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Limited Joint and Several Liability Under Section 15-38-15: Application of the Rule and the Special Problem Posed by Nonparty Fault

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

I. INTRODUCTION

In March 2005, South Carolina Governor Mark Sanford signed into law a bill that addresses several issues relating to the civil justice system's treatment of tort claims.[1] Joint and several liability is one important issue the bill addresses.[2] Section 15-38-15 of the South Carolina Code does not abolish joint and several liability but does limit the instances when it applies.[3] Under the new rule, the jury allocates fault between the parties, and a defendant can be held jointly and severally liable only if he is fifty percent or more at fault for the plaintiff's injuries.[4] This revision of joint and several liability law reflects an evolving national approach to tort liability and brought South Carolina in line with the trend toward abolishing or limiting joint and several liability.[5] Nevertheless, how the courts should apply South Carolina's new joint and several liability provision is ambiguous, especially regarding the role nonparties play in fault allocation.

Part II briefly reviews joint and several liability prior to reform, focusing on the impact of comparative negligence on the doctrine of joint and several liability. This part suggests that limiting joint and several liability is consistent with the equitable principles underlying comparative negligence. Part III describes the fault allocation scheme of section 15-38-15, demonstrates the application of the new rule using a hypothetical scenario, and identifies the special problem posed by nonparty fault. This part argues that the statute is ambiguous regarding the allocation of fault to nonparties and suggests that a court applying the statute would not permit a jury to allocate fault to a nonparty. Part IV introduces some of the policy arguments surrounding the nonparty fault issue and argues that the better rule for South Carolina would be to not permit a jury to consider nonparties when apportioning fault. Part V concludes.

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1. H.B. 3008, 2005 Leg., 116th Sess. (S.C. 2005). The provisions of this bill took effect on July 1, 2005 and apply only to causes of action arising on or after July 1, 2005. F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 237 (3d ed. Supp. 2006).

2. S.C. CODE ANN. § 15-38-15 (Supp. 2005).

3. *See* § 15-38-15(A).

4. § 15-38-15(A), (C).

5. *See* 3 STEIN ON PERSONAL INJURY DAMAGES § 14:25 (Gerald W. Boston ed., 3d ed. 1997 & Supp. 2006).

II. PRIOR TO REFORM: JOINT AND SEVERAL LIABILITY AND COMPARATIVE NEGLIGENCE

Prior to the adoption of section 15-38-15, pure joint and several liability was the rule in South Carolina.[6] In *Rourk v. Selvey*,[7] the South Carolina Supreme Court explicitly rejected a standard that apportioned fault among multiple defendants when the defendants' negligent acts combined to produce an indivisible injury.[8] The court in *Rourk* held that apportioning damages between defendants according to their fault was "unjust and illogical because it deprives a plaintiff of the right to a verdict, for the full amount of damage sustained, against all wrongdoers whose actionable conduct has contributed as a proximate cause of indivisible injuries to him."[9] This ruling was grounded squarely in the logic of joint and several liability, and the Court of Appeals applied it in *South Carolina Insurance Co. v. James C. Greene & Co.*[10] In *James C. Greene*, the court held that "the courts will not undertake to apportion damages among the various persons whose negligence concurred to cause the plaintiff's injury."[11] The policy underlying the doctrine of joint and several liability is to afford the injured party the best opportunity to recover damages.[12] Thus, if two defendants negligently cause a plaintiff's injury and one of them is insolvent, the plaintiff has a means of recovering all of his damages by electing to collect from the solvent defendant.[13] Many courts found this to be a just result because, as between a negligent party and an innocent plaintiff, it is preferable for a tortfeasor to bear the cost of the damages rather than an innocent plaintiff.[14] The same policy justification for joint and several liability applies where one tortfeasor is unidentified and thus not a party to the action.

In *Nelson v. Concrete Supply Co.*,[15] the South Carolina Supreme Court

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6. While the doctrine of joint and several liability was not codified by statute, the South Carolina Contribution Among Tortfeasors Act specifically mentions the doctrine in reference to contribution actions. *See* S.C. CODE ANN. § 15-38-20 (2005).

7. 252 S.C. 25, 164 S.E.2d 909 (1968).

8. *Id.* at 28–29, 164 S.E.2d at 910.

9. *Id.* at 35, 164 S.E.2d at 913–14.

10. 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).

11. *Id.* at 176, 348 S.E.2d at 620 (citing *Rourk*, 252 S.C. at 35, 164 S.E.2d at 913–14).

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

13. *See id.*

14. *See Rourk*, 252 S.C. at 35, 164 S.E.2d at 913–14; 1 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS § 3:7 (2003).

