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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Randy Skelton and Penelope Skelton, )  
 )  
 ) Plaintiffs, )  
 )  
v. )  
 )  
Summerville Plaza, LLC; Bi-Lo, LLC; and )  
Bi-Lo, Inc., )  
 )  
 ) Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT  
CASE NO.: 2015-CP-108566  
SC Court of Appeals

ORDER DENYING DEFENDANTS BI-  
LO, LLC AND BI-LO, INC.'S  
MOTION TO ADD JOHN DOE 1 AND  
JOHN DOE 2 AS INDISPENSABLE  
PARTIES

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The above-captioned Plaintiffs filed this action against the above-captioned Defendants in November, 2012. Plaintiffs alleged several South Carolina negligence claims arising from an incident that occurred in a parking lot outside of a Bi-Lo grocery store in Summerville, South Carolina. The building in which the building is located is owned and leased to Bi-Lo by Summerville Plaza, LLC. The Defendants have now moved to add John Doe 1 and John Doe 2, the alleged individuals who assaulted Plaintiff Randy Skelton in the Bi-Lo parking lot. Defendants' based their motion on Rule 19 of the South Carolina Rules of Civil Procedure.

**I. A JOHN DOE CANNOT BE NAMED AS AN INDISPENSABLE PARTY UNDER A PLAIN READING OF SCRPC RULE 19.**

SCRPC Rule 19(a) reads as follows:

**Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims and interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a

plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

After seven years of litigation and a criminal investigation, John Doe 1 and John Doe 2 have not been identified. Furthermore, complete relief can be granted among those already parties: the Defendants have insurance coverage sufficient to compensate Plaintiff for his injuries. Therefore paragraph (1) of Rule 19 does not apply.

Paragraph (2) of Rule 19 is not applicable as neither John Doe is even identified, much less capable of claiming an interest relating to the subject of the litigation. Moreover, the absence of John Doe 1 and John Doe 2 does not leave any person already a party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations "by reason of his claimed interest." John Doe 1 and John Doe 2, by definition, have claimed no interest.

**II. JOHN DOE 1 AND JOHN DOE 2 ARE NOT INDISPENSABLE PARTIES UNDER RULE 19.**

The Defendants' argument that John Doe 1 and John Doe 2 are indispensable parties is grounded in an interpretation of S.C. Code Ann. § 15-38-15. Subsection 15-38-15(A) modified the common law principle of joint and several liability for Defendants who are "determined to be less than 50% 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." Now, "[a] Defendant whose conduct is determined to be less than 50% of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact." *Id.* Because of the possibility that Defendants can be held only liable for their percentage of the indivisible damages if John Doe 1 and John Doe 2 are named as parties, Defendant contends that their joinder is necessary to "accord complete relief among existing parties." Otherwise, the Defendants contend, John Doe 1 and John Doe 2's absence could make Defendants jointly and

severally liable for all damages attributable to all of the Defendants. Exposure to that risk, Defendants maintain, would unduly prejudice them by making them liable for damages they would otherwise not be liable for.

John Doe 1 and John Doe 2 are not indispensable parties pursuant to Rule 19(a). The United States Supreme Court has noted that “[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as Defendants in a single lawsuit.” *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). It is noted “that a tortfeasor with the usual ‘joint-and-several’ liability is merely a permissive party to an action against another with like liability.” Thus, the mere fact that the damages are “indivisible” does not require joinder of John Doe 1 and John Doe 2. It is Defendant’s contention that subsection 15-38-15(A)’s partial abrogation of joint and several liability in South Carolina alters the analysis. Recently, the South Carolina Supreme Court interpreted a provision of the state’s Tort Claims Act (“SCTCA”) which similarly limits the liability of SCTCA defendants in their proportion of fault. *See* S.C. Code Ann. § 15-78-100(c) (“[T]he trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.”). The Court’s decision in *Chester v. South Carolina Department of Public Safety*, 698 S.E.2d 559, 560-61 (S.C. 2010) reversed the trial court’s ruling that other non-SCTCA defendants must be joined pursuant to South Carolina’s version of Rule 19. The Defendants’ arguments in this case have been expressly rejected by the South Carolina Supreme Court in the context of a Tort Claims Act claim.

The authority is highly persuasive in the construction of the interplay between Rule 19(a) and section 15-38-15. In *Chester*, the court reasoned that no language in SCTCA could be read to “compel a plaintiff to join other alleged tortfeasors as defendants” in light of a “firmly

entrenched common law principle.” 698 S.E.2d at 560. Determinative was the “well-settled” rule that “a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue.” *Id.*

