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?

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I. INTRODUCTION

It is fundamentally unfair to hoist the entire burden of a phantom or absent tortfeasor on a marginally negligent co-defendant,[1] and the South Carolina Legislature's adoption of

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section 15-38-15 of the Uniform Contribution Among Tortfeasors Act[2] (the Act) seemingly provides a remedy for defendants facing such inequity.[3] The express purpose of section 15-38-15 is to prevent defendants less than fifty percent responsible for a plaintiff's injuries from being held more than fifty percent liable.[4] Specifically, the Act "establishes that if two or more defendants cause an 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."[5] However, if South Carolina courts fail to allow

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1. *See* Russell T. Burke & E. Raymond Moore, *Apportionment of Liability*, NEXSEN PRUET, 7 (2004), http://www.nexsenpruet.com/assets/attachments/54.pdf [hereinafter Burke & Moore]; Julie O'Daniel McClellan, *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, 789 (1994).

2. H.B. 3008, 116th Gen. Assemb., Reg. Sess. (S.C. 2005), http://www.scstatehouse.gov/sess116_2005-2006/bills/3008.htm. The provisions of the bill took effect July 1, 2005, and only apply to causes of action arising on or after that date. *Id*. § 16(4).

3. S.C. CODE ANN. § 15-38-15 (Supp. 2010).

4. *Id*.

5. Joshua D. Shaw, *Tort Law: 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, 630–31 (2007) (citing § 15-38-15(A)). The statute purports to address liability of defendants "responsible for less than fifty percent of total fault," and provides:

> (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 tortuous 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

apportionment of fault to nonparty or settling defendants, the ostensible protection provided to defendants within the Act from

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the indivisible damages determined by the jury or trier of fact.

(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:

(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 in sub item (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortuous 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).

(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.

§ 15-38-15 (A)–(D).

the harsh injustice of joint and several liability[6] could all but vanish without a trace in cases involving phantom tortfeasors.

The Act unambiguously purports to limit the instances when joint and several liability applies in South Carolina tort actions, specifically denying application of the judicially created doctrine in cases where a defendant's conduct "is determined to be less than fifty percent of the total fault for the indivisible damages . . . ."[7] Whether the comparison is limited to defendants who are actual parties to the suit is unclear.[8] The Act has yet to be interpreted by the courts, but one proposed interpretation suggests fault allocation should be limited to named parties.[9] This interpretation, however, would render the March 2005 enactment of section 15-38-15 an inefficacious attempt to limit the doctrine of joint and several liability because it would allow plaintiffs the opportunity to impose backdoor joint liability on defendants who, consequently, will be forced to absorb the entire fault of nonparties.[10] Thus, the determination of whether section 15-38-15 is merely a phantasm in cases involving absent tortfeasors is yet to be seen.

This Note proposes that the Act was intended by the legislature to complete the shift to a fault apportionment approach, thereby requiring the fault of all tortfeasors, whether or not a party to the suit, to be considered by a jury or court when apportioning liability. Part II illustrates the practical issues implicated by the ambiguous language used in the Act and demonstrates the potential abuse that could result if courts interpret the Act as precluding consideration of nonparty tortfeasors. Part III tracks the shift in South Carolina tort law from the inherently inequitable doctrine of contributory

6. *See* Burke & Moore, *supra* note 1, at 2.

7. § 15-38-15(A).

8. Shaw, *supra* note 5, at 632–33.

9. *Id*. at 633 ("[T]he legislature's decision to omit any reference to nonparties demonstrates its intent to exclude nonparties from the fault allocation process.").

10. *See* Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 903 (1984) ("[I]n order to achieve a fair distribution of the financial burden in a true comparative fault system, it is imperative that the fault of all culpable actors, whether or not they are parties to the legal action, be measured and assigned.").

negligence to the adoption of a comparative approach, focusing on the conceptual tension between the comparative approach and the use of non-comparative approaches to joint and several liability. This part further suggests the equitable trade-offs that once justified the doctrine of joint and several liability no longer exist and further concludes the extinction of those principles necessitates the need for a shift of fault allocation among parties and nonparties. Part IV explores the language, purpose, and objectives of section 15-38-15 to support the position that a court applying the statute should permit a jury to allocate fault to a nonparty.

II. PRACTICAL IMPLICATIONS OF SECTION 15-38-15 AND THE POTENTIAL FOR BACKDOOR JOINT AND SEVERAL LIABILITY

The doctrine of joint and several liability "has the ancillary effect of enabling injured plaintiffs to seek out and sue only 'deep pocket' defendants—tortfeasors with significant assets but a potentially low degree of fault who by virtue of joint and several liability may be responsible for the entire amount of recoverable damages."[11] To counter the resulting "'inequities' suffered by low-fault, 'deep-pocket' defendants," many jurisdictions have enacted legislation to limit the scope of the rule.[12] "Indeed, '[t]he clear trend over the past several decades has been a move away from joint and several liability.'"[13]

South Carolina is no exception to this general trend, formally limiting the reach of joint and several liability in 2005.[14] Theoretically, the Act severs the power of a plaintiff to place an unfair and disproportionate burden on potential deep-pocket defendants by proclaiming that "joint and several liability does

11. Debenedetto v. CLD Consulting Eng'rs, Inc., 903 A.2d 969, 977 (N.H. 2006) (citations omitted).

12. *Id*. (citing other jurisdictions that have enacted legislation limiting low-fault, deep-pocket defendant liability).

13. *Id*. (quoting RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB., § 17 Reporters' Note to cmt. a, at 149 (2000)).