15. 303 S.C. 243, 399 S.E.2d 783 (1991). In *Nelson*, the driver of an automobile was killed when her vehicle ran into the back of a tractor trailer merging onto the interstate. *Id.* at 244, 399 S.E.2d at 784. While the driver's estate successfully convinced the court to adopt a modified comparative negligence doctrine in which the plaintiff can recover if his "negligence is not greater than that of the defendant [or] the combined negligence of all defendants," the doctrine did not aid the plaintiff in *Nelson* because the tractor trailer driver was not found to be negligent. *Id.* at 244–45, 399 S.E.2d at 784. The Supreme Court did not discuss its reasoning for adopting comparative negligence other than to deem it "the more equitable doctrine" and refer judges and attorneys to the discussion of the doctrine in *Langley v. Boyter*,

adopted comparative negligence, providing an opportunity for revising the tort system to apportion damages between defendants.[16] A major argument supporting a revision was that the same equitable principles behind the comparative negligence doctrine could be applied to defendants: "[A] jury should be similarly capable of apportioning damages between defendants or joint tortfeasors."[17]

While these arguments eventually convinced the legislature to reform joint and several liability, until that reform recently took place, the courts continued to uphold pure joint and several liability in the period following *Nelson*.[18] In *Fernanders*, the South Carolina Court of Appeals acknowledged that joint and several liability was "less defensible" in a comparative negligence system because the fairness policy that justified joint and several liability under contributory negligence was, in part, based on the fact that the plaintiff had to be completely innocent to recover.[19] Conversely, in a comparative negligence system, where a jury allocates fault between the plaintiff and defendants, a plaintiff can recover despite being partially at fault. In this instance, the fairness principle does not favor forcing a partially-at-fault defendant to bear the costs of an insolvent or absent tortfeasor, especially if the plaintiff's portion of fault may be greater than the solvent defendant's.[20] Despite recognizing the conceptual difficulties of retaining joint and several liability under comparative negligence, in *Fernanders* the court declined to "expand" *Nelson* by abolishing joint and several liability.[21] The court's primary reasoning was reluctance to effectively nullify the Uniform Contribution Among Tortfeasors Act, which was drafted with the understanding that joint and several liability applied where more than

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284 S.C. 162, 172–77, 325 S.E.2d 550, 556–59 (Ct. App. 1984). *Nelson*, 303 S.C. at 244, 399 S.E.2d at 784.

16. *See* F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing* Nelson v. Concrete Supply Co., 43 S.C. L. REV. 273, 305–07 (1992) (discussing the application of *Nelson* and the tension between comparative negligence and joint and several liability).

17. Steven A. Snyder & J. Antonio Delcampo, *Comparative Negligence and Apportionment of Liability Among Tortfeasors: Is Joint and Several Liability Obsolete?*, S.C. LAW., Sept.-Oct. 1995, at 37, 38 (citing *Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978)). *But see* SPEISER, KRAUSE & GANS, *supra* note 14, §§ 3:10–11 (suggesting that the retention of joint and several liability can be consistent with both "pure" comparative negligence and "modified" comparative negligence).

18. *See, e.g.*, *Fernanders*, 330 S.C. at 475–78, 499 S.E.2d at 511–13 (discussing the appellate court's reluctance to expand the judicially constructed comparative negligence system).

19. *Id.* at 476, 499 S.E.2d at 512. *But see* Martinez v. Stefanich, 577 P.2d 1099, 1101 (Colo.1978) (citing Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 905–06 (Cal. 1978) (en banc)) (holding that the doctrine of joint and several liability is not incompatible with a modified comparative negligence statute). Despite the *Martinez* court's reasoning supporting the retention of joint and several liability, the Colorado legislature later adopted a fault allocation regime that displaced joint and several liability. *See* COLO. REV. STAT. ANN. § 13-21-111.5 (West 2006).

20. *See Fernanders*, 330 S.C. at 476, 499 S.E.2d at 512; *see also* Hubbard & Felix, *supra* note 16, at 309 (stating that there may be a shift towards allocation of liability among defendants).

21. *Fernanders*, 330 S.C. at 478, 499 S.E.2d at 513.

one defendant was found negligent.[22] Thus, despite an evolving fault allocation doctrine, prior to the adoption of the 2005 statutory change, South Carolina courts did not permit fault allocation between defendants.

III. AFTER REFORM: ALLOCATION OF FAULT BETWEEN DEFENDANTS AND LIMITED JOINT AND SEVERAL LIABILITY.[23]

A. Application of the New Rule

Section 15-38-15[24] establishes that if two or more defendants cause an

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22. *Id.* (citing Berkebile v. Outen, 311 S.C. 50, 56, 426 S.E.2d 760, 763 (1993)) (noting that "the legislature is presumed to know" about judicial changes to common law doctrine and respond with necessary changes to the statutory scheme).

