SPECIAL REPORT | QUALITY OF LIFE

SANDLAPPER SHAKEDOWN:

How the South Carolina Lawsuit Industry Unfairly Targets Job-Creators and Raises Prices for Everyone

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Our laws and regulations provide guidelines to…prosperity, and our civil justice system provides enforcement of these guidelines and redress for injury. Yet, our rules on joint and several liability have introduced an element of uncertainty into our business arena and uncertainty is the enemy of sound business.

—Governor Henry McMaster, The State of the State, January 24, 2024

The trucking industry in the United States is the lifeblood of the nation's economy. Over three-quarters of American communities depend exclusively on trucks to meet their freight transportation demands, which is not surprising since trucks move roughly 72 percent of U.S. domestic tonnage shipped. Yet trucking in America is under siege by litigation.

—*Roadblock: The Trucking Litigation Problem and How to Fix It,* U.S. Chamber of Commerce Institute for Legal Reform, July 2023 (citing U.S. Census Bureau, *U.S. Census Bureau Commodity Flow Survey,* 2017)

WELCOME TO THE "JUDICIAL HELLHOLE"

South Carolina's lawsuit industry is out of control. Plaintiff attorneys benefit from outrageous damage awards while bars close and job-creators are alarmed. This phenomenon was on national display in Netflix's *Murdaugh Murders: A Southern Scandal* where a convenience store owner was unfairly and relentlessly targeted by plaintiff attorneys because alcohol was involved.

There's a reason for all those lawsuit industry billboards on the Interstates…they work!

But the problem in the Palmetto State goes deeper than a few one-off traffic accidents and slips and falls. **South Carolina led the "judicial *hellhole*" list in 2020 and has remained in the top 10 since then**. Our state has become famous for outrageous awards, including **$32 million** for secondhand asbestos exposure. Judges here have even *increased* awards and have acted as a "thirteenth juror," driving up damages even further. In a related issue, in 2023, businesses began to shut down due to rising insurance premiums caused in part by government policy.

As Governor McMaster has said, this is bad for attracting and keeping job-creating businesses. A recent expert analysis of Palmetto State tax policy even listed the lawsuit industry as a threat to the state's economic competitiveness—the lawsuit industry pain and injustice spill over into policy areas beyond jurisprudence. The final point in this indictment stings the patriotic South Carolinian the most: our neighbors are reforming their civil justice systems—in some cases dramatically—and we are not.

So, how did we get here, and how do we get this massive problem fixed?

HERE'S THE RECENT ACTION ON THE ISSUE

There was hope as the 2023-24 legislative session began. The issue of "tort reform" (also known as "lawsuit reform" or "civil justice reform") attracted significant attention. But after languishing in a hostile committee for over a year and a half with a trial lawyer Democrat as chairman, a Senate bill (The South Carolina Justice Act, S.533) limped onto the floor. Though 24 of 46 Senators were listed as sponsors, the bill was defeated. Seven Republicans joined most Democrats to kill it. No concerted effort was attempted in the House of Representatives, though a bill was filed (H.3933).

The loss was a gut-punch for sure, but for perhaps the first time, businesses of all sizes became engaged in the debate, raising awareness among family,

friends, customers, and the General Assembly, of how, in the current Palmetto State civil liability system, their livelihoods have targets on their backs.

Business and industry are finally making a solid case that outsized damage awards are a lawsuit *tax* by a lawsuit *industry* on employers, that these trial lawyer-led shakedowns have become all too common in South Carolina, and we are at risk of strangling the golden goose that has led to our recent in-migration and prosperity. 275,000 jobs are at risk in the hospitality industry alone.

This outrage at the injustice of both the "lawsuit tax" and the "bar tax" could lead to a broader base of support for action in 2025 to finally repeal a tort statute that is essentially a regressive tax, not only on the *businesses* who are being dragged into court for a scintilla of true liability but on *anyone* who consumes goods and services. That would be all of us!

WHAT DO SOUTH CAROLINA CITIZENS THINK ABOUT CURBING THE LAWSUIT INDUSTRY AND RESTORING CIVIL JUSTICE? THE SCGOP ASKED ON THE BALLOT.