14. S.C. CODE ANN. § 15-38-15 (Supp. 2010); H.B. 3008, 116th Gen. Assemb., Reg. Sess. (S.C. 2005), http://www.scstatehouse.gov/sess116_2005-2006/bills/3008.htm.

not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault."[15] However, as discussed more thoroughly in Part IV, ambiguity in the Act's language could potentially diminish the ability of the statute to protect defendants less than fifty percent at fault from the harsh injustice of joint and several liability.[16] Although the Act explicitly allows a defendant to assert that "another potential tortfeasor, whether or not a party . . . may be liable for any or all of the damages alleged,"[17] it fails to expressly mention nonparties in the procedural fault apportionment subsection.[18] Consequently, it could be argued that absent tortfeasors were not intended to be considered in the fault apportionment process.[19] However, as the following subparts demonstrate, failure to consider nonparties would expose defendants to an inequitable allocation of fault—precisely the exposure the legislature intended to limit by enacting section 15-38-15.[20]

A. Enter (or Exit) Phantom Tortfeasors

The absence of an at-fault party inherently and undeniably exposes named parties to potential unfairly allocated liability.[21] Such nonparty tortfeasors are often called "phantom tortfeasors."[22] Phantom tortfeasors could be created intentionally by a plaintiff[23] or could be the result of a statutory

15. § 15-38-15(A).

16. *See infra* Part IV.

17. § 15-38-15(D).

18. § 15-38-15(C).

19. Shaw, *supra* note 5, at 633.

20. *See* § 15-38-15(A).

21. Mark M. Hager, 33 CONN. L. REV. 77, 124 (2000) ("Immunities protect or subsidize some social good or value, but in doing so impose a cost or tax which must be borne somewhere.").

22. F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing* Nelson v. Concrete Supply Co., 43 S.C. L. REV. 273, 308 (1992) [hereinafter Hubbard & Felix] ("The term 'phantom defendants' refers to a wrongdoer who causes the plaintiff's injury in part, but who is not a named party to the suit."); *see* Eilbacher, *supra* note 10, at 909–10.

23. The nonparty likely to be encountered by the jury most frequently is that tortfeasor with whom a plaintiff has reached a settlement before submission for decision. Eilbacher, *supra* note 10, at 909.

or jurisdictional mandate.[24] One article distinguishes between three classes of nonparties as (1) extrajurisdictional tortfeasors,[25] (2) immune nonparties,[26] and (3) nonparties that are neither extrajurisdictional nor immune and thus potentially answerable if sued.[27] Regardless of origin, it is clear their absence creates a gap between responsibility and liability that must be borne by either the plaintiff or the defendant.[28] Under traditional joint and several liability rules, this cost was allocated to defendants.[29] However, as jurisdictions move toward the more equitable approach of comparative fault, it becomes more difficult to unequivocally hoist this burden solely upon defendants.[30]

24. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB., § B19 cmts. e–f (2000); *see also* Hubbard & Felix, *supra* note 22, at 308 ("For example, because of the exclusivity of workers' compensation as a remedy for employment-related injuries, an employer who negligently alters a machine will not be a party to a suit for negligent design brought by the injured employee against the manufacturer of the machine." (citing S.C. CODE ANN. § 42-1-540 (1976) (footnotes omitted)).

25. Examples of extrajurisdictional nonparties could include unidentified parties or parties outside the jurisdictional reach. *See* Eilbacher, *supra* note 10, at 915.

26. Immunity could be found where a "person[] . . . [is] truly immune despite tortious conduct that would be actionable [or it could be] an alternative way of stating that there is no duty." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB., § B19 cmt. e (2000). "[F]or example, a municipality may be 'immune' from suit for failing to provide police protection to an individual who was assaulted." *Id.* Examples of the former include "[p]ersons for whom the statute of limitations bars suit" and persons upon whom "[s]tatutory provisions . . . place limits on the amount of liability . . . (e.g., a physician who committed malpractice)." *Id.*

27. Hager, *supra* note 21, at 119–20. For a detailed discussion of the possible scenarios that give rise to nonparty tortfeasors, see Eilbacher, *supra* note 10, at 908–20.

28. *See* Hager, *supra* note 21, at 124; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 475–76 (5th ed. 1984) ("[T]he failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault.").

29. Hager, *supra* note 21, at 124.

30. *See, e.g.*, Debenedetto v. CLD Consulting Eng'rs, Inc., 903 A.2d. 969, 978 (N.H. 2006).

B. Unfair Application of Section 15-38-15 and Backdoor Joint and Several Liability

If South Carolina courts refuse to consider nonparties—particularly settling defendants[31]—in the fault allocation process, plaintiffs will be given the unfair opportunity to impose back door joint and several liability on named defendants.[32] Further, the exclusion of phantom tortfeasors from consideration presents problems of fairness to both defendants and plaintiffs.[33]

To illustrate how easily the limitations of section 15-38-15 can be dodged, eliminating the protections intended for defendants, consider the following hypothetical: Plaintiff, a 13-year-old, is the passenger in an automobile driven by Plaintiff's eighty-seven year old grandmother (Grandmother) when they are involved in an accident. The accident involves two other tortfeasors; a judgment-proof graduate student (Student), and a wealthy executive (Executive) with substantial assets and insurance. Grandmother is eighty percent at fault, while Student and Executive are each ten percent at fault. Plaintiff could elect not to sue Grandmother and Student, bringing suit solely against Executive. If nonparty fault is ignored, Executive is essentially liable for 100% of the indivisible harm—a result that would be typical under traditional joint and several liability, but is

31. *See infra* Part IV for the textual argument that settling defendants should be considered.