23. This Note does not exhaustively cover all issues relevant to the new law. Specifically, the Note does not address subsection (C)(3)(a), which provides that a court can treat two or more parties as one in some instances, and subsection (F), which states that the limitation on joint and several liability does not apply to "wilful, wanton, reckless, grossly negligent, or intentional [conduct], or conduct involving . . . alcohol or . . . drugs." S.C. CODE ANN. § 15-38-15(C)(3)(a), (F) (2005). Subsection (F), while seemingly a straightforward rule based on a factual determination, may be problematic in its application. For example, a court may be unclear about how to treat a situation involving multiple defendants if all are less than 50% at fault but one defendant was grossly negligent. Subsection (F) provides that the grossly negligent party does not receive the benefit of apportionment and is therefore jointly and severally liable for the plaintiff's injury. § 15-38-15(F). The statute, however, does not inform courts how to treat the merely negligent defendants in the same case. The most logical way to handle this scenario is for the jury to apportion fault between all defendants as provided in subsection (C). The merely negligent parties would be responsible only for their proportionate share of the fault, while the grossly negligent party would be jointly and severally liable. The problem with this solution is that it does not appear in the statute, thus opening the door to an argument that all defendants should be held jointly and severally liable where subsection (F) applies to one defendant. *See id.*

24. The bulk of section 15-38-15 is related to fault allocation:

> (A) 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 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.
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> (B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).
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> (C) The jury, or the court if there is no jury, shall:
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> (1) specify the amount of damages;
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> (2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and
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> (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

indivisible injury to a plaintiff, the individual defendants are not jointly and severally liable if they are found to be less than fifty percent at fault for the damages to the plaintiff.[25] In other words, a defendant is liable only for the percentage of the damage that he individually caused if he is less than fifty percent at fault, but jointly and severally liable for the total damage to the plaintiff if he is more than fifty percent at fault.[26] The statute directs the jury to specify the amount of damages, determine the percentage of the plaintiff's fault, and, in a separate verdict, specify the percentage of fault attributable to each defendant.[27]

The general purpose of the statute is clear: the jury can now allocate fault between all parties in a suit, and joint and several liability applies only to a defendant who is fifty percent or more at fault.[28] Furthermore, applying subsection (C), which directs the jury in the allocation of fault, presents no difficulty in a relatively simple case. Consider the following example: *A* is injured in an automobile accident and sues *B* and *C*, the drivers of two other vehicles, in negligence to recover damages. The jury determines that both *B* and *C* proximately caused the indivisible damage to *A*. Pursuant to subsection (C)(1), the jury determines that *A* has suffered damages of $75,000 for medical bills and $25,000 for pain and suffering, for a total of $100,000. The jury further

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> 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).

§ 15-38-15(A)–(C).

25. § 15-38-15(A).

26. *Id.* If a defendant is found to be more than 50% at fault and is held liable for the plaintiff's total damages, but others are partially at fault for the plaintiff's injury, the defendant can bring a contribution action against the other tortfeasors. *See* S.C. CODE ANN. §§ 15-38-20 to -40 (2005). Section 15-38-15 did not affect this capability. Curiously, section 15-38-20 stipulates that in a contribution action, a defendant's "total recovery is limited to the amount paid by him in excess of his pro rata share." S.C. CODE ANN. § 15-38-20(B). This limitation does not consider the tortfeasors' relative degrees of fault. *See* S.C. CODE ANN. § 15-38-30(1). In at least one version of House Bill 3008, the "pro rata" language of section 15-38-20 was replaced with "proportionate." H.B. 3008, 2005 Leg., 116th Sess. § 15-38-20(B) (as reported by H. Comm. on the Judiciary, Feb. 9, 2005).

27. § 15-38-15(C)(1)–(3). The statute prescribes a tiered system of jury verdicts. In the first verdict, the jury determines damages and the plaintiff's negligence, resulting in the total amount recoverable (if any) by the plaintiff. Only after this verdict is issued can a defendant move for fault allocation. The jury then hears the arguments and issues a separate verdict on fault allocation. *See* § 15-38-15(C)(3)(b).

