The South Carolina Policy Council

BAD FOR BUSINESS:

South Carolina must reform its unfair civil liability system

By Bryce Fiedler

INFORMATION

The South Carolina Policy Council
1323 Pendleton St.
Columbia SC 29201

SCPC is a leader in tax reduction and reform, private property rights, education reform, government deregulation, transparency and governmental accountability, and efforts to expand individual liberty.

Bad for business: South Carolina must reform its unfair civil liability system

It took less than three hours for a South Carolina jury to find disgraced attorney Alex Murdaugh guilty of killing his wife Maggie and son Paul. But the unraveling of this once-prominent family has brought to light a much broader legal issue which has existed for years: South Carolina's civil liability law is grossly unfair to businesses, and the resulting legal climate will make it harder to attract and retain new jobs and investment.

In many states, if you cause someone harm, you pay your share of damages – no more, no less. But not in South Carolina. Here, local businesses can be forced to pay entire legal verdicts even if they were only partially at fault for an incident, a concept known as "joint and several" liability.

Small- and medium-sized companies are at particular risk under this law, and there is worry it will deter them from locating or doing business in our state. Unlike large corporations, these businesses can't afford to employ in-house legal teams, which can be necessary when trying to operate in a precarious legal environment.

Attention to the law has been heightened recently by the civil suit filed on behalf of Mallory Beach, who tragically died in a 2019 boat crash involving Paul Murdaugh. Prior to the accident, Paul illegally purchased alcohol at a Parker's Kitchen convenience store (part of a company with 70 stores in South Carolina and Georgia), and alcohol was later purchased or made available at other businesses or homes, according to court records.

Several defendants initially settled, but the suit against Parker's Kitchen would not be resolved until July 2023, after the business agreed to pay a reported total settlement of $18 million. Despite the fact alcohol was illegally provided at subsequent locations, including shots of liquor that were served shortly before the crash, Parker's Kitchen was forced to accept a disproportionately high settlement as the remaining defendant.

Other examples showing the negative impacts of SC's civil liability law

In 2012, Walter Smith was struck and injured by another driver, Corbett Mizzell, as Mizzell was exiting a gas station onto the highway in Saluda County. Mizzell claimed his view was obstructed by a disabled commercial truck parked on the highway shoulder, though his insurance company paid their policy limits and settled the case. When Smith sued the truck owner, the owner argued that Mizzell was responsible for a significant share of Smith's injuries because he initiated the crash and requested Mizzell's proportion of fault be considered at trial. However, in 2017, the S.C. Supreme Court ruled that South Carolina's joint and several liability law only permits allocation of fault among named *defendants*, and Mizzell could not be included on the verdict form for purposes of allocating fault.

At a March 2023 legislative hearing, an insurance broker described how one South Carolina business was held liable for serving a single beer to a customer. After leaving the business, the customer in question visited multiple other bars or restaurants, becoming involved in a car accident more than 12 hours later. Despite these factors, the business had to pay out $250,000 through its insurance provider. The broker estimated that 20 insurance carriers in the last four years have pulled out of the state because of the current law and legal climate.

If the South Carolina General Assembly does not quickly repeal and replace the state's joint and several liability law, local businesses will continue to be unfairly punished by being forced to pay hefty verdicts that include damages caused by others, while future companies and investors will look elsewhere in search of a fairer and more predictable legal environment.

Key Takeaways

In South Carolina, a defendant in a civil case who is partially at fault for an injury can be forced to pay 100% of a court's verdict.

Select businesses are often targeted because of this law, many of whom face disproportionate and unfair damage awards.

Rising insurance rates and a poor legal climate will harm South Carolina's ability to compete for jobs in the future, putting recent economic progress in jeopardy. Small- and medium-sized businesses are at particular risk in this climate.

A pair of House and Senate bills (H.3933 & S.533) would address problems with the current law and help reduce the number of businesses forced to pay unfair damage awards in civil cases, but would not entirely fix the underlying problem.

South Carolina should join the growing number of states that have adopted a pure several liability model, under which a defendant is only liable based on their percentage of fault.

Modified joint and several liability

Joint and several liability is a legal doctrine under which a person can be held entirely liable for damages to a plaintiff, regardless of their percentage of fault for an incident. As of 2005, South Carolina follows a modified version of joint and several liability, which says that a defendant who is at least 50% at fault can be forced to pay an entire verdict.

For example, if three drivers are involved in a car accident in which two were at fault, one or both at-fault drivers could potentially be liable for 100% of the damages. Here is how this could play out:

There was a car accident involving three separate drivers.