32. For example, a plaintiff could strategically settle with a substantially at-fault defendant, with minimal assets, in order to ensure the deep pocket defendant would remain in the suit and be liable for 100% of the damages. However, because settling defendants are still technically defendants, they should not be precluded by the apportionment process outlined in sub-section C3 of the South Carolina Code section 15-38-15. *See* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining a defendant as "a person sued in a civil proceeding").

33. Including phantom defendants in fault allocation presents difficult issues for both plaintiffs and defendants. Hubbard & Felix, *supra* note 22, at 309. ("Plaintiffs face a tactical dilemma in arguing that an absent person was at fault; often plaintiffs will want to compare their own fault with the combined fault of all wrongdoers, but plaintiffs also face the risk that the court will find an absent nonparty defendant to be an intervening wrongdoer who was the sole proximate cause and therefore solely liable. Defendants face the converse dilemma.").

expressly proscribed in section 15-38-15.[34]

Now, consider this twist: Plaintiff brings suit against Grandmother and the wealthy Executive. On the eve of trial, Grandmother settles for $500. The jury returns a verdict in favor of Plaintiff for $10,000. If the jury were allowed to consider the nonparty fault of Grandmother and Student (assuming they found the same percentages above), Executive's liability would be limited to ten percent of the damages minus the proportional set-off from the $500 settlement,[35] or $750. In this same scenario, if nonparty fault is ignored, Executive would be liable for 100% of the verdict, minus the $500 set-off, or $9,500.

These patently unfair results do not serve the purpose of proportionate liability[36] and ultimately ensure that a marginally at-fault defendant will essentially still be jointly liable for the total amount of damages attributable to all defendants. Such a result does not comport with the language of subsection A, which states: 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."[37] Accordingly, in this hypothetical and numerous other real-world scenarios, failure to consider nonparty fault would render the protections of section 15-38-15 merely an illusion.

On the other hand, the exclusion of phantom tortfeasors from consideration also presents problems for plaintiffs. For example, "a plaintiff who is less than fifty percent at fault compared to all wrongdoers, including a phantom [tortfeasor], receives no recovery if the plaintiff is more at fault than the party defendants."[38] This could occur in a number of potential situations, even though the plaintiff is only marginally at fault.[39] One such scenario would be where a substantially at-fault party is immune.[40] Suppose the immune nonparty was seventy percent

34. *See* S.C. CODE ANN. § 15-38-15(A) (Supp. 2010).

35. § 15-38-15(E).

36. *See* discussion *infra* Part III and Part IV.B (outlining the policy objectives of comparative fault).

37. § 15-38-15(A).

38. *See* Hubbard & Felix, *supra* note 22, at 309–10

39. *See supra* notes 24–26 and accompanying text.

40. *See supra* notes 24, 26.

responsible for the indivisible harm, the plaintiff was twenty percent responsible, and the named defendant was ten percent responsible. If the immune nonparty's fault is ignored, the plaintiff will be foreclosed from any recovery because the plaintiff would be more than fifty percent at fault (approximately 66.66%), as compared to that of the named defendant (approximately 33.33%).[41] This result is contrary to the rationale behind the modified system of comparative fault, as it precludes recovery for a plaintiff who is less than fifty percent at fault for his total loss.[42]

Each of the above outlined situations, involving both defendants and plaintiffs, is contrary to the principles of comparative fault, as discussed more thoroughly in the following section.

III. EQUITABLE TRADE-OFFS: DEVELOPMENT OF COMPARATIVE FAULT IN SOUTH CAROLINA BEFORE SECTION 15-38-15

The polarizing debate concerning fair apportionment of liability between and among multiple tortfeasors has failed to bear much consistency among jurisdictions in the wake of a majority of states—including South Carolina[43]—abandoning the common law doctrine of contributory negligence and implementing the more equitable doctrine of comparative negligence.[44] The core principle of comparative negligence is that

41. In this scenario the plaintiff is responsible for two-thirds of the injury as compared to the named defendant, while only two-tenths responsible as compared to all three tortfeasors. Thus, when only considering the fault of the two named tortfeasors, the plaintiff would be foreclosed from any recovery under South Carolina's comparative fault rule because as between the named parties, the plaintiff is more than fifty percent at fault. *See infra* note 60 and accompanying text.

42. *See* Haley v. Brown (*In re* Estate of Haley), 634 S.E.2d 62, 73 (S.C. Ct. App. 2006) (citing Regenstreif v. Phelps, 142 S.W.3d 1, 6 (Ky. 2004)); *accord, e.g.,* Miller v. Lammico, 973 So. 2d 693, 706 (La. 2008) ("The fundamental purpose of Louisiana's comparative fault scheme is to ensure that each tortfeasor is responsible only for that portion of damage he has caused.").

43. Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991) (adopting comparative negligence as the law of South Carolina).

44. Hubbard & Felix, *supra* note 22, at 277 ("The [*Nelson*] court adopted

"[o]ne is liable for an amount equal to his degree of fault, no more and no less."[45] Consequently, much debate has surrounded several deeply rooted common law principles, including joint and several liability, as jurisdictions struggle to move from the inherently inequitable doctrine of contributory negligence to an allocation of responsibility based on degree of fault.[46] As one scholar noted, "the nonparty issue has become inextricably bound to the question of joint and several liability."[47] It is clear, however, the result of this national trend has been a seemingly slow and agonizing death of the judicially created doctrine of joint and several liability.