28. § 15-38-15(A).

determines, under subsection (C)(2), that *A* was twenty-five percent at fault for causing the accident; consequently, *A* may recover only $75,000.[29] *B* makes a motion under (C)(3) for the jury to allocate fault between *B* and *C*, and the court allows oral argument on the issue pursuant to subsection (C)(3)(b).[30] After argument, the jury finds that that *B* was twenty-five percent at fault and *C* was fifty percent at fault. *B* is responsible for only twenty-five percent of the remaining damages, or $18,750. *C*, on the other hand, does not receive the benefit of subsection (A) because he was not less than fifty percent at fault.[31] Thus, *C* is liable for one hundred percent of *A*'s remaining damages, or $75,000.[32]

This example illustrates the process of determining liability according to the new framework of section 15-38-15. A difficulty arises in applying the statute, however, when the following fact is inserted into the above hypothetical: a fourth automobile, not involved in the accident, negligently swerved in front of *A* and caused the chain reaction that led to the lawsuit. The fourth automobile immediately sped away without stopping and has not been identified. Assuming *A*, *B*, and *C* each still negligently and proximately caused *A*'s injury—although to a lesser extent than in the original hypothetical—the issue is whether section 15-38-15 permits a jury to allocate fault to the unidentified nonparty.[33] The following subpart argues that section 15-38-15 is ambiguous about the treatment of nonparties and suggests that a court applying South Carolina law would not permit a jury to allocate fault to a nonparty.

B. Problems with Applying the New Rule: Nonparty Fault

Section 15-38-15 does not clearly address the issue of nonparty fault in negligence actions.[34] On the one hand, the statute provides that the determination of joint and several liability is based on on the defendant's percentage of fault relative to the fault of the other defendants and the plaintiff and does not mention the fault of nonparties.[35] The statute continues in subsection (C)(3) by instructing the jury in how it must allocate fault: "In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item

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29. *See* Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) ("The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence.").

30. § 15-38-15(C)(3)(b).

31. § 15-38-15(A).

32. Recall that *A*'s total recovery is limited to $75,000 because of comparative negligence. If *A* elects to recover all $75,000 from *C*, *C* may bring a contribution action against *B*. *See supra* note 26 and accompanying text.

33. The hypothetical assumes that the unknown party is not joined as a party to the action. The procedural issue of joinder in this scenario is discussed below. *See infra* text accompanying notes 61–65.

34. For examples of how other states have clearly addressed nonparty fault, see *infra* note 49 and accompanying text.

35. § 15-38-15(A).

(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.*"[36] While this language seemingly forecloses any debate on the issue of allocation of fault to nonparties, subsection (D) casts doubt on this assumption. Subsection (D) provides that "[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."[37] A court could construe these provisions as being contradictory: subsection (D) allows a defendant to argue that a nonparty is at fault, while subsection (C) requires that the fault of the defendants and plaintiff equal one hundred percent.

In construing a statute, a court's objective is to ascertain the legislative intent.[38] The rest of this part argues that given the identified textual ambiguity, a court would likely find that the legislature did not intend for juries to allocate fault to nonparties. To support this argument, this part juxtaposes the previous unadopted versions of the statute with section 15-38-15, demonstrating that the legislature considered, but rejected, language explicitly permitting fault allocation to nonparties. Next, this part examines the introductory language of subsection (F) and describes an interpretation of that subsection that is consistent with the legislative history. Finally, this part reviews statutes from other jurisdictions. While jurisdictions differ considerably on this issue, general trends support the view that interpretation of the South Carolina statute should not permit allocation of fault to nonparties.

The legislature had the opportunity to include the fault of nonparties in subsection (C)(3), which directs the jury on how to allocate fault.[39] In light of previous versions of the bill, the legislature's decision to omit any reference to nonparties demonstrates its intent to exclude nonparties from the fault allocation process. For example, the December 8, 2004 version of House Bill 3008 proposed the following language: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged injury . . . regardless of whether the person was, or could have been, named as a party to the suit."[40] The proposed section continued by providing how the defendant was to assert the nonparty defense, which included a notice requirement and an extra statement of the basis for believing the nonparty was at fault.[41] A later version of House Bill 3008, which more closely resembled the adopted section 15-38-15, instructed the jury to consider in its fault allocation process the fault

36. § 15-38-15(C)(3) (emphasis added).

37. § 15-38-15(D).

38. Merchants Mut. Ins. Co. v. S.C. Second Injury Fund, 277 S.C. 604, 607, 291 S.E.2d 667, 668 (1982).

39. § 15-38-15(C)(3).

40. H.B. 3008, 2005 Leg., 116th Sess. § 15-32-30(A) (as referred to the H. Comm. on the Judiciary, Dec. 8, 2004).

41. *Id.*

of those parties who had previously settled or been released.[42] In the end, the legislature declined to adopt either of these versions; instead, it chose an approach to fault allocation that not only failed to mention nonparties, but provided specific instructions that the jury consider only the fault of the plaintiff and the defendants.[43] The implication is that the legislature deliberately determined that the jury should not consider any potential fault of nonparties.

