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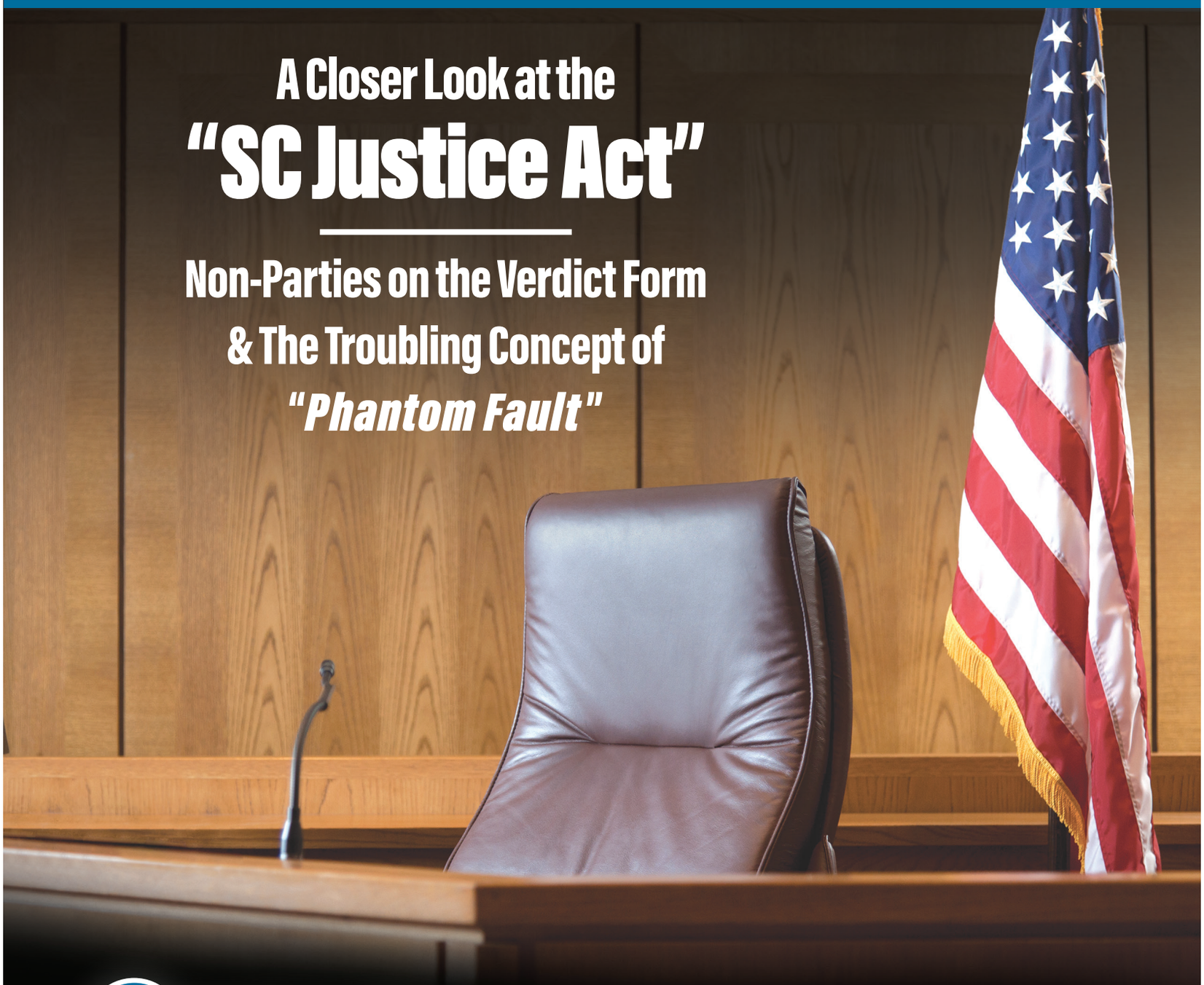

A Closer Look at the "SC Justice Act"

Non-Parties on the Verdict Form & The Troubling Concept of *"Phantom Fault"*

South Carolina Association for Justice
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A CLOSER LOOK AT THE "SC JUSTICE ACT"

By Perry M. Buckner, IV

There is new legislation currently pending before the General Assembly, and it is seeking to take tort reform to unprecedented levels in South Carolina. Senate Bill 533 ("S.533") seeks to fundamentally alter South Carolina's civil justice system in several dramatic ways, and these proposed changes all have one common element: they will make it more difficult for innocent victims of wrongdoers to be made whole.