Should it be an immediate legislative priority to protect South Carolina's competitiveness and small businesses by changing state law so that a person's responsibility for financial damages in a lawsuit is based on that person's actual share of responsibility?

YES 88%
NO 12%

In seeking to understand the reasons why the South Carolina civil justice system is broken, first, let's engage in a bit of Lawsuit 101. Simply defining our terms (and defining our terms simply) sheds a lot of light on the problem.

HERE ARE THE KEY TERMS TO UNDERSTAND...

1. **TORT/TORTIOUS**. An intentional or negligent act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which redress may be found by bringing the wrongdoer to Court and seeking the imposition of money damages by a jury or judge.

2. **LIABILITY.** Liability attaches where a jury (or sometimes a judge) in a civil court, determines that, by a preponderance of the evidence (the scales of justice tip ever so slightly in the Plaintiff's favor), the alleged wrongdoer is responsible for damage to another due to an intentional or negligent act or omission. While an individual convicted beyond a reasonable doubt of a crime is "guilty," an individual in a civil case may be found, by a preponderance of the evidence, to be "liable."

3. **TORTFEASOR**. A person or entity that commits a tort.

4. **NEGLIGENCE.** The failure to behave with the level of care that a reasonable person would have exercised under the same or similar circumstances which leads to damages.

5. **CONTRIBUTORY NEGLIGENCE.** Tort rule which bars plaintiffs from recovering for the *negligence* of others if *they too* were negligent in causing the harm.

6. **COMPARATIVE NEGLIGENCE.** A legal doctrine which compares the fault of parties, including the plaintiff, in a lawsuit and requires apportionment of fault among all parties to that lawsuit by a judge or jury.

7. **"PLAINTIFF CHOOSES."** In the case of multiple *tortfeasors*, the person or entity harmed due to a *tort* decides which tortfeasor to sue and can decide to settle with some defendants or all of them prior to trial.

8. **JOINT & SEVERAL LIABILITY (JSL).** When two or more parties are jointly and severally liable for a tortious act, that means that each party is independently liable for the full extent of the injuries stemming from the tortious act. Thus, if a plaintiff wins a money judgment against the [tortfeasor] parties collectively, the plaintiff may collect *the full value of the judgment from any one of the tortfeasors*. That party may then seek contribution from the other wrongdoers but there is no guarantee of success in that attempt.

9. **CONTRIBUTION.** An action a defendant may bring in a joint and several liability jurisdiction to recover for damages they paid out but did not cause.

DRILLING DOWN ON "JOINT AND SEVERAL"

Joint and Several liability refers to the apportionment system that courts use to allocate responsibility for payment of damages awarded in tort cases with multiple negligent parties. The term joint and several liability can refer to many types of apportionment such as pure several liability, "pure" joint-and-several liability (**JSL**), or modified joint and several liability.

The intent behind the original **JSL** construct was to protect the plaintiff at all costs. In its most basic form of implementation, **JSL** ensures that a plaintiff receives all the financial compensation to which a jury determines their injury has warranted...paid by *anyone* of the named defendants. On the other hand, **pure several liability** holds defendants liable only for the payment of damages to the plaintiff they are *actually responsible for* according to the percentage of fault assigned to them by the fact-finder (jury or judge).

PURE SEVERAL LIABILITY

In states with **pure several liability** laws—like Florida and in most cases Tennessee—if, in a civil suit with multiple defendants, Defendant #1 is found 5% liable for the damages in a case in which the plaintiff was granted $100,000 for their injuries, Defendant #1 would then owe the plaintiff $5,000. In a **pure several liability** state, that would be the end of the story: Defendant #1 owes $5,000. The other defendants would likewise be responsible for their apportioned fault.

In states with **joint and several liability** or comparative negligence—like South Carolina—the legal outcomes become much more complicated. The plaintiff could be able to seek full financial compensation from Defendant #1 no matter what percentage of fault is assigned by a judge or jury. Thus, instead of owing $5,000, Defendant #1 could potentially be held liable for the full $100,000, even when that sum does not reflect their actual *proportionate* share of the damages. This happened in a

case in Florida, *Walt Disney World v. Wood* (1987) where a tortfeasor (Disney) with 1% fault paid 86% of the damages. This outrage led to tort reform in the Sunshine State.