Prior to this trend, a plaintiff's contributory negligence, no matter how slight, served as an absolute bar to recovery.[48] However, in a seemingly equitable trade-off, a completely innocent plaintiff could invoke the benefits of joint and several liability, whereby the aggregate wealth of each defendant stood "behind the judgment regardless of the proportionate responsibility of the defendants individually for the loss."[49] Conspicuously, the rule of joint and several liability favored plaintiffs, but found justification in the harsh requirement of complete innocence on the part of the plaintiff rooted in the doctrine of contributory negligence.[50] "As between a defendant who was less at fault than a co-defendant and a plaintiff who was completely innocent, it was reasonable to place the loss on the wrongdoing defendant."[51] However, as jurisdictions adopted comparative negligence, the once "apparent" fairness of the

comparative negligence because it determined that compared to common-law contributory negligence, 'comparative negligence is the more equitable doctrine.'" (quoting *Nelson*, 399 S.E.2d at 784)); McClellan, *supra* note 1, at 789.

45. *See* cases cited *supra* note 42.

46. *See* Burke & Moore, *supra* note 1, at 1.

47. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 268 (1990).

48. Fernanders v. Marks Constr. of S.C., Inc., 499 S.E.2d 509, 512 (S.C. Ct. App. 1998).

49. *Id*. (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 475 (5th ed. 1984)). In other words, because the plaintiff was completely innocent, courts found it equitable to impose the entire burden of judgment-proof or absent parties on at-fault defendants.

50. *Id*.

51. *Id*.

doctrine of joint and several liability has proven "less defensible."[52]

In South Carolina, the innocent plaintiff justification remained a viable rationale for joint and several liability until the state supreme court in *Nelson v. Concrete Supply Co.*[53] adopted comparative negligence as the law in 1991.[54] Until that point, our jurisdiction was one of the last remaining citadels of traditional contributory negligence, but in one short paragraph the *Nelson* court "put us on the road to modernity in the apportionment field."[55] Following *Nelson*, the amount of a plaintiff's recovery would be reduced in proportion to the amount of his or her negligence. Where more than one defendant was responsible, the plaintiff's negligence would be compared to the combined negligence of all defendants.[56] "The primary question left unresolved by *Nelson* was its effect on the doctrine of joint and several liability when there was an insolvent or phantom [tortfeasor]."[57] In other words, where a nonparty tortfeasor was partially responsible for the injury, the question remained, where should that liability be absorbed? Despite the lack of clear direction from the *Nelson* court, an examination of the rationale behind the court's decision indicates a definitive shift to a more proportionate allocation of liability between plaintiffs and defendants.[58]

The *Nelson* opinion is brief and does not contain an analysis of the reasons for its adoption of comparative negligence beyond the assertion that "comparative negligence is the more equitable

52. *Id.*

53. 399 S.E.2d 783 (S.C. 1991).

54. *See* Hubbard & Felix, *supra* note 22, at 275 (noting that prior to *Nelson,* South Carolina followed the common-law rule that contributory negligence served as a complete bar to a plaintiff's recovery).

55. *See* Burke & Moore, *supra* note 1, at 2.

56. *Nelson*, 399 S.E.2d at 784.

57. Burke & Moore, *supra* note 1, at 3.

58. *See* Hubbard & Felix, *supra* note 22, at 278 ("*Nelson* gave no express rationale for selecting the equal-to-or-less-than modified system of comparative fault. However, the *Nelson* court referred to the court of appeals opinion in *Langley v. Boyter*, which the supreme court previously had quashed on procedural ground." (referencing Langley v. Boyter, 325 S.E.2d 550 (S.C. Ct. App. 1984) (footnotes omitted)).

doctrine."[59] However, the opinion in *Langley v. Boyter*,[60] to which the *Nelson* court expressly referred,[61] provides insight into the policy considerations examined by the *Nelson* court.[62] In *Langley*, the court of appeals summarized the reasons in favor of a modified system of comparative fault as follows:

> We choose the not-greater-than version of the doctrine [of comparative negligence] for essentially two reasons. Unlike the pure version, it does not allow a plaintiff to recover when he has been the most at fault in causing an accident. But, unlike the not-as-great-as version, it does not allow a defendant to escape all responsibility for an accident which he was equally at fault in causing. Instead, the not-greater-than version of the doctrine strikes the *reasonable balance of providing that parties equally at fault in causing an accident share equally in its cost*.[63]

Undoubtedly, the rationale behind the decision of the *Nelson* court in adopting comparative negligence nearly twenty years ago was to take a substantial step in the direction of ensuring an equitable division of liability among tortfeasors.[64] Nevertheless, development of comparative negligence through case law has required courts to harmonize certain tort concepts with the comparative approach[65] and has proven to be a gradual and incremental process. Specifically, the deeply rooted common law doctrines of assumption of risk and last clear chance met their demise with the onset of comparative negligence.[66] Rather than

59. *Nelson*, 399 S.E.2d at 784.

60. 325 S.E.2d 550 (S.C. Ct. App. 1984).

61. *Nelson*, 399 S.E.2d at 784.

62. *See Langley*, 325 S.E.2d at 564–65.

63. *Id*. at 565 (emphasis added).

64. *See generally* Hubbard & Felix, *supra* note 22, at 287 ("The comparative approach arguably is a fairer and more efficient method because it makes both wrongdoers responsible and provides both parties with a greater incentive to use due care.").