The bill's central aim is a rewriting of S.C. Code Ann. § 15-38-15—South Carolina's modified joint and several liability law—which was enacted in 2005 after much debate. While some of the talking points supporting this new legislation may sound rational and benign, this so-called "SC Justice Act" will have alarming impacts for victims in our State and the public at large, and it will inevitably increase the amount of litigation and lawsuits pursued in South Carolina while lessening civil liability for criminal and reckless conduct. The intended and unintended consequences of this legislation must be confronted, examined, and addressed before it is too late.

This legislation primarily offers two critical changes to South Carolina's current tort law: 1) allowing non-parties to appear on the jury's verdict form in every civil trial and 2) removing the limited exceptions in our current law that still allow for pure joint and several liability for certain situations (e.g. grossly negligent acts or those related to alcohol or illegal drugs).

Non-Parties on the Verdict Form & The Troubling Concept of "Phantom Fault"

While civil defendants in South Carolina have long been able to argue an "empty-chair" defense at trial and that right was codified with the 2005 amendments to S.C. Code Ann. § 15-38-15, South Carolina does not currently permit non-parties or defendants who previously settled out of the case to be included on the jury's verdict form at trial. *See Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017); *Machin v. Carus Corp.*, 419 S.C. 526, 799 S.E.2d 468 (2017). A civil defendant may still successfully use the "empty-chair" defense if they can demonstrate to a jury that the plaintiff has not met their burden of proof against the defendant by virtue of another party's (or parties') superseding fault. Even if they cannot successfully do that at trial, defendants still have the recourse of contribution and indemnity claims against these non-parties or settled defendants in a subsequent lawsuit to "cure" any alleged disproportionate fault which is allocated to them by the jury and recover any alleged "overpayment." *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Our current system provides defendants with abundant options.

Nonetheless, S.533 attempts to completely overhaul this system and would permit juries to formally assign fault to those who aren't even technically part of the trial taking place before them. Of course, if a jury does assign fault to these non-parties, the plaintiff cannot lawfully recover monetary damages from them, and this new "phantom fault" would only serve to diminish a defendant's potential liability at trial while limiting a plaintiff's ability to recoup the total value of their loss.

Inevitably, this new law will turn South Carolina civil trials into a three-ring circus. How? Well, essentially <u>any</u> entity or individual person could be placed on the jury's verdict form under this proposed law's provisions so long as the defendant proposing their inclusion provides "a brief statement" that indicates a "good faith belief" in the non-party's fault and identifies these non-parties at least 120 days before the trial begins. See S.533 Section 1 at proposed Section 15-38-15(C)(3)(c)(ii).

The absurdity of this "good faith" threshold is well-illustrated when juxtaposed with the plaintiff's burden of proof at trial: to prove, by a preponderance of the evidence, that any defendant has both breached their applicable legal duty <u>and</u> proximately caused the plaintiff's damages. Plaintiffs must gather significant evidentiary support to defeat defendants' motions to dismiss, motions for summary judgment, and motions for directed verdict all in order to simply get their claims against a defendant before a jury. These long-established barriers make good sense: we do not want frivolous, unsupported claims being presented to a jury.

But under this new tort reform bill, defendants can apparently add non-parties to the verdict form on a whim so long as they subjectively state they are not doing so for nefarious purposes. This "good faith" standard would also seemingly override a defendant's current evidentiary burden to prove any affirmative defense, like non-party fault, by a preponderance of the evidence. This type of "justice" is not equaling the playing field for litigants by any objective measure. It is creating a new set of rules unique to defendants and tipping the scales in their favor.

