James*, 388 S.C. 16, 25, 694 S.E.2d 35, 39 (Ct. App. 2010) (noting counties must conduct tax sales "in strict compliance" with the statute);

Reeping v. JEBBCO, LLC, 402 S.C. 195, 199, 740 S.E.2d 504, 506 (Ct. App. 2013) ("Failure to give the required notice is a fundamental defect in the tax sale proceedings which renders the proceedings absolutely void." (quoting *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996) (per curiam))); *id.* at 202, 740 S.E.2d at 507 (concluding section 12-51-160 did not preclude a tax sale challenge because a failure to give the owner "proper notice rendered the tax sale void"). Accordingly, we find the master erred by determining Appellants could not challenge the tax sales because more than two years had passed from the date of the tax sales.

Appellants make multiple other arguments regarding alleged errors in the master's order. However, because we reverse the master's finding on adverse possession and find Appellants had title to parcel five, we need not address Appellants' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we reverse the master's finding that Appellants' adverse possession claim failed because no evidence reasonably tended to support the finding. We find Appellants met their burden of showing the elements of adverse possession by clear and convincing evidence for parcel five as it was shown on the 1965 Tax Map. Finally, we find Appellants could challenge the tax sales even though more than two years had passed from the date of the sales.

REVERSED.[6]

WILLIAMS and GEATHERS, JJ., concur.

[6] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Community Bank, Respondent,

v.

Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia Empowerment Zone and Frank Mitchell, Defendants,

Of Which Salon Proz, LLC is the Appellant.

Appellate Case No. 2014-002627

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Opinion No. 5481
Heard October 13, 2016 – Filed April 26, 2017

REVERSED AND REMANDED

Andrew Sims Radeker, of Harrison & Radeker, PA, of Columbia, for Appellant.

S. Nelson Weston, Jr., Charles Joseph Webb, and Carmen Vaughn Ganjehsani, all of Richardson Plowden & Robinson, PA, of Columbia, for Respondent.

MCDONALD, J.: Salon Proz, LLC (Salon), appeals the master-in-equity's order denying Salon's motion to transfer the case to the general jury docket. Salon

argues (1) it did not waive its jury trial demand, (2) the clerk of court lacked the authority to refer the case, (3) if the clerk had the authority to refer the case, the clerk erred in doing so, and (4) a return to the jury docket is required because Salon's amended answer demands a jury trial and creates new issues of fact. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On October 26, 2011, South Carolina Community Bank (Bank) filed a foreclosure complaint against Salon for defaulting on an $883,634.04 note and mortgage. On November 23, 2011, Salon answered, raising several counterclaims and demanding a jury trial. In January 2012, Bank filed a Rule 12(b)(6) motion to dismiss Salon's counterclaims; on February 13, 2012, Bank moved to refer the case to the master pursuant to Rule 53, SCRCP. That same day, the clerk of court signed and filed an order of reference authorizing the master to take testimony, determine the issues involved, report findings of fact and conclusions of law to the circuit court, and "enter final judgment."[1] The order of reference was not appealed.

In August 2012, Salon obtained new counsel and filed a motion to transfer the case back to the general jury docket. At a hearing on this motion, Salon argued it did not waive its right to a jury trial by failing to appeal the order of reference because nothing in the record showed Salon's prior counsel ever received the order or any notice of its filing. Bank countered that the court would have mailed the order to Salon's counsel, who neither objected to the order nor appealed from it. On June 21, 2013, the master denied the motion to transfer the case back to the general docket without explanation.[2] Salon filed a motion to reconsider, but after a hearing, the master denied the motion as it related to the transfer.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440 (2014) (quoting *Hayne Fed.*

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[1] The date stamp on the motion to refer the case is 4:15 p.m.; the clerk stamped the order of reference at 4:16 p.m.

[2] Separately, the master allowed the parties to amend their pleadings. Salon's amended answer revised several of its counterclaims.

Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Id.* at 328, 755 S.E.2d at 441. "However, '[w]hether a party is entitled to a jury trial is a question of law.'" *Id.* (alteration by court) (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)). "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Id.*; *see Snow v. Smith*, 416 S.C. 72, 85, 784 S.E.2d 242, 248 (Ct. App. 2016) ("[A] reviewing court is free to decide questions of law with no particular deference to the [master].").

LAW/ANALYSIS

A. Waiver of Jury Demand

Salon asserts it did not waive its right to a jury trial by failing to appeal the order of reference because nothing in the record demonstrates its former attorney ever received notice of the order's entry or Salon otherwise voluntarily relinquished the right to a jury trial. We agree.

"Orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately." *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998). "The failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Id.* However, "[t]he right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication." *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). "In the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed." *Id.*

The record contains no dispositive evidence addressing the question of whether Salon or its former counsel received notice of the entry of the order of reference. The only suggestion that Salon's former attorney *did* receive notice of the order was a statement made during the reconsideration hearing by a separate defendant's attorney that "[t]o the order of reference, it was referred. I do have a copy of it, and it was served on [former counsel]." However, no documentation of this alleged service appears in the record, and the attorney who made this statement did

not explain the basis for her knowledge.[3] Under these circumstances, and given the important right involved here, we find no waiver of the right to a jury trial occurred following the proper jury demand. *See Keels*, 315 S.C. at 342, 433 S.E.2d at 904 ("In the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed."). We decline to presume a waiver occurred when any evidence supporting such is sparse and ambiguous.