Bluntly speaking, this practice is unfair. However, South Carolina does provide some assistance to the defendants when situations like the ones noted in the above example occur. For example, Defendant #1 would be entitled to seek **contribution** from the non-paying defendant (see above) in order to "get back" the funds they lost because they had to pay the other defendant's portion of the share. Regardless, this option would only come into play *after* the defendant provides the plaintiff with the full amount they are ordered by the court to remit (in this example, the full $100,000). In addition, for Defendant #1, the **contribution action** means more legal fees, more time, and significant emotional strain from ongoing legal proceedings. This is where we see that **joint and several liability** is not just an arcane legal term—it's highway robbery.

There is no question that our civil justice system should protect vulnerable plaintiffs, but not at the expense of grossly unfair treatment of a defendant who is perceived as having "deep pockets," like a regional **trucking** firm in a **traffic accident** or a large **discount store** chain in a "**slip and fall.**" The reality is anyone could end up on either side of a trial—and every citizen should be able to know with confidence that the state has their back—that state law is *just*—regardless of which table they occupy in the courtroom.

LEGAL AND LEGISLATIVE HISTORY TO KNOW

Several dates and actions are key to our understanding of how South Carolina tort law has evolved. Much of this history was laid out beautifully in Judge Costa Pleicones' dissent in *Smith v. Tiffany* (2017). The following is taken from the Pleicones' dissent but includes some simplifications.

- **1988.** Passage of the *South Carolina Contribution Among Tortfeasors Act* allowing a tortfeasor (again, that is a person who has committed a tort and caused an injury) to seek *contribution* if he paid more than his fair share under the state **joint and several liability** statute. Before that Act, common law prevented any right of contribution.

- **1991**. Supreme Court leads a shift from **contributory negligence** to **comparative negligence**. Before that, if a plaintiff contributed even only slightly to an injury, the plaintiff could have been out of luck. The principle of **Plaintiff Chooses** was still in effect.

- **2005**. In the *South Carolina Economic Development, Citizens, and Small Business Protection Act of 2005*, (SC Code Section 15-35-15) of 2005, the General Assembly abrogated **pure joint and several liability** for tortfeasors less than **50%** at fault and strengthened the notion of allocation of fault. The factfinder (in most cases a jury) would apportion the 100% of fault between the plaintiff and the defendants. But the sting in the tail was that if a defendant is over 50% at fault, joint and several still applies (minus the amount attributed to the plaintiff), so the business or person could still be liable for the *total* damages if they are over 50% liable for the damages.

- **2017**. ***Smith v. Tiffany*.** This landmark case led to an interpretation of the 2005 Act that still holds. The ruling was that fault in a civil action must be allocated among ***defendants*** in the case before the court only, not necessarily among all ***tortfeasors***. In *Smith*, the Court found that it was the intent of the legislature to ensconce in the law the principle that "defendant" and "tortfeasor" have different meanings. Non-party tortfeasors (persons that the plaintiff chose not to sue in the case) cannot be joined to a case in order to serve the cause of just allocation of fault among ***all*** tortfeasors. In the outcome of the *Smith* case itself, this led to the party with most of the fault not being a part of the case and not presented to the jury.

  Judge Pleicones argued in his dissent in this complicated traffic accident case that the **plaintiff chooses** rule should not be invoked to violate his view of the legislative intent in the 2005 Act. He argued that the majority's decision to prevent a defendant (or all defendants) from being joined to a case would produce an "irrational allocation of fault" where "a seemingly major contributor to the accident is not factored into the liability determination." His clincher: "I find such a result contrary to the policy expressed by the General Assembly in the 2005

amendments to the Act, which seeks to protect less culpable defendants from being burdened with more than their fair share of liability."

But, Judge Pleicones was a dissenter, not a part of the four-judge majority opinion. South Carolina still operates under a ***modified* comparative negligence** system, because of the holding in *Smith v. Tiffany* in 2017 and the 2005 Act. Parties to an event could settle separately with a tortfeasor and not be a part of a later suit. Liability would be divided *only among those before the court* in the succeeding case.