Rule 19, *SCRCP*, is identical to the Federal Rule. Case law interpreting the Federal Rule makes it clear that the absence of a party does not automatically deprive the court of jurisdiction to resolve the interests of the parties before it. This changes some older state precedents which have held that such defects were jurisdictional. *See Green v. Niver*, 43 S.C. 359, 21 S.E. 263 (1894); *Gooch v. Elliott*, 120 S.C. 245, 113 S.E. 72 (1922). Furthermore, The Advisory Committee Notes accompanying Federal Rule 19(a), explain that the clause outlining the necessity to “accord complete relief among existing parties” “stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or ‘hollow’ rather than complete relief to the parties before the court.” Here, Plaintiffs seek indivisible damages for injuries resulting proximately from breach of the duties Defendants owed them. Any judgment rendered by this Court would accord complete relief to Plaintiffs and “avoid repeated lawsuits on the same essential subject matter.” John Doe 1 and John Doe 2, therefore, are not indispensable parties under Rule 19(a). As noted above, Supreme Court emphatically affirmed, after the enactment of S.C. Code Ann. § 15-38-15, the long recognized rule that “a Plaintiff has the sole right to determine which co-tortfeasor(s) she will sue.” *Chester*, 698. S.E.2d at 560.

### **III. JOHN DOE 1 AND JOHN DOE 2 SHOULD NOT BE INCLUDED ON THE JURY VERDICT FORM.**

Defendants argued that John Doe 1 and John Doe 2 should be included on the Jury Verdict Form in order to permit the jury to allocate fault among all tortfeasors, including non-party tortfeasors. Since the passage of § 15-38-15 in 2005, both the Plaintiff and Defense bars have debated the effect of the law, especially as it is related to non-parties like John Doe 1 and John Doe 2. *See Note, Joshua D. Shaw, 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 (2007). There appears to be no authority directly on point from South Carolina's appellate courts, see, e.g. *Keeter v. Alpine Towers Int'l, Inc.*, 730 S.E.2d 890, 899 (S.C. Ct. App. 2012) (declining to review trial court's decision to not allow the jury to consider the fault of a non-party). Indeed, the debate finds its genesis in the wording of subsection 15-38-15(D), which provides that "[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." Defendants argue that this subsection exists to prevent plaintiffs from doing precisely what Plaintiffs are attempting to do here, prevent the non-party John Does from appearing on the verdict form. They imply that neither justice, nor the clear intent of § 15-38-15, would be served by allocating fault among only the named parties.

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A review of § 15-38-15 reveals that only subsections (D) and (E) refer to other potential tortfeasors. See S.C. Code Ann. § 15-38-15(E) ("Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C)."). All other subsections only refer to "defendants." This distinction is significant because only subsections (A), (B), and (C) affected substantive changes in the law as it existed at the time. Also telling is how the special verdict procedure outlined in subsection (C)(3) only provides for jury findings regarding the allocation of fault when there are "two or more defendants" who were previously found liable. The subsection provides no accommodation for non-party tortfeasors. Nevertheless, there is little question that subsection (D) presents an apparent conflict and thus an ambiguity. But such a conflict can be harmonized by the context in which the law was passed. See *State v. Bridgers*, 495 S.E.2d 196, 197-98 (S.C. 1997) ("The

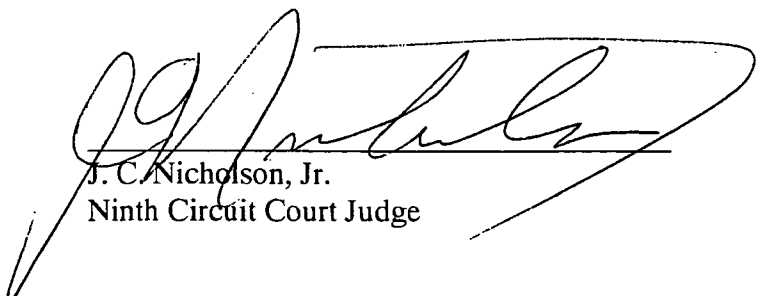
General Assembly is presumed to be aware of the common law.”). As noted above, the Supreme Court emphatically reaffirmed—*after* the enactment of the statute at issue—the long recognized rule that “a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue.” *Chester*, 698 S.E.2d at 560; *see also* Robert R. Sansbury III, *Pointing the Finger: An Examination of South Carolina Law Regarding Allocation of Fault to Non-party Tortfeasors*, *The Defense Line*, Fall 2013, at 42 (“Although *Chester* did not address the [Contribution Among Tortfeasors Act (“SCCATA”)], it clearly showed the South Carolina Supreme Court’s unwillingness, even after the SCCATA’s passage, to allow fault allocation to non-party tortfeasors.”). Moreover, prior to the statute’s passage, defendants were entitled to assert an “empty chair” defense at trial and receive a setoff for any settlement obtained from a joint and several tortfeasor. *See Chester*, 698 S.E.2d at 560. The plain language of the statute simply codified a defendant’s retention of these rights. A reading to the contrary would create more friction with the plain language than it would resolve.

### **CONCLUSION**

For the foregoing reasons, **IT IS THEREFORE ORDERED** that Defendants’ Motion to Add John Doe 1 and John Doe 2 to the caption of this case as indispensable parties and to add John Doe 1 and John Doe 2 to the jury verdict form is **DENIED**.

**IT IS SO ORDERED!**

This 17 day of June, 2016.  
Charleston, South Carolina

  
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J. C. Nicholson, Jr.  
Ninth Circuit Court Judge