65. *See* Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 482 S.E.2d 569, 571 (S.C. Ct. App. 1997) ("This nationwide trend away from adherence to an 'all or nothing' rule such as contributory negligence in favor of the shared fault approach of comparative negligence has had a spillover effect in related areas . . . like last clear chance . . . and assumption of risk.").

66. *Id*. at 573 ("We choose, instead, to align South Carolina with the overwhelming majority of jurisdictions which have abolished assumption of risk

providing a complete defense, as traditionally was the case, these doctrines now serve as matters for the jury to consider when apportioning fault.[67]

The court's treatment of these common law doctrines provides compelling support for the view that the jury should consider the fault of all parties, whether named or not, when apportioning liability. While *Nelson* did not explicitly address the allocation of liability among multiple defendants,[68] the rationale for employing joint and several liability and imposing all the risk of insolvency on defendants—that, as between innocent plaintiffs and culpable defendants, the latter should bear this risk—does not coexist comfortably with the rationale for comparative responsibility.[69] Despite the innocent status of plaintiffs no longer being the justification for joint and several liability, the courts still struggled with reconciling the conceptual tension between the comparative approach of *Nelson* with the judicially enacted, and deeply rooted, doctrine of joint and several liability.[70]

In *Fernanders v. Marks Construction of South Carolina, Inc.*, the Court of Appeals recognized that the rationale for joint and several liability is "less defensible" in light of the *Nelson* decision.[71] However, the court refused to abrogate the doctrine and rectify the inherent unfairness of shouldering the entire

as a total bar to recovery."); Spahn v. Town of Port Royal, 499 S.E.2d 205, 208 (S.C. 1998) (holding last clear chance is merely a factor for the jury to consider in apportioning negligence).

67. *See* cases cited *supra* note 66 and accompanying text.

68. *See* Hubbard & Felix, *supra* note 22, at 308 ("*Nelson* indicates that 'the plaintiff's negligence shall be compared to the combined negligence of all defendants.' Whether the comparison is limited to defendants who are actual parties to the suit is unclear.") (quoting Nelson v. Concrete Supply Co., 399 S.E.2d 783 (S.C. 1991)).

69. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 10 cmt. a (2000).

70. *See* Fernanders v. Marks Constr. of S.C., Inc., 499 S.E.2d 509, 512–13 (S.C. Ct. App. 1998). Following the *Nelson* decision, the Court of Appeals was forced to address the issue of whether fault could be allocated between multiple defendants. However, the court refused to do so finding such a decision would abrogate joint and several liability and "would involve an expansion of *Nelson*, not merely an application." *Id*. at 513.

71. *Id*. at 512.

burden of the remaining judgment on the defendants, irrespective of their degree of fault, even where the plaintiffs are also at fault.[72] The court found that abrogation of joint and several liability would involve "an expansion of *Nelson*, not merely an application."[73] The court went on to hold such "expansion" would effectively nullify a statutory provision of the Act[74] by allowing proportionate allocation of liability based on a defendant's relative degree of fault, which would be inconsistent with the pro rata approach outlined in the statute.[75] This argument, however, failed to recognize that *Nelson* already adopted a scheme whose policy basis is at odds with the Act since a plaintiff's degree of fault was determined proportionately rather than on a pro rata basis.[76]

Despite the continued unfairness following the decision in *Fernanders* that joint and several liability continues to exist under comparative negligence,[77] the recent enactment of section 15-38-15 has effectively limited the circumstances where defendants can be held jointly liable.[78] The remaining issue, however, is whether this limitation is illusory in the instance of phantom tortfeasors. Specifically, is the jury's comparison of fault limited to defendants who are actual parties to the suit?[79]

72. *Id*. at 513 ("[J]oint and several liability could never be a factor in apportioning negligence because a plaintiff's ability to collect a judgment has no bearing on a defendant's relative degree of negligence . . . .").

73. *Id*. (citing Hubbard & Felix, *supra* note 22, at 306).

74. S.C. CODE ANN. §§ 15-38-10 to -70 (Supp. 2010).

75. *See Fernanders*, 499 S.E.2d at 513.

76. *See* Burke & Moore, *supra* note 1, at 7.

77. *Fernanders*, 499 S.E.2d at 513.

78. § 15-38-15(A).

79. Shaw, *supra* note 5, at 632–33.

IV. FAIR ALLOCATION OF LIABILITY: LIMITATIONS OF JOINT AND SEVERAL LIABILITY AFTER SECTION 15-38-15

The only feasible way to accomplish the South Carolina legislature's express goal of section 15-38-15[80]—to shield defendants from the inequities inherent in joint and several liability when they are less than fifty percent at fault[81]—is to allow the jury to consider nonparty fault in cases involving phantom or absent tortfeasors.[82] 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.[83] The problem of the phantom tortfeasor is explicitly addressed in subsection D, which 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."[84] As such, the language of subsection D ostensibly forecloses any debate on the issue of whether the jury shall consider nonparty fault when allocating liability, when the defendant has properly set forth evidence that another potential tortfeasor was at fault.[85]

However, the language of subsection C3,[86] which provides for the apportionment of percentages of fault, could potentially be viewed as ambiguous as it relates to the role nonparties play in

80. To ascertain the legislative goal, we are confined to the express language of the statute, the title provided by the legislature, and the language used in previous versions of H.B. 3008 as the legislative history is scant.

81. *See* § 15-38-15(A), (D).