The introductory phrasing of subsection (D) also supports the reading that the legislature did not intend for a jury to allocate fault to nonparties and perhaps explains its inclusion in the statutory scheme. Subsection (D) begins with the language, "[a] defendant shall *retain the right* to assert."[44] This language suggests that subsection (D) is not intended to change the law with respect to the defendant's ability to argue nonparty fault.[45] Further, prior to the adoption of section 15-38-15, a jury was not permitted to allocate fault between defendants or between defendants and nonparties.[46] This reading of subsection (D) provides insight into the legislature's decision to include subsection (D). One concern is that a court would interpret the new statute to eliminate a defense previously available to defendants, such as defending on the grounds that another tortfeasor caused the plaintiff's injury. Subsection (D) serves as a safeguard against such an interpretation.[47]

A final argument in support of the interpretation that section 15-38-15 does not allow allocation of nonparty fault comes from a review of the statutes and decisions of other jurisdictions. There is no consensus across jurisdictions regarding the allocation of fault to nonparties; the statutory language varies considerably, and courts have applied a variety of approaches in handling their jurisdictions' statutes.[48] Nevertheless, some common concepts can be gleaned from the various approaches. The first concept, which is simple but important, is that jurisdictions that allow juries to allocate fault to nonparties have statutes with express language to that effect.[49] Because the legislature could have chosen

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42. H.B. 3008, 2005 Leg., 116th Sess. § 15-38-15(B) (as reported by H. Comm. on the Judiciary, Feb. 9, 2005).

43. § 15-38-15(C)(3).

44. § 15-38-15(D) (emphasis added).

45. *See* HUBBARD & FELIX, *supra* note 1, at 237.

46. *See* Rourk v. Selvey, 252 S.C. 25, 35, 164 S.E.2d 909, 913–14 (1968); S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 176, 348 S.E.2d 617, 620 (Ct. App. 1986) (citing *Rourk*, 252 S.C. at 35, 164 S.E.2d at 913–14).

47. There are, however, conceptual difficulties in interpreting subsection (D) as the legislature's attempt to preserve previously available defenses. *See infra* notes 54–57 and accompanying text.

48. *See generally* Nancy A. Costello, Note, *Allocating Fault to the Empty Chair: Tort Reform or Deform?*, 76 U. DET. MERCY L. REV. 571, 581–82 (1999) (identifying the jurisdictions that permit fault allocation to nonparties and noting successful constitutional challenges in two).

49. *Compare* GA. CODE ANN. § 51-12-33(C) (Supp. 2006) ("In 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*.") (emphasis added), *and* MICH. COMP. LAWS ANN. § 600.2957(1) (West 2000) ("In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, *regardless of whether the person is, or could have been, named as a party to the action*.") (emphasis

to include such express language—and there are a multitude of models to follow from other jurisdictions[50]—it is unlikely that a court would be willing to read the South Carolina statute to permit allocation of fault to nonparties in the absence of an express directive. Furthermore, as previously mentioned, the legislature considered but did not adopt versions of the joint and several liability statute that included express language permitting the jury to allocate fault to nonparties in its special verdict.[51]

A second concept apparent from analyzing the statutes of other jurisdictions is that if a statute authorizes a jury to allocate fault to nonparties, it will include procedural safeguards to ensure the accurate apportionment of liability.[52] Examples of such procedural safeguards include requirements to affirmatively plead a nonparty defense, to notify the plaintiff by providing the nonparty's identity and location, to notify the nonparty that he is being blamed for the plaintiff's injuries, and to allow the nonparty the opportunity to appear and defend himself.[53] Because section 15-38-15 neither expressly provides for

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added), *with* KY. REV. STAT. ANN. § 411.182(1) (LexisNexis 2005) ("In all tort actions . . . involving fault of more than one (1) party to the action, . . . the court . . . shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating: . . . (b) The percentage of the total fault of *all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability* under subsection (4) of this section.") (emphasis added). A Kentucky court, interpreting its statute, held that:

> [Section 411.182] does not direct or authorize the adjudication of fault of absent, potential litigators.
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> . . . "When the statute states that the trier-of-fact shall consider the conduct of 'each party at fault,' such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large."

Copass v. Monroe County Med. Found., Inc., 900 S.W.2d 617, 619–20 (Ky. Ct. App. 1995) (quoting Baker v. Webb, 883 S.W.2d 898, 900 (Ky. Ct. App. 1994)).

50. See *supra* note 49 for examples.

51. *See supra* notes 39–43 and accompanying text.

52. *See* Plumb v. Fourth Dist. Court, 927 P.2d 1011, 1018 (Mont. 1996). Due process may require the addition of procedural safeguards where statutes permit the allocation of fault to nonparties. *See* Newville v. State, 883 P.2d 793, 802 (Mont. 1994) (holding that allocating fault to nonparties without any procedural safeguards affects a fair adjudication of the claims and imposes an unreasonable burden on a plaintiff to anticipate nonparty defenses).