This shockingly low threshold for the addition of non-parties will create endless potential problems for all litigants if enacted. These non-parties a) won't have lawyers participating in the trial on their behalf, b) might elect to not appear at the trial at all, c) might not be even subject to the jurisdiction of the South Carolina court in which the trial is conducted and d) might be legally immune from tort liability to begin with. Nonetheless, they would be blamed by defendants, and the jury must individually formally determine their potential fault. The practical effect? Protracted litigation, longer trials, and increased costs and expenses for all parties. Why? Defendants would be incentivized to blame any conceivable non-party so as to diminish their share of fault and plaintiffs would now be incentivized to sue these entities and individuals (who wouldn't otherwise be named as defendants) solely to avoid the allocation of fault to those who aren't parties in the case. These proposals will actually serve to increase claims and litigation. In states where similar bills have been enacted, dozens of defendants are frequently named in civil lawsuits so that they prevent abuse of non-party blame.

This bill would essentially create a new cottage industry of litigation in and of itself whereby the parties are constantly fighting in every trial over what "good faith" inclusion might mean, thereby thwarting judicial economy and undermining the supposed purpose of this bill: to make the civil justice system more fair. It will significantly increase pre-trial motion practice and lengthen the necessary amount of time before a case is ready for trial. Our State's trial judges, already burdened with backed-up trial dockets, will see these problems exacerbated.

The proposed legislation also specifies that the jury's liability allocation will include nonparties that settled prior to trial. See S. 533, Section 1 at proposed Section 15-38-15(C)(3)(c)(i) ("Allocation of fault to a nonparty shall be considered … if the plaintiff entered into a settlement agreement with the nonparty…".) From a public policy perspective, this provision presents two problems. First, it discourages settlements by any defendant prior to trial because a settlement would no longer prevent a public, judicial assignment of blame toward them, which is often a chief consideration in reaching a compromise. Second, plaintiffs would be presented with a Hobson's choice under this new law: forgoing any settlements prior to trial to avoid abuse of non-party blame or reach settlements knowing that "phantom fault" allocation could hinder their chance at being made whole. In doing so, this bill is contrary to South Carolina's policy favoring civil settlements. *See Chester v. South Carolina Dept. of Public Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010).

This Senate bill also offers a windfall to civil defendants placing previously settled defendants on the verdict form. Currently, trial defendants are entitled by law to a "set-off" or credit after the jury's verdict for any settlement amount paid by another defendant prior to trial. *Welch v. Epstein*, 342 S.C. 279, 312–13, 536 S.E.2d 408, 425 (Ct.App.2000). This law exists to prevent plaintiffs from a double recovery. If the plaintiff already got paid a portion of the damages a jury is later awarding them at trial, it is unfair to let the plaintiff get those damages twice.

S.533 does not consider this existing set-off right though and appears intent on giving defendants a duplicative reduction based on both the settlement monies paid by the settling defendant *and* the allocation of fault by a jury to that settling defendant. Indeed, any allocation of fault to settled defendants by the jury would serve to reduce the trial defendant's share of damages *on top of* their existing legal right to set-off which already serves to reduce their share of damages. There is simply no justification or rationale for this type of result being proposed as law.

In addition to the issues cited above, the most fundamental problem with putting either non-parties or settled defendants on the verdict form is that this concept of "phantom fault" undermines and discredits the integrity of the entire jury trial process. Our civil justice system is an adversarial system that relies on parties to advance and protect their own legal interests in order for the system to work. If trials are to function as a search for the truth, we rely on litigants to put their best case forward with the aid of competent legal counsel so that a jury can best evaluate fault when presented with opposing views.

However, what happens when non-parties or settled defendants are placed on the verdict form and injected into the case with no threat of a judgment or further payment obligation if fault is assigned to them? With no "skin in the game," there is no motivation for these entities or individuals to vigorously defend themselves, or even defend themselves at all, particularly without the ability to have legal counsel participate in the trial proceedings that will now formally involve them. Juries won't be seeing their best defense, or any defense at all, to these assertions of fault, and these non-parties will be blamed, in a public forum, while being deprived of the opportunity to properly defend themselves. The search for the truth will be diminished, and both plaintiffs and these non-parties will be inherently disadvantaged by this new "justice" proposal.