82. *See, e.g.*, Debenedetto v. CLD Consulting Eng'rs, Inc., 903 A.2d. 969, 978 (N.H. 2006) ("Many jurisdictions permit a jury to consider 'nonparties' such as unknown or immune tortfeasors when apportioning fault."). One court found "[t]he underlying rationale for such a rule is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question, whether or not they are named parties to the case." *Id.* (citing Laselle v. Special Prod. Co., 677 P.2d 483, 485 (Idaho 1983)).

83. *See* § 15-38-15(A).

84. § 15-38-15(D).

85. *Id.*; *see also* Shaw, *supra* note 5, at 633.

86. § 15-38-15(C)(3).

fault allocation.[87] Although subsection D expressly allows a defendant to argue that fault should be allocated to a nonparty, subsection C3 does not specifically mention fault of nonparties as a consideration in determining fault among the defendants and the plaintiff.[88] Rather, subsection C3 directs the fact-finder to specify the percentage of liability that is "attributable to each *defendant* whose actions are a proximate cause of the indivisible injury."[89] This section continues by stating that the "total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent."[90]

While there is obvious ambiguity in the language of the statute, in light of the express language of subsection D,[91] the purpose and intent behind comparative fault, and the policy considerations supporting nonparty fault allocation, a court applying the statute should find that fault can be allocated to a nonparty.

A. Statutory Interpretation

The language contained in subsection D expressly and unambiguously provides a defendant with the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury and/or may be liable for any or all of the damages alleged by the plaintiff.[92] This express language,

87. *See* Shaw, *supra* note 5, at 633 ("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.").

88. *Id*. ("[T]he legislature's decision to omit any reference to nonparties demonstrates its intent to exclude nonparties from the fault allocation process."). Use of the term "defendants" in subsection C3 could arguably include settling parties, who were named defendants prior to reaching a settlement agreement with the plaintiff.

89. § 15-38-15(C)(3) (emphasis added). It could be argued, though, that the use of the term defendants could include "phantom defendants," as "phantom defendants" are sometimes defined as "unnamed defendants." *See* Max Ernst, Lincoln Property Co. v. Roche*: Slaying the Phantom Defendant*, 53 LOY. L. REV. 323, 352 (2007).

90. § 15-38-15(C)(3).

91. § 15-38-15(D).

92. *Id*.

notwithstanding any potential interpretive ambiguity of subsection C3,[93] cannot be ignored, as the "legislature intends to accomplish something by its choice of words, and would not do a futile thing."[94] Further, 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 a statute's operation."[95] As such, to simply ignore the language of subsection D would be a "subtle or forced construction"[96] of the precise language used by the legislature,[97] 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.[98] Furthermore, glossing over the language would essentially render this provision of the statute meaningless and superfluous.

Notwithstanding the unambiguous language of subsection D, it could be argued that the express language of subsection C3,[99] which directs the jury on how to allocate fault, precluded the consideration of nonparties in the apportionment instructions by failing to include any specific reference to nonparties.[100] It could

93. § 15-38-15(C)(3); Shaw, *supra* note 5, at 632–33.

94. Gordon v. Phillips Utils. Inc., 608 S.E.2d 425, 427 (S.C. 2004) (citing State *ex rel*. McLeod v. Montgomery, 136 S.E.2d 778, 782 (1964)).

95. Rowe v. Hyatt, 468 S.E.2d 649, 650 (S.C. 1996) (citing Gilstrap v. S.C. Budget & Control Bd., 423 S.E.2d 101, 103 (S.C. 1992)).

96. *Id*.

97. *See* Shaw, *supra* note 5, at 636 (conceding there is a strong argument against construing section 15-38-15(D) as merely a legislative reservation of a defense that was previously available to defendants because of the express language provided in subsection D).

98. § 15-38-15(D).

99. § 15-38-15(C)(3), (D).

100. *See* Shaw, *supra* note 5, at 632–33. Many statutes that allow apportionment of fault to nonparties have express language that provides for such consideration. *Id*. at 634 (citing GA. CODE ANN. § 51-12-33(C) (Supp. 2006) which states: "In assessing percentages of fault, the trier of fact shall consider that 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 omitted)). Admittedly, the legislature could have chosen more direct language in subsection C3 to ensure nonparty fault would be considered. However, until the legislature adopts clearer statutory language, it is imperative that the courts consider the language of subsection D, as well as the goals of comparative negligence to ascertain that under section 15-38-15, nonparty fault must be taken into account when

also be contended that the legislature deliberately determined that the jury should not consider any potential fault of nonparties.[101] The former is the most compelling argument against nonparty fault allocation; however, it fails to consider one of South Carolina's primary rules of statutory construction.[102] "In construing statutory language, the statute must be read as a whole . . . and sections which are part of the same general statutory law of the state must be construed together, and each one given effect, if it can be done by any reasonable construction."[103] Reading the statute as a whole establishes that it was enacted to limit the reach of joint and several liability to instances where a defendant is more than fifty percent at fault.[104] Thus, this purpose should be "given effect"[105] by allowing nonparty fault allocation. The latter argument, that the legislature deliberately excluded nonparties, is not completely accurate.

While the legislature did not explicitly use the term "nonparty" in subsection C3, it was expressly referenced in subsection D.[106] The legislature's express inclusion of nonparties in subsection D reinforces that fault should be allocated to a nonparty, thereby reducing a defendant's percentage of liability in the overall allocation of fault.[107] Furthermore, failure to do so would make subsection D a right without a remedy, as the defendant asserting that another potential tortfeasor "contributed to the alleged injury" and is liable for part of the

apportioning liability.