Driver 1 is the plaintiff, who was not at fault and sustains $200,000 in damages for his property and injury.

A jury determines that Driver 2 is 51% at fault and Driver 3 is 49% at fault for the accident.

The plaintiff could collect the full amount of damages from Drivers 2 and 3 proportionally.

However, the plaintiff could also collect 100% of the damages from Driver 2 since he was at least 50% at fault.

But what would happen if the plaintiff sued only one of the drivers? One South Carolina Supreme Court case provides some clarity:

In Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (2017), plaintiff Smith was injured in a vehicle accident in Saluda County. Smith's vehicle was struck by another vehicle driven by Mizzell. Mizzell struck Smith while Mizzell tried to exit a gas station onto U.S. 178. Although Mizzell claimed his view was obstructed by a disabled commercial vehicle that was parked on the shoulder of U.S. Highway 178 adjacent to the gas station exit, Mizzell's insurance company paid their policy limits and settled the case. Following the insurance settlement with Mizzell's insurance company, Smith filed suit against the driver and owner of the disabled truck that was parked on the shoulder of the road.

At trial and on appeal, the commercial truck driver claimed that Mizzell was responsible for a significant portion of the plaintiff's injuries because it was Mizzell who hit Smith's vehicle while exiting the gas station parking lot. Thus, the commercial truck driver called for a determination of Mizzell's proportion of fault, regardless of whether Mizzell had previously settled. The S.C. Supreme Court held that current law only permits allocation of fault among "defendants" and thus Mizzell was not included on the verdict form for purposes of allocating fault.

In other words, the case brought to light a critical flaw with our civil liability system: current law does not permit juries or judges to properly consider the liability of nonparties when assigning fault percentages, even if they were largely responsible for an incident.

The failings of the 2005 law

Prior to 2005, South Carolina relied on a pure joint and several liability model, under which each defendant in a civil case can be held fully liable for a plaintiff's damages, regardless of their percentage of fault.

The concept of joint and several liability is explained in Matthews v. Seaboard Air Line Railway, 67 S. C. 499, 46 S. E. 335 (1903) (citations omitted):

"If two or more persons owe to another the same duty, and by their common neglect of that duty, he is injured, doubtless, the tort is joint, and upon well-settled principle each, any, or all of the tort feasors may be held. But when each of the two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, if such several neglects occurred and united together in causing injury, the tort is equally join, and the tort feasors are subject to a like liability."

In 2005, the General Assembly enacted a modified joint and several liability law that was facially intended to provide that a defendant less than 50% at fault would only be responsible for damages based upon their percentage of fault – and provide for the allocation of fault among the plaintiff, defendants and other responsible parties.

The issue, however, is that the law now only permits allocation of fault among the plaintiff and named defendants, effectively leaving a named defendant responsible for the fault of nonparties. The language of the 2005 statute – as reinforced by the South Carolina Supreme Court's 2017 decision in Smith v. Tiffany – has created a civil liability system rife with inequity and given trial lawyers free rein to target businesses to recover damages caused by another person.

In Smith v. Tiffany, the party arguably most at fault – the driver who actually hit the plaintiff – did not get sued and was able to settle within their insurance policy limits. By settling with the main tortfeasor, the plaintiff was able to seek virtually all 100% of his damages against the commercial truck driver, a party with significantly more financial resources.

Another problem is that, according to the law, "any percentage of fault of the plaintiff . . . shall not reduce the amount of plaintiff's recoverable damages."

Finally, the law provides that a defendant – regardless of their percentage of fault – will be held jointly and severally liable if their conduct involves the use, sale, or possession of alcohol; or if it falls within a broad list of conduct that is "wilful, wanton, reckless, grossly negligent, or intentional." This effectively means that any business selling or providing goods or services related to alcohol could arguably be forced to pay an entire verdict if a jury finds them just 1% at fault for an incident.

The General Assembly has failed to address these issues, including the plain language issue highlighted by the 2017 Tiffany decision. Meanwhile, other states are seeking to restore balance to their legal environments and improve their ability to attract and retain business.

Citizens are entitled to a legal system that is fair to all, a rule which must extend to civil liability. Many would agree that plaintiffs should not be allowed to "judge shop" or "jurisdiction shop" to secure a friendly venue that tilts the scales of justice in their favor. Yet in South Carolina, plaintiffs are both permitted and financially incentivized to unfairly target specific defendants, many of whom are only partially at fault for an incident. South Carolina businesses and its people deserve better.