Protecting Bad Actors: An Attempt to Eliminate All Remnants of Traditional Joint and Several Liability

The second critical change sought by the "SC Justice Act" is the elimination of the few exceptions to S.C. Code Ann. § 15-38-15's abrogation of "traditional" or "pure" joint and several liability. While well-known to lawyers, joint and several liability is not a topic frequently encountered by the public at large. At its core, joint and several liability is a legal doctrine that was established in furtherance of one of the most fundamental goals of all tort laws: to ensure that innocent victims of wrongdoing are made whole. Understanding that many defendants are uninsured or judgment-proof, traditional joint and several liability permits plaintiffs/victims to collect all of the money damages awarded to them by a jury from any defendant that the jury finds responsible for the plaintiff's damages irrespective of their degree of fault.

Traditional joint and several liability remains the law of the land today for the vast majority of civil cases that are filed in states like Alabama, North Carolina, Virginia, and others. *See Tatum v. Schering Corp.*, 523 So.2d 1048 (Ala. 1988); N.C.G.S.A. § 1B-2; Va. St. § 8.01-443; *Cox v. Geary* 624 S.E.2d 16 (Va. 2006). However, this system was all but abolished in South Carolina in 2005. During that year, South Carolina Governor Mark Sanford signed the "South Carolina Tort Reform Act" into law, effectively ending traditional joint and several liability for 99% of civil cases filed in this state.

However, South Carolina's current law carved out some very limited exceptions for the purpose of both public safety and appropriately valuing victims' rights. Pursuant to S.C. Code Ann. § 15-38-15(F), "pure" joint and several liability still applies to:

> a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale or possession of drugs.

The logic behind these carve-outs is that criminals or people who intend to inflict harm should face steep civil deterrents under the law, and our legislature wisely decided to apply these same deterrents to defendants engaging in behavior that can be deemed reckless or grossly negligent conduct. These exceptions were public policy decisions that honored the values of South Carolina's citizenry in 2005 and still do today. South Carolinians generally don't want to incentivize reckless, quasi-criminal behavior or irresponsible acts involving drugs or alcohol. If we seek to be tough on crime and foster public safety, both our criminal and civil laws must have consequences for those who ignore them.

Unfortunately, these carve-outs are needed now even more so than in 2005. Alcohol and drug-related deaths, along with crime, are increasing at alarming rates in this State. According to the Governors Highway Safety Association, 477 deaths in South Carolina were attributed to intoxicated drivers in 2019 alone. According to statistics from the National Highway Traffic Safety Administration, drunk driving fatalities rose 14% from 2019 to 2020, and drunk driving was a critical component in making 2021 the d*eadliest year ever for South Carolina's roadways*. These same statistics demonstrate that South Carolina remains today among our nation's highest ranks for drunk-driving related incidents.

Ignoring this stark reality, the "SC Justice Act" seeks to disincentivize the safe, prudent sale and distribution of alcohol in this State and effectively immunize bars and restaurants from liability in alcohol-related fatalities and injuries. At a time

when alcohol-related fatalities remain high in South Carolina, do we really want to enact measures that will promote the unsafe, illegal consumption and sale of alcohol? For victims who are injured by drivers who were knowingly served four, five, or six times the legal limit of impairment to drive a vehicle, should drunk drivers be the only parties looked to for victim compensation? There has never been a more inappropriate time to loosen the responsibilities of all parties involved in the sale and distribution of alcohol.

The "SC Justice Act" has no business becoming the law of this state. **Our State's victims deserve better.**

Perry Buckner

Perry Buckner joined Yarborough Applegate in 2019 and has practiced law in Charleston since 2011. He has helped obtain some of the largest single-injury settlements in the history of South Carolina, which have included the representation of victims in cases involving industrial workplace accidents, tractor trailer collisions, defective products, negligent security, insurance bad faith, corporate negligence, medical malpractice, and nursing home neglect.