101. *Id*. at 632. A previous version of the bill stated: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person was, or could have been, named as a party to the suit." H.B. 3008, 116th Gen. Assemb., Reg. Sess. (S.C. 2005), http://www.scstatehouse.gov/sess116_2005-2006/prever/3008_200 41208.htm (as referred to H. Comm. on the Judiciary, Dec. 8, 2004).

102. Smalls v. Weeds, 360 S.E.2d 531, 534 (S.C. Ct. App. 1987).

103. *Id*. (citing State v. Fidelity & Deposit Co. of Md., 104 S.E. 182 (1920)).

104. § 15-38-15.

105. *Smalls*, 360 S.E.2d at 534.

106. § 15-38-15 (C)(3)–(D).

107. *See generally* Shaw, *supra* note 5, at 636 (outlining potential arguments in favor of fault allocation to nonparties).

damages alleged by the plaintiff[108] serves no mitigating function for the defendant if the assertion is not considered in the overall fault allocation.

Additionally, the inclusion of nonparties in the fault allocation scheme can be done without violating the express language of subsection C3.[109] For instance, upon motion by a defendant for a special verdict,[110] the jury could allocate fault to each tortfeasor, including nonparties, on the verdict form.[111] The statute requires that (1) the total of the percentages must equal 100%, and (2) the inclusion of any percentage of fault of the plaintiff shall not reduce the amount of the plaintiff's recoverable damages.[112] Neither mandate would be compromised by allowing the jury to consider nonparties, while the express purpose of the Act would undoubtedly be negated by failure to do so. In fact, consideration of nonparty fault would only limit the amount of recoverable damages against the named defendants in accordance with the percentages of fault assessed by the jury but would leave the plaintiff free to collect from other nonparty tortfeasors.

Furthermore, the argument that subsection D was included to prevent a court from misreading the Act as eliminating a defense previously available to the defendant that another tortfeasor caused the plaintiff's injury[113] also ignores the plain language of the statute.[114] The subsection provides a right to assert that another is liable for "any or all of the damages,"[115] which implies it is applicable beyond traditional causation defenses and is available when multiple parties are

108. § 15-38-15(D).

109. § 15-38-15(C)(3).

110. *Id*.

111. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § B19 cmt. h (2000) ("If a jury is the factfinder, the court submits a verdict form seeking a determination of the total damages suffered by the plaintiff and the responsibility assigned to each party and each other person having legal responsibility for [or having proximately caused] plaintiff's damages.").

112. § 15-38-15(C)(3).

113. *See* Shaw, *supra* note 5, at 634.

114. § 15-38-15(D).

115. *Id*.

proportionately and simultaneously at fault.[116]

The plain language contained within the recently enacted statute, taken with the history of comparative and contributory negligence principles, provides a strong argument for finding the legislature intended nonparty fault to be taken into account by the jury. The following subpart argues that the principles of comparative negligence and the policy objectives of section 15-38-15 could not properly be served without considering nonparty fault in apportioning liability. Further, the clear purpose of enacting section 15-38-15—to limit the situations in which joint and several liability is applicable—would be circumvented without such consideration given to nonparties.

B. Principles of Comparative Negligence and Policy Objectives

The failure to allow consideration of nonparty fault provides plaintiffs with the necessary tools to impose backdoor joint and several liability upon named defendants because, by default, the defendants would be the proverbial last (or only) man standing. This result could occur even when a defendant is less than fifty percent liable, in blatant contravention of the express purpose of section 15-38-15.[117] To the extent that a given legal system ignores the fault of any tortfeasor and shifts the financial burden from one culpable person to another, the fundamental principle of comparative fault is compromised.[118] As one court opined, "[t]here is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss."[119] Accordingly, where the intended purpose of the Act is that defendants are only liable for their proportionate share of fault, it is essential that the negligence of absent tortfeasors be

116. *See generally* Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 141 (Ark. 2009) (finding a distinction between allocation of fault to a phantom tortfeasor and the traditional "empty chair" defense).

117. § 15-38-15(A); *see also supra* Part II.

118. Eilbacher, *supra* note 10, at 903.

119. Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978).

subtracted.[120] Further, as discussed above,[121] serious problems of fairness to both plaintiffs and defendants could result in a variety of potential scenarios.[122] Last, limiting fault allocation to named parties "could result in strategic behavior by plaintiffs that is inefficient."[123]

Without allowing for consideration of nonparty fault when applying section 15-38-15, the very essence of comparative negligence and proportionate liability would be thwarted.[124] "The core principle of comparative negligence is that '[o]ne is liable for an amount equal to his degree of fault, no more and no less.'"[125] Furthermore, as one court stated when addressing the issue of nonparty fault allocation, "[p]laintiffs now take the parties as they find them."[126] There is no compelling social policy that requires a defendant to pay more than his proportionate share of loss.[127] This is true even:

> If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency . . . . The same is true if one of the defendants is wealthy and the other is not.[128]

The arguments that once supported such inequity in contributory negligence jurisdictions are "no longer compelling because of the purpose and intent behind . . . comparative negligence."[129] Thus,

120. Mutter, *supra* note 47, at 268.

121. *See supra* Part II.

122. Plaintiffs and defendants could also potentially face substantial disincentives to settle where nonparty fault is not considered. For example, in those situations in which a plaintiff's own negligence might be less than the negligence of two potential defendants combined, but greater than the negligence of either defendant alone, the plaintiff would be reluctant to settle. Hubbard & Felix, *supra* note 22, at 309–10.

123. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB., § B19 Reporters' Note to cmt. d, at 179 (2000).

