

# SC Litigation Update

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## Media Contact

Erica Gianetti

Marketing & Communications Supervisor

[erica.gianetti@mgclaw.com](mailto:erica.gianetti@mgclaw.com)

## SC Supreme Court Rules Against Defendants in Two Key Apportionment/Contribution Cases

Two companion cases were recently addressed by the South Carolina Supreme Court. For any questions regarding these two cases, please contact one of [MGC's litigation attorneys](#).

### [Smith v. Tiffany](#)

In a case involving partial settlement under the S.C. Contribution Among Joint Tortfeasors Act, S.C. Code § 15-38-10, *et seq.*, the S.C. Supreme Court denied Defendants' attempts to join a co-tortfeasor who had settled with the Plaintiff in exchange for a covenant not to execute.

Smith was injured when his vehicle was struck by Mizzell as the latter attempted to exit a parking lot and merge onto the roadway on which Smith was traveling. According to Mizzell, a disabled truck parked on the roadway's shoulder obscured his view of Smith's vehicle. Mizzell's liability carrier tendered its policy limits to Smith in exchange for a covenant not to execute in favor of Mizzell. Smith then brought suit against Defendants, the driver of the disabled truck and that driver's employers. Defendants brought a third-party complaint against Mizzell and raised numerous affirmative defenses seeking to have Mizzell added as a Defendant. Mizzell moved for summary judgment.

While the legislature abolished pure joint and several liability for tortfeasors who are less than fifty percent at fault under the S.C. Contribution Among Joint Tortfeasors Act ("Act"), the Act also requires the fact-finder to apportion one-hundred percent of the fault between the plaintiff and each "defendant" whose actions are the proximate cause of the indivisible injury. As such, Defendants contended that it was necessary to join Mizzell, despite the covenant not to execute, in order to allow a fair apportionment of damages. The Court found that, while achieving fair apportionment of damages was a policy goal of the Act, the legislature's foremost intent was to strike a fair balance for all involved – Plaintiffs and Defendants – and to do so in a way that promotes fair settlements. Importantly, a Plaintiff holds the right to choose which co-tortfeasor to sue. In an effort to balance interests, the Act allows the value of any settlement received prior to the verdict to be offset; a method to apportion fault; and the so-called empty chair defense. Mere joint tortfeasors are not necessary or indispensable parties to achieving a balanced outcome among parties.

**Key Takeaway:** The S.C. Contribution Among Joint Tortfeasors Act discharges a settling tortfeasor's liability as to the Plaintiff and nonsettling tortfeasors. The Act does not create a standalone cause of action for apportionment of fault to a non-party, but the Act does contain other ways to balance interests.

In a case certified by the US District Court, the South Carolina Supreme Court considered the intersection between the SC Contribution Among Tortfeasors Act and the exclusivity provision of the Workers' Compensation Act. It involves a tort claim brought against Carus, the manufacturer of a chemical product that reduces the odor in sewage.

**Background:** The Plaintiff was employed by the Town of Lexington and was injured when the product was being loaded into a storage system designed and constructed by the Town. He brought a workers' compensation claim against the Town and then sued Carus in federal district court.

**Key Takeaways:** The federal court certified four questions to the SC Supreme Court.

1. Could the jury hear an explanation as to why the employer was not part of the tort action?
2. Could the Defendants argue the empty chair defense and suggest that the Plaintiff's employer was the wrongdoer?
3. Could the court instruct the jury that the employer's responsibility, if any, has been determined in another forum, the WCC?
4. Could the court allow the jury to apportion fault against the non-party employer by putting the employer's name on the jury verdict form?

The Court answered "yes" to questions one through three, but answered "no" to question four, explaining that not allowing a non-employer Defendant to argue the empty chair defense and to point out the employer's actions that led to the injury, the non-employer Defendant's defenses might lack credibility and it could be held liable for an injury it did not cause. However, while an employer could have caused the injury in fact, that is different from legal cause, *i.e.*, finding the employer proximately caused the injury, given the exclusivity provision in the WCA. Because an employer cannot be the "legal cause" of an injury, it cannot be included on jury form. The opinion includes suggested jury instruction language.

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