Economic impact

South Carolina's liability law is having a far-reaching economic impact and imposes a tremendous cost on residents. If not addressed quickly, local businesses could be faced with bankruptcy after a single lawsuit, and the state's ability to attract and retain small- and medium-sized companies will be severely undermined.

A poor legal climate – South Carolina's liability system was ranked 37th in the nation by the Institute for Legal Reform (ILR) in a 2019 report. It was ranked 34th by ILR just two years prior, showing a trend for the worse. Meanwhile, the 2022-2023 "Judicial Hellholes" report, a project by the American Tort Reform Foundation, ranked South Carolina as the 6th-worst "hellhole" for its asbestos litigation practices, citing "extraordinary pro-plaintiff rulings" and a reputation for "severe verdicts."

Impact on future business – Eighty-nine percent of businesses indicated that a state's litigation environment is likely to impact their business decisions, including where to locate, according to a survey as part of ILR's 2019 report. Half indicated that it is very likely.

High costs – According to a 2022 ILR report, South Carolina's tort costs are an astonishing 2.6% of the state GPD, which can be measured as a cost of $3,181 per household. The South Carolina Chamber of Commerce notes that Palmetto State businesses are often paying for these costs through high insurance premiums and litigation expenses, which are passed on to the consumer.

A desire for change – A whopping 87% of S.C. Republican primary voters indicated support for civil liability reform and answered "yes" to the following ballot question in 2022: "In a situation where there is more than one person responsible for damages in a lawsuit, do you support changing South Carolina law so that each person should pay damages based on that person's actual share of fault?

The South Carolina Policy Council has spoken with local business leaders and recruiters to learn more about the challenges facing state economic growth. A consensus among the parties is that the liability issue is being used by other states to try to scare off businesses from locating here, and there is concern our state may struggle to keep those that take a chance.

Unfortunately, the scare tactics are not without basis. At a March committee hearing on S.533 (the Senate's modified joint and several liability reform bill), one insurance broker provided several examples of how the current law is unfairly punishing local businesses. He described how one business was held liable for serving a single beer to a customer – who subsequently visited multiple other bars or restaurants and was involved in a car accident more than 12 hours later – resulting in a staggering $250,000 payment by the liability insurer. The broker estimated that 20 insurance carriers in the last four years have pulled out of the state and will no longer offer liquor liability insurance because of the current law and the state's legal climate.

Often, when companies and manufacturers decide to locate in South Carolina, their moves are heavily subsidized by taxpayers. In March, South Carolina announced a massive taxpayer-funded deal with the auto manufacturer Scout Motors, owned by the Volkswagen Group. The bulk of the state's $1.3 billion incentives package covers infrastructure items that include the purchase of land, local road improvements, and a sprawling new training center.

While taxpayer-funded incentives are routinely used to attract large companies, South Carolina can do more to support small- and medium-sized business by passing liability reform. Creating a legal environment that is fairer and less punitive will be critical to economic growth in this sector.

States are ditching joint and several liability

Currently, 18 states – including Florida, Georgia, Kentucky, Mississippi and Tennessee – have largely or entirely abandoned joint and several liability and determine a defendant's liability based upon their percentage of fault.

Florida

The Florida Legislature limited their joint and several liability laws because of the unfairness to business owners. Walt Disney World Co. v. Wood, 515 So. 2d 198 (Fla. 1987), explains that the state Legislature should reconsider the doctrine of joint and several liability because while Disney World was found to be only 1% at fault, they were responsible for the largest portion of damages. In this case, the jury had found that the plaintiff was 14% at fault, her husband was 85% at fault, and Disney was 1% at fault. Because Florida law allowed defendants to be held jointly and severally liable for a plaintiff's injuries, the trial court entered a judgment against Disney to pay for 86% of the plaintiff's damages

In 2006, the Florida Legislature amended its law, which now reads in part: "In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." § 768.81(d)(3), Fla. Stat. (2022)

And, on March 23, 2023, Florida enacted further legal reforms, including addressing the ability of plaintiffs to recover "phantom damages" for medical expenses they didn't incur, limiting abusive bad faith claims against insurers, and reforming Florida's comparative fault law, which had previously permitted plaintiffs to recover even if they were majority at fault.

Tennessee

Tennessee amended its joint and several liability law in 2021 to read: "If multiple defendants are found liable in a civil action governed by comparative fault, a defendant shall only be severally liable for the percentage of damages for which fault is attributed to such defendant by the trier of fact, and no defendant shall be held jointly liable for any damages." TN Code § 29-11-107(a) (2021).