This leads to a final concept that is essential for understanding South Carolina's version of **joint and several**: our **faulty jury verdict form**. Here is what that means. When a case is presented to a jury in a civil action in South Carolina, the verdict form used by the jury to award **damages** and assign **fault** includes only the defendants in the specific case before the court ("plaintiff chooses"). Other defendants who have liability in the tort action (example: others involved in a traffic accident) are not necessarily included on the jury verdict form. Post *Smith v. Tiffany*, the responsibility of others with whom the plaintiff may have settled in a separate case *are often not presented to the jury*. This is perhaps the greatest injustice. It all but guarantees an unfair result.

WHAT TORT REFORMS HAVE BEEN ENACTED?

- The **2005 Tort Reform Act** prevents plaintiffs in medical malpractice actions from pursuing non-economic damages, such as pain and suffering, over $350,000 unless the defendant's conduct was willful, wanton, or grossly negligent. It also required a Notice of Intent to Sue and mediation in suits against accountants, lawyers, professional engineers, and other professionals as well as medical doctors. Joint and Several liability would no longer apply to a defendant whose conduct is determined to be less than 50% of the total fault. **This legislation essentially undid a state Supreme Court case on medical malpractice (*Epstein v. Brown; Pittman v. Stevens*).**
- In **2011**, a contractor's risk for any construction defects was reduced from thirteen to eight years, a cap on punitive damages modeled after Florida's cap was instituted, appeals bonds were capped, and approval from the attorney general began to be required for civil actions by circuit solicitors. Other Florida reforms related to Workers' Compensation were not included.

THE WAR ON SC TRUCKING BUSINESSES...

Trucking is a low-margin business, with many businesses operating on a profit of 10 cents per dollar in revenue. Most motor company carriers are small as well, with fleets of ten or fewer trucks. Nobody in our economy works harder than truckers and motor carrier company owners.

- 79.8% of SC communities depend exclusively on trucks to move their goods.
- 93.8% of total manufactured tonnage transported by trucks in the state (148,900 tons per day)
- 21,730 trucking companies are located in SC.

South Carolina trucking businesses are primarily small, locally owned businesses, these companies are served by a wide range of supporting businesses.

But trucking is under siege from the lawsuit industry. Verdicts have exploded in the last 25 years. An analysis by the Institute for Legal Reform of 154 trucking cases over three years (2020-2023) revealed that the mean or average plaintiffs' award was $27,507,334. The median was $759,875. The trucking companies and their insurance carriers are forced to write the checks, but these costs represent a drain on our economy and a tax on us all.

....AND MOM & POPS

We often assume that big businesses are the only targets of personal injury litigation, but this is not the case.

While small businesses accounted for just 20 percent of business revenues in 2021, they bore 48 percent of commercial tort costs. Furthermore, in proportion to revenue, the costs of the tort system in 2021 were more than seven times greater for the smallest businesses than for the largest ones.

—U.S. Chamber of Commerce Institute for Legal Reform

SOUTH CAROLINA MAKES THE TOP TEN WORST LIST FOR TORT COSTS PASSED ON TO CONSUMERS

In *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* (November 2022), researchers used insurance data to estimate the cost of the tort system in America. The report was able to break costs to the United States economy down into general and commercial claims which included personal injury claims, consumer claims and other claims, automobile accident claims, and medical liability claims. The total cost to the nation's economy was **$443 billion** in 2020, or **2.1%** of Gross Domestic Product (GDP). Because a similar study had been conducted in 2016, researchers were able to show that the 2016 direct economic costs of the tort system have grown at **6%** per year, faster than inflation during that period. The longitudinal analysis also showed that commercial liability claims are growing faster than personal liability claims—**7%** per year versus **4%** per year. This makes businesses less competitive and because the United States has higher costs than other developed countries, it can drive away foreign investment.

Finally, the study found that "for every dollar paid in compensation to claimants, **88 cents** were paid in legal and other costs," a most inefficient system for compensating claimants.