53. *See Plumb*, 927 P.2d at 1018. Both the Georgia and Michigan statutes contain such procedural safeguards. *See supra* note 49. Georgia provides:

> (1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault. (2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

GA. CODE ANN. § 51-12-33(d) (Supp. 2006).

Similarly, Michigan states:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading

allocation of fault to nonparties nor includes procedural safeguards to ensure that the use of a nonparty defense would not unfairly impact the fault-allocation verdict, a court is not likely to construe the statute to permit fault allocation to nonparties.

Despite the strong arguments against interpreting the South Carolina statute to allow apportionment of fault to nonparties, there is an unavoidable counterargument. A basic rule of statutory interpretation is that "words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."[54] As suggested above, a court could construe section 15-38-15(D) as merely a legislative reservation of a defense that was previously available to defendants. Another argument is that such an interpretation would be a "subtle or forced construction"[55] of the precise language of subsection (D), which provides that the defendant has the right to assert that a nonparty "contributed" to the plaintiff's injury and that the nonparty is "liable for any or all" of the plaintiff's damages.[56] If this language is given its "plain and ordinary meaning,"[57] a defendant may argue that some fault should be allocated to a nonparty, thereby reducing his own share in the jury's overall allocation of fault. While this textual argument is strong, at best it reinforces the ambiguity identified at the outset: subsection (C)(3) limits a jury's fault allocation to party plaintiffs and defendants, while subsection (D) suggests that nonparties can be blamed for the plaintiff's injuries. In light of the express language of subsection (C)(3), the legislature's failure to adopt versions of the bill providing for allocation of fault to nonparties, and the common concepts derived from other jurisdictions, a court is likely to resolve any ambiguity in favor of an interpretation that does not permit a jury to allocate fault to nonparties.[58]

The above discussion of section 15-38-15 provides a response to the automobile accident hypothetical that introduced this part. Even when a nonparty has clearly caused some of *A*'s injuries, the jury must nevertheless apportion one hundred percent of the fault to the parties: the plaintiff, *A*, and the defendants, *B* and *C*. The result is that the jury's allocation of fault cannot be an accurate assessment of the actual fault that caused the injury because the fault of the nonparty will be redistributed to the party defendants in the jury's one

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> alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

MICH. COMP. LAWS ANN. § 600.2957(2) (West 2000).

54. Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) (citing Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992)).

55. *Rowe*, 321 S.C. at 369, 468 S.E.2d at 650.

56. S.C. CODE ANN. § 15-38-15(D) (2005).

57. *Rowe*, 321 S.C. at 369, 468 S.E.2d at 650.

58. The legislature's instruction that courts interpret Chapter 38 to make the law uniform provides an additional reason for a consistent interpretation. S.C. CODE ANN. § 15-38-60 (2005).

hundred percent fault allocation.[59] While this outcome seems unfair to the defendants, who will be sharing the liability for another's wrongdoing, the unfairness is caused not by the construction of the statute, but by the fact that a tortfeasor has managed to escape without being identified. If the statute permitted allocation of fault to nonparties, the result would be unfair to plaintiffs who would be unable to recover their total damages. In other words, regardless of the wording of the statute, unfairness is inherent in the hypothetical. By not permitting allocation of fault to nonparties, the legislature is simply making a determination that the better system places the risk of an unidentified or nonparty tortfeasor on defendants rather than on a plaintiff seeking to recover for his injury.[60]

In South Carolina, the risk that defendants will absorb the fault of nonparty tortfeasors may not be as great as it seems. In at least one instance where nonparty fault is likely (an automobile accident such as in the hypothetical above), South Carolina permits bringing an action against an unknown motorist.[61] In section 38-77-180, the South Carolina Code specifically contemplates a scenario involving the potential liability of an unidentified motorist and expressly permits an action against an unknown motorist, as well as the joinder of an unknown defendant.[62] In the latter instance, the unknown tortfeasor would be a party to the action, thereby allowing the jury to consider his fault in its special verdict.[63] In the former instance, according to section 38-77-180, a plaintiff may bring an action against the unknown motorist, and in the event that the motorist's identity later becomes known, the statute provides that the earlier action against "John Doe" does not bar a new action naming the motorist as a defendant.[64] Beyond the unknown motorist situation governed by section 38-77-180, however, it is not clear whether an unknown "potential tortfeasor" may be joined as a party.[65]

The range of instances where a nonparty may be at fault for some percentage of the plaintiff's injury is not limited to the unknown tortfeasor. A more likely scenario involves a nonparty, liable for some percentage of the plaintiff's injury, who has already settled the claim. The legislature anticipated this scenario in section 15-38-15(E), which provides that a setoff received from any person potentially liable to the plaintiff "shall be applied in proportion to

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59. Because the jury determines the percentage of the plaintiff's fault independently in subsection (C)(2), it is almost inevitable that the defendants will absorb any nonparty fault in the jury's one hundred percent allocation. *See* § 15-38-15(C)(2).