B. Clerk's Authority to Refer

Next, Salon argues the clerk lacked the authority to refer the case. We agree.

Rule 53(b), SCRCP, states in relevant part,

> In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.

Rule 38(b), SCRCP, states,

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the

[3] Neither this attorney nor her client are listed on the certificate of service that appears to accompany the motion to refer, and the certificate of service in the record simply references "the foregoing Motion." The record contains no proof of service as to the proposed order referring the case. Although the certificate of service was signed January 25, 2012, the motion, motion slip, and certificate of service are date-stamped February 13, 2012, and February 17, 2012. The record does not reflect the reason for the two date stamps on these documents.

> commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Rule 39(a), SCRCP, provides,

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the calendar and the clerk's filebook as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

It is undisputed that Salon made a valid jury demand in its answer. *See* Rule 38(b), SCRCP (stating a party may serve a jury demand "not later than 10 days after the service of the last pleading" or the demand "may be endorsed upon a pleading of [a] party"). Because of Salon's valid jury demand, Rule 39 provides the action should have been designated as a jury action in the clerk's filebook unless the parties consented otherwise or the court found the right to a jury trial did not exist.

Despite the lack of consent, a court finding, or a hearing on the matter, the clerk signed Bank's proposed order referring the case. Admittedly, Rule 53(b) states that in a foreclosure action "some or all of the causes of action in a case may be referred to a master . . . by order of . . . the clerk of court." However, the clerk does not retain this power to refer a case when a party has already made a valid jury demand. To hold otherwise would give the clerk the power to disregard a demand made in the pleadings and require a party seeking a jury trial to file a second jury demand once the party's case was referred without the party's consent.[4]

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[4] A note to Rule 53(b) explains that after the rule's 2002 amendment, the rule "permits referral of foreclosure cases to the [master] by order of the clerk of court. If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court." Based on this

Such an interpretation is nonsensical. Because Salon demanded a jury trial in its initial answer, the clerk should not have referred the case, and the master erred in denying Salon's motion to transfer the case to the jury docket.

C. Salon's Counterclaims

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable . . . ." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). Salon is entitled to a jury trial in this equitable action "only if the counterclaims are legal and compulsory." *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim." *Id.* (citing Rule 13(a), SCRCP). Salon asserts its amended counterclaims meet the restrictions enunciated in *BADD* because they bear a logical relation to the foreclosure claim and arise out of the origination and administration of the subject mortgage loan.

In *BADD*, a bank sought foreclosure after a company defaulted on two promissory notes. *Id.* at 291, 778 S.E.2d at 107. The bank also sued William McKown, who had executed a personal guaranty. *Id.* McKown demanded a jury trial and asserted counterclaims for civil conspiracy and breach of contract. *Id.* at 291–92, 778 S.E.2d at 107. However, the supreme court held McKown waived his right to a jury trial because his counterclaims were permissive. *Id.* at 292, 778 S.E.2d at 107. The supreme court stated, "In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." *Id.* at 295, 778 S.E.2d at 109. The court held the execution of the guaranty agreements was the "transaction or occurrence" and "McKown's civil conspiracy counterclaim [did] not arise out of that transaction or occurrence because it [bore] no logical relationship to either the execution or enforceability of the guaranty agreements." *Id.* Specifically, the alleged conspiracy took place two years after McKown executed the guaranty documents and, in effect, the counterclaim "presume[d] the enforceability of the guaranty agreements because

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note, Rule 53(b) gives clerks the power to refer some or all causes of action in a foreclosure case when a party *has not yet made* a jury demand under Rule 38.

the allegations, if true, would not render the guarantees unenforceable." *Id.* at 295–96, 778 S.E.2d at 109. Likewise, the court held the breach of contract counterclaim was permissive because it depended on the alleged conspiracy "that took place, if at all, two years after the guarantees had been executed." *Id.* at 296, 778 S.E.2d at 110.

Here, Salon's amended answer raises six counterclaims: violation of the Unfair Trade Practices Act (UTPA), breach of contract and the covenant of good faith and fair dealing, breach of contract with fraudulent intent, slander of title, libel, and negligent misrepresentation. As at least one of Salon's counterclaims is legal and compulsory, Salon is entitled to a jury trial. *See Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441–42 (stating when a complaint is equitable, no waiver exists, and there is a legal and compulsory counterclaim, then a party has a right to a jury trial on the counterclaim). For example, the UTPA claim is an action at law seeking treble damages. The substance of Salon's UTPA claim alleges Bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case." Were this allegation true, it could affect the loan's enforceability. *Cf. BADD*, 414 S.C. at 296, 778 S.E.2d at 109 (holding a counterclaim was permissive when its allegations, if true, would not have rendered the guaranty agreements unenforceable). Therefore, we find the UTPA claim was both legal and compulsory. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518–19, 381 S.E.2d 903, 904–05 (1989) (holding a counterclaim alleging violation of the UTPA by breach of an oral agreement was both legal and compulsory).

Accordingly, we reverse and remand with instructions that the case be returned to the jury docket for further proceedings, including a hearing before the circuit court to determine the nature of any remaining counterclaims and any request for an order of reference as to equitable matters. *See Blackburn*, 407 S.C. at 329, 755 S.E.2d at 441 (stating when a party has a right to a jury trial on a counterclaim, the trial judge may order separate trials of the legal and equitable claims or may order the claims tried in a single proceeding).

REVERSED AND REMANDED.

LOCKEMY, C.J., and KONDUROS, J., concur.