124. *See* Haley v. Brown (*In re* Estate of Haley), 634 S.E.2d 62, 73 (S.C. Ct. App. 2006) (citing Regenstreif v. Phelps, 142 S.W.3d 1, 6 (Ky. 2004)) (discussing the principles of comparative negligence).

125. *Id.* (quoting *Regenstreif*, 142 S.W.3d at 6).

126. Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978).

127. *Id.*

128. *Id.*

129. *Id.*; *see also supra* Part III discussing the development of comparative

it is apparent that an interpretation of section 15-38-15 that turns a blind-eye to a plaintiff's opportunity to extract the above results from defendants through backdoor joint and several liability cannot be reconciled with the policies behind comparative negligence.[130]

Further, limiting fault allocation to named parties "could result in [inefficient] strategic behavior by plaintiffs. If nonparty responsibility is [ignored], plaintiffs [are incentivized] to sue multiple defendants serially, rather than in the same action, in the hope that with multiple opportunities to recover the overall result will be better than joining all potentially responsible parties."[131] Moreover, ignoring phantom defendants in fault allocation could create "difficult problems of coordinating the outcome of multiple suits over the same indivisible injury."[132] Alternately, allowing nonparty fault allocation would serve as an incentive for plaintiffs to adjudicate their claims in an efficient manner and to ensure that all potential tortfeasors are held proportionately liable. Otherwise, joined defendants are unfairly prejudiced because they are consequently required to bear a greater portion of the plaintiff's loss than attributable to their fault.[133]

While this Note is not aimed at the procedural aspects of considering nonparties, it is worth mentioning that there are some legitimate concerns of fairness where nonparty fault is considered. First, a "plaintiff may not always be compensated for that portion of his damages attributable to certain kinds of tortfeasors, such as the insolvent tortfeasor."[134] "Although this

fault in South Carolina.

130. *See* Hubbard & Felix, *supra* note 22, at 306 (discussing the "conceptual tension" between the comparative approach of *Nelson* and noncomparative approach of joint and several liability).

131. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB., § B19 Reporters' Note to cmt. d, at 179 (2000).

132. *Id*.

133. *Id*.; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 475–76 (5th ed. 1984); *see also* Eilbacher, *supra* note 10, at 903 ("To the extent that a given legal system ignores the fault of any tortfeasor, and shifts the financial burden from one culpable person to another, the fundamental principle of comparative fault is compromised.").

134. *See* Eilbacher, *supra* note 10, at 907.

may appear to be a harsh result, a defendant should not be penalized for a plaintiff's lack of diligence,"[135] strategic party selection, or tactical settlement schemes. If fairness and "[d]iligence is to be encouraged, so as to achieve true apportionment and liability according to fault, the burden of loss must fall on the party who determines who shall be [or who shall remain] defendants in the suit."[136] Second, there is the potentially negative effect of apportionment of comparative responsibility on the nonparty's reputation, as well as the burden of proof being placed on the plaintiff to introduce evidence and argue the culpability of nonparties.[137] However, there are procedural safeguards available to alleviate those concerns, such as intervention or a motion to join the absent party as a necessary and indispensable party.[138] Further, the latter concern is "obviated by the fact that the plaintiff and defendant have symmetrical and opposing incentives to present evidence regarding the appropriate share of comparative responsibility to be assigned to a nonparty."[139]

Thus, to give full effect to the purposes and objectives of the legislature in enacting section 15-38-15, a court should allow the jury to consider nonparty fault and allocate liability accordingly. Failure to do so will result in unfair exposure for both plaintiffs and defendants, as their relative degree of fault would be determined based on an incomplete compilation of wrongdoers. Because the policy considerations cannot be served without doing so, courts should allow apportionment between all wrongdoers when section 15-38-15 is implicated.

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135. *Id*. at 912.

136. *Id*.

137. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB., § B19 Reporters' Note to cmt. c, at 178 (2000).

138. *Id*.

139. *Id*.; *see also* Eilbacher, *supra* note 10, at 909 ("It does not matter to the defendants whether . . . a settlement has been consummated, or for how much, or even if the settling tortfeasor is excused from participating at trial, since the terms of such settlement are not determinative of the extent of any defendant's liability for damages. However, the defendant is vitally concerned about the percentage of fault to be assigned to the settling nonparty and will actively seek to shift as great a percentage as possible to the settling tortfeasor. *Of course, such an attempt to shift fault will be resisted by the plaintiff*." (emphasis added)).

V. CONCLUSION

Prior to the enactment of section 15-38-15, the development of comparative fault in South Carolina was dependent upon judicial change and evolution of common law on a case-by-case basis. However, in 2005 the legislature stepped in to make a definitive and express amendment to the applicability of joint and several liability, in order to limit the situations in which a defendant would be liable for more than his proportionate share of fault. The express purpose was to allow such exposure only where a defendant is more than fifty percent at fault. To comport with this purpose and to prevent a defendant from bearing the brunt of liability of phantom or absent parties, merely by virtue of the procedural apportionment process, it is necessary to consider nonparty fault. While the language outlined in the Act failed to specifically reference nonparties in the apportionment of percentages subsection, the ability of defendants to assert nonparty fault was specifically included within the Act, which is compelling evidence that the legislature intended to include such parties within the new statutory scheme of comparative fault analysis. As such, courts should allow juries to consider nonparty fault as part of their fact-finding mission. Otherwise, the apportionment scheme of section 15-38-15 may serve no legitimate purpose other than an inefficacious attempt to modify the never-changing doctrine of joint and several liability—one that is disproportionately harsh on defendants and plaintiffs alike.