60. *See infra* Part IV for a discussion of the policy arguments surrounding the issue of allocation of fault to nonparties.

61. S.C. CODE ANN. § 38-77-180 (2002).

62. *Id.*

63. *See* § 15-38-15(C)(3).

64. § 38-77-180. A plaintiff presumably would bring an action against John Doe for insurance purposes.

65. HUBBARD & FELIX, *supra* note 1, at 237. While the procedural maneuvers available to parties are certainly important in this situation, this Note is not aimed at resolving the procedural issues surrounding section 15-38-15.

each defendant's percentage of liability" as determined by the jury.[66] Another possible nonparty situation involves a known nonparty that is potentially liable for the plaintiff's injuries but cannot be brought into the action because, for example, the court cannot exercise jurisdiction over the nonparty. In this circumstance, a separate action against the tortfeasor by the plaintiff or a contribution action by the defendant are available to protect the rights of the parties subject to section 15-38-15.[67]

While this list of possible nonparty situations is not exhaustive,[68] it demonstrates that a fault allocation scheme that does not permit the jury to allocate fault to nonparties does not necessarily result in inequity for defendants in South Carolina. While there are no clear statements from the legislature regarding why it chose to limit fault allocation to parties to the lawsuit, the legislature may have considered various potential situations and competently concluded that this fault allocation scheme dealt with the issues that arise in the context of nonparty fault. The following part discusses policy considerations that support the legislature's approach and argues that the better rule of fault allocation for South Carolina does not permit a jury to consider nonparty fault.

IV. POLICY CONSIDERATIONS SUPPORTING THE LEGISLATURE'S DECISION TO LIMIT FAULT ALLOCATION TO PARTIES

The South Carolina General Assembly appropriately determined that juries should not allocate fault to nonparties and, with the exception of the ambiguity introduced by the text of subsection (D), took a solid approach to reforming joint and several liability. As previously discussed, the vast majority of comparative fault jurisdictions have eliminated or limited joint and several liability based on the recognition that the same equitable principles underlying the allocation of fault between plaintiff and defendant can be extended to allocate fault between defendants as well.[69] Many of these jurisdictions, however, have not stopped with allocation of fault to defendants but have further extended the factfinder's fault allocation ability to consider nonparties as well.[70] While at least one court has acknowledged that "[p]olicy considerations do not weigh heavily in favor of

66. S.C. CODE ANN. § 15-38-15(E) (2005).

67. *See* § 15-38-20(A).

68. *See* Kurt G. Stiegelmeier, *Designation of Immune, Nonliable and Unknown Nonparties*, COLO. LAW., Jan. 1993, at 31, 32–33 (discussing the various nonparties that may be designated under Colorado's fault allocation statute, including nonparties protected by government, workers' compensation, and common law immunity, as well as unknown nonparties, nonliable nonparties, deceased nonparties, bankrupt nonparties, and dissolved and unavailable nonparties).

69. *See* STEIN, *supra* note 5, at §§ 14:24 to 25 (citing Laubach v. Morgan, 588 P.2d 1071, 1075 (Okla. 1978) (superseded on other grounds by statute as stated in Smith v. Jenkins, 873 P.2d 1044 (Okla. 1994)).

70. *See, e.g.*, Gust v. Jones, 162 F.3d 587, 593 (10th Cir. 1998) (applying Kansas law and finding that adequate evidence must show nonparty negligence before the judge can instruct the jury to include nonparty fault in its comparative allocation).

either position on the absent tortfeasor issue,"[71] the potential for abuse in a scheme that permits fault allocation to nonparties tips the scales in favor of the decision of the South Carolina legislature to limit the jury's fault allocation to parties to the suit.