Here is what the study found for the top ten states as a percentage of Gross Domestic Product:

	STATE	GENERAL/ COMMERCIAL	MEDICAL LIABILITY	AUTO-MOBILE	TOTAL COSTS	TORT COSTS AS % OF STATE GDP	TOTAL COSTS PER HOUSEHOLD
1	FL	$19,931	$1,146	$19,096	$40,173	3.63%	$5,065
2	LA	$2,714	$149	$4,177	$7,040	2.99%	$4,018
3	NM	$1,365	$170	$1,209	$2,745	2.79%	$3,462
4	DE	$1,161	$61	$811	$2,033	2.68%	$5,480
5	NJ	$8,523	$724	$7,306	$16,552	2.68%	$5,059
6	MT	$740	$54	$563	$1,358	2.64%	$3,114
7	MS	$1,341	$96	$1,561	$2,998	2.63%	$2,685
8	AR	$1,757	$94	$1,529	$3,380	2.59%	$2,888
9	GA	$6,867	$607	$8,447	$15,922	2.56%	$4,157
10	SC	$2,529	$172	$3,539	$6,239	2.55%	$3,181

TWO SOUTH CAROLINA PROBLEMS

Generally speaking, South Carolina operates under a system of modified comparative negligence. Under this scheme, a Plaintiff cannot recover if they are determined to be more than 50% at fault for an accident. If the Plaintiff is less than 50% at fault and no defendant is more than 50% at fault, then the recovery is reduced by the percentage of fault assigned to the Plaintiff and then each defendant pays its pro rata share of the damages. However, if the Plaintiff is less than 50% at fault and any defendant is more than 50% at fault, that Defendant can be made to pay the entire amount of the award (less the amount assigned to be the fault of the Plaintiff). Two considerations, however, affect the fairness of this system:

Modified Comparative Negligence Jury Verdict Form

First, if there are multiple Defendants originally sued, however, during the pendency of litigation, some of those Defendants settle out and at trial, only one or some of the Defendants are left, the law states that the **verdict form** can only include the **at-trial parties** and that the apportionment of fault must equal 100%.

Existence of Joint & Several Liability in the Context of Alcohol

Second, there's alcohol. The current South Carolina tort statute included an unfortunate sentence. It reads:

> **"This section [requiring 50% fault to trigger joint and several liability] does not apply to a defendant whose conduct is determined to be willful, 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." (SC Code §15-38-15F)**

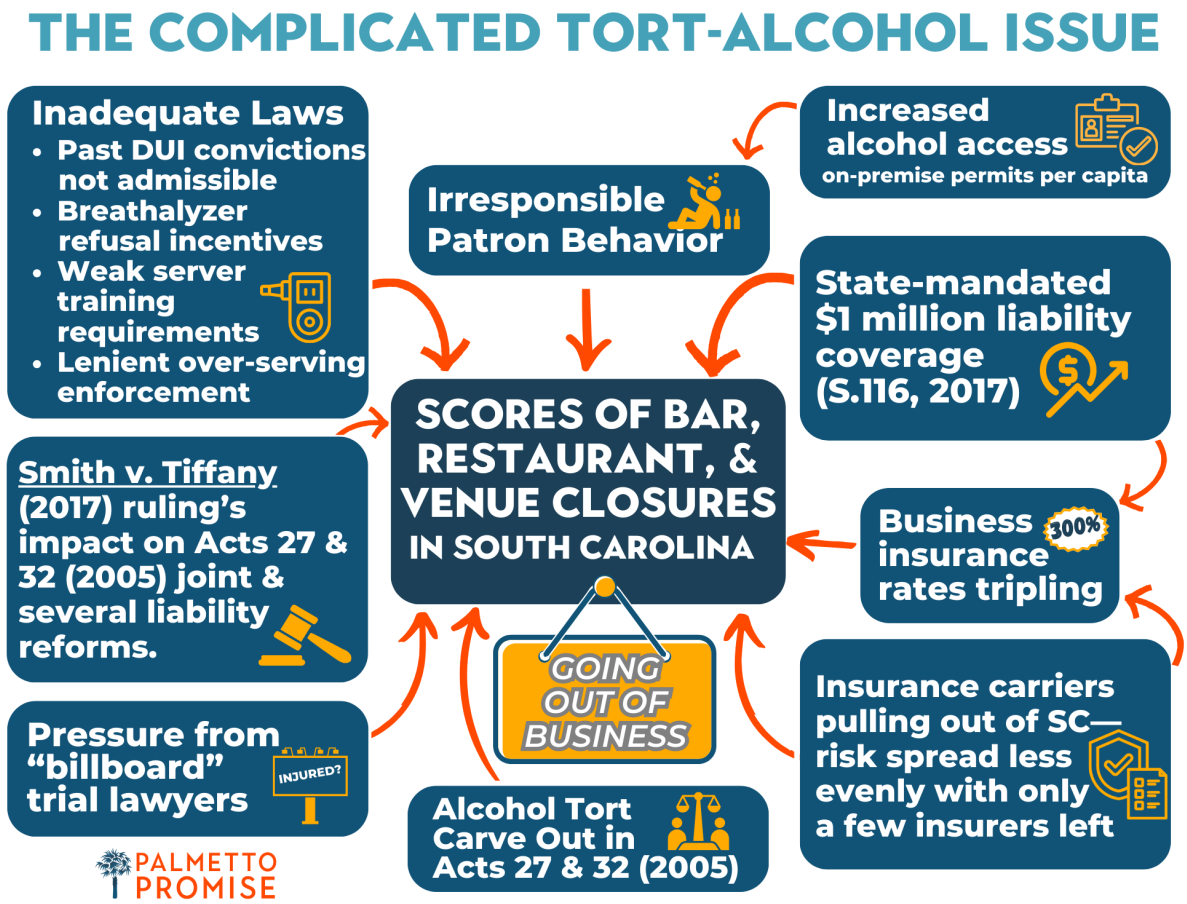
As generally applied, it could very well have been written this way:

> **"This section [requiring 50% fault] does not apply to…conduct involving the use, sale, or possession of alcohol…"**

This alcohol exception means Joint and Several is in full effect and has not been abrogated by the comparative fault system like in other negligence areas. In typical liability cases in South Carolina, a defendant with deep

pockets could pay **100%** of the damages to a plaintiff though his or her actual contribution to the tort could have been **50.1%**. Under this alcohol exception, **1%** of responsibility could result in being responsible for paying **100%** of the judgment. According to testimony provided to the General Assembly, this happens frequently in South Carolina.

The alcohol issue is so complicated that it has a life of its own beyond the civil justice system. This is illustrated in this comprehensive infographic developed by our team. Patron behavior is a factor as well as insurance companies attempting to clear a profit. But government actions of various kinds interfere at multiple points.



HERE'S WHAT SOUTH CAROLINA CAN DO

Joint and Several Liability (or Modified Joint & Several Liability post-2005) and its progeny, as well as a faulty Jury Verdict Form, are not injustices that South Carolina citizens and businesses must simply bear. The General Assembly has the power to change the unjust laws around civil justice and stop the lawsuit industry shakedown.

- Remove the **alcohol** exception in current law or define it properly. In its current form, the statute distorts liability.
- Allow **non-party** defendants (tortfeasors) to be placed on the jury verdict form for fault allocation.
- **Do away with JSL completely (Florida, 2006; 2023). That action enabled that state to adopt jury forms that allow defendants to pay only the percentage of fault for which they are liable. Within the Southeast, other states have rejected JSL and have moved toward pure several liability (Tennessee, 2021).**
- Also, like Florida (Fl. Stat. § 768.0427), prevent **medical damages inflation** in personal injury suits by limiting evidence to prove damages attributable to medical treatment or services to amounts that are fairly determined based on specific methods for calculating medical damages.
- Allow failure to use a **seatbelt or wear a helmet (in a motorcycle accident)** to be admissible in court. Whether injuries by the plaintiff could have been avoided or lessened if the plaintiff had worn a seatbelt is relevant to the mitigation of damages.

CONCLUSION

South Carolina's civil tort system rightfully holds businesses to account by providing a robust system of recovery for injured persons to recover if they are injured due to the fault of others. However, Defendants too are worthy of equal protection under the law and at the moment, our system fails in many important instances to safeguard the rights of Defendants.

SOURCES & RECOMMENDATIONS FOR FURTHER READING

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Joy Davis is a current senior at Wade Hampton High School in Greenville, SC. There, she is a member of Mock Trial, Youth in Government, Beta Club, Chamber Choir, and National Honors Society, as well as a Student Ambassador. She was a 2022 Palmetto Girls State Delegate and is a published poet. Her work as a Junior Policy Scholar for Palmetto Promise Institute in summer 2024 contributed tremendously to this report. Joy hopes to attend law school and become a practicing attorney.