Georgia

In 2005, the Georgia Legislature eliminated joint and several liability by enacting O.C.G.A. § 51-12-33, which, after a series of amendments in 2022, states in part: "(b) Where an action is brought against one or more persons for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the person or persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution." GA Code § 51-12-33 (2022).

It further reads: "(c) 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."

In August, Georgia Governor Brian Kemp announced that he intends to pursue further legal reforms in order to address frivolous lawsuits that drive up costs for Georgia businesses and harm economic development. The move brings further pressure on South Carolina to quickly pass reform, or risk falling behind in the region.

Mississippi

Prior to enacting major tort reform, including the repeal of joint and several liability, Mississippi was seen as a "playground" for trial attorneys because the state's justice system was tilted so heavily in favor of plaintiffs. In fact, Mississippi's former Gov. Haley Barbour once admitted to the *Wall Street Journal* that the CEOs of several Fortune 500 companies informed him they wouldn't locate to the state unless the system was fixed.

Mississippi amended its liability law in 2004, which reads in part: "(2) Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault." MS Code § 85-5-7 (2013).

Governor McMaster's proposal

In South Carolina Governor Henry McMaster's 2022 and 2023 State-of-the-State addresses, he called upon the General Assembly to address joint and several liability, most recently stating:

"One issue in need of re-examination is in the area of civil litigation known as 'joint and several liability.' Nobody, including business owners, should be penalized for the actions of others, simply because they have more money. Nor should anyone be absolved of responsibility for their own actions. I am confident that we can find a commonsense formula which will provide accountability and just compensation without damaging our economy."

Governor McMaster's attention to joint and several liability reform was applauded by the National Federation of Independent Business (NFIB). "South Carolina's reputation as one of the best states for small business is being undermined by a civil justice system that leans heavily against defendants including small business owners," said NFIB State Director Ben Homeyer. "We agree with Governor McMaster that small businesses shouldn't be penalized for someone else's mistake just because they might have more money. When a small business is sued, it has to spend tens of thousands of dollars to defend itself. Just one frivolous claim can be enough to put a small business out of business, even if the case is eventually thrown out of court."

Recent legislative proposals

In March, the Policy Council analyzed a pair of House and Senate bills (H.3933 and S.533), each of which has a significant number of legislative co-sponsors and would improve, but not fully reform, the state's liability system.

The bills would:

- Require juries or judges to consider nonparties in addition to defendants when determining fault, addressing the issue brought to light by the S.C. Supreme Court's 2017 decision.
- Repeal the unfair state law applied to businesses selling alcohol (or whose conduct falls within other exceptions), which hypothetically could force them to pay entire verdicts if they are just 1% at fault.
- Ostensibly reduce the number of businesses forced to pay disproportionate damage awards by requiring juries or judges to consider nonparties.
- Repeal the section of law which prevents a plaintiff's percentage of fault from reducing their recoverable damages.

Critically, however, the bills would not entirely repeal South Carolina's modified joint and several liability law. Under the proposals, a defendant determined to be 50% or more at fault could still be held liable for the damages caused by another, continuing the unfair practice of forcing businesses to pay entire verdicts.

The sponsor of H.3933 also filed another bill (H.3053) that would completely repeal joint and several liability and hold each party liable based on their percentage of fault, while allowing allocation of fault to nonparties. Of the legislative proposals filed in the current session, H.3053 most represents reform and should be prioritized.

Conclusion

South Carolina's approach to civil liability is having a negative impact on the local business environment and will ultimately jeopardize its ability to compete for jobs and investment. With other nearby states making efforts to balance their respective legal environments, South Carolina must swiftly reform its civil liability law or risk being left behind. Addressing joint and several liability is a good place to start. The Policy Council urges the Legislature to repeal joint and several liability and replace it with a pure several liability model, under which a defendant is only financially liable based upon their percentage of fault.

Make a donation Online:
Go to scpolicycouncil.org/donate
in order to give via PayPal or credit card.

By Mail:
Mail your gift to
SCPC, 1323 Pendleton Street,
Columbia SC 29201

Where to find us:
scpolicycouncil.org
thenerve.org

Follow SCPC & The Nerve:
Facebook.com/scpolicycouncil
Twitter.com/scpolicycouncil
Facebook.com/thenervesc
Twitter.com/thenervesc

Contact us:
info@scpolicycouncil.org
Phone: 803-779-5022

Sign up for our weekly newsletter on our website!