The primary justification for considering the fault of an absent tortfeasor is that it results in an accurate allocation of fault and ensures that a negligent defendant's liability is proportionate to his percentage of fault.[72] After all, "comparative negligence was designed to allocate negligence among the parties *at fault* and not just the parties to the lawsuit."[73] Other policies favoring allocation of fault to nonparties include encouraging plaintiffs to join all potential tortfeasors in one suit rather than face the prospect of having to prove both the defendant's negligence and the nonparty's non-negligence, and, possibly, encouraging plaintiffs to settle rather than risk the unknown impact of nonparties on a jury verdict.[74]

These policy justifications, especially the attempt to arrive at an accurate allocation of fault, are strong, but they are susceptible to attack based on competing policies against allocating fault to nonparties. For example, if an accurate apportionment of fault includes the fault of a nonparty, the plaintiff will be denied the portion of his recovery attributed to the nonparty.[75] Thus, a legislature's determination of whether or not to allocate fault to nonparties essentially boils down to the question of whether the plaintiff or the defendant should bear the cost of an absent tortfeasor—a question on which legislatures could easily disagree.[76] Furthermore, plaintiffs may be unfairly burdened when they are forced to litigate a nonparty fault issue because the determination of that issue would not be binding on the nonparty under collateral estoppel.[77] As to the policy of encouraging settlement, it is doubtful that a rule permitting a jury to compare the fault of all tortfeasors would encourage settlement because defendants are more likely to resist settlement if they have strong nonparty defenses to present to a jury.

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71. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 662 P.2d 1056, 1059 (Colo. 1983) (en banc). The Colorado legislature has revised its fault allocation scheme since *Frackelton*. *See* COLO. REV. STAT. ANN. § 13-21-111.5 (West 2006). *Frackelton* is still useful, however, in framing the policy issues regarding the allocation of fault to nonparties.

72. *Frackelton*, 662 P.2d at 1059.

73. *Id.*

74. *Id.* at 1059–60 (citing Paul v. N. L. Indus., Inc., 624 P.2d 68, 69–70 (Okla. 1980)).

75. *Frackelton*, 662 P.2d at 1060; Julie O'Daniel McClellan, Note, *Apportioning Liability to Nonparties in Kentucky Tort Actions: A Natural Extension of Comparative Fault or a Phantom Scapegoat for Negligent Defendants?*, 82 KY. L.J. 789, 827 (1994).

76. For a persuasive argument that the plaintiff should bear this risk because an injured plaintiff is always at risk that the tortfeasor cannot be identified or is insolvent, see McClellan, *supra* note 75, at 832.

77. *Cf.* Gillespie v. Flight Line Pub, Inc., 768 N.Y.S.2d 410, 410 (App. Div. 2003) (holding that an allocation of fault equaling one hundred percent in a previous action does not foreclose the issue of a new defendant's fault in a second action because the issue of the defendant's fault was not litigated in the earlier action). How a court would handle collateral estoppel in this context is not at issue here; it is merely raised as a potential factor against considering the fault of nonparties.

Because the policy debate does not reveal a superior approach to the nonparty fault issue, it was appropriate for the South Carolina legislature to limit fault allocation to the parties to the lawsuit. The wisdom of this approach is illustrated by the frustration that at least one state has experienced with the proliferation of nonparty-at-fault defenses.[78] Siegel and Wright chronicle the abuse of the nonparty-at-fault defense by defense attorneys in Arizona, which permits juries to allocate fault to nonparties.[79] They argue that while the legislature can implement procedural safeguards, such as notice to the plaintiff of the nonparty's identity, location, and the facts on which the claim is based, unless the courts construe these requirements strictly, abuse of the nonparty-at-fault defense is likely.[80] Whether or not the authors are correct in their assertion that the Arizona fault allocation system favors defendants, they raise several issues confronting a scheme that permits juries to consider the fault of nonparties, such as whether a time limit on alleging nonparty fault should be strictly enforced, whether defendants can blame unidentified nonparties or nonparties that cannot be located, and what burden the defendants have in demonstrating nonparty fault.[81]

V. CONCLUSION

As the jurisdictions using a "pure" fault allocation scheme refine their systems to resolve the issues of abuse of the nonparty-at-fault defenses, it may become apparent that allocating fault to nonparties is simply the next step in the evolution of fault allocation. When, and if, pure fault allocation becomes the rule in a majority of jurisdictions, the South Carolina legislature will benefit from other jurisdictions' experiences. In the meantime, it was proper for the legislature to resist rushing into a system still rife with unresolved issues and potential inequities. The legislative decision was especially appropriate if it was based on policy concerns such as the legitimate fear that comparing the negligence of nonparties might harm a plaintiff's ability to recover. While the problem of the "phantom" tortfeasor is not resolved by either system, the South Carolina Code—as amended to include section 15-38-15—coupled with liberal rules for joining parties to a suit, creates a system that adequately addresses nonparty fault, while at the same time accomplishes the goal of limiting joint and several liability.

Joshua D. Shaw

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78. *See* Mark Siegel & H. Michael Wright, *The Non-Party at Fault Defense: The Squirrel, The Phantom and Everybody Else But Me*, ARIZ. ATTORNEY, Jan. 1995, at 23, 23.

79. *Id.*

80. *Id.* at 24–26.

81. *Id.* at 24–28.