

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Charleston County  
Court of Common Pleas

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

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Appellate Case No. 2016-001486  
Circuit Court Case No. 2015-CP-10-3566

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**RECEIVED**  
AUG 31 2016  
SC Court of Appeals

Randy Skelton and Penelope Skelton,

Respondents,

v.

Summerville Plaza, LLC; BI-LO, LLC; and BI-LO, Inc.,

Defendants,

Of whom BI-LO, LLC; and BI-LO, Inc. are

Appellants.

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**APPELLANTS' RETURN TO  
RESPONDENTS' MOTION TO DISMISS APPEAL**

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*Attorney for Appellants  
BI-LO, LLC; and BI-LO, Inc.*

By and through their undersigned counsel, Appellants BI-LO, LLC; and BI-LO, Inc. (hereinafter collectively referred to in the singular as “BI-LO”), submit this return in opposition to the Motion to Dismiss Appeal (the “Subject Motion”) made by Respondents Randy Skelton (“Mr. Skelton”) and Penelope Skelton (“Mrs. Skelton”) (collectively the “Skeltons”). Most respectfully, the Subject Motion should be denied.

### **BACKGROUND**

The Skeltons, a married couple, seek damages—Mr. Skelton for personal injuries and Mrs. Skelton for related loss of consortium—arising out of an alleged incident wherein Mr. Skelton, a truck driver, was attacked and robbed by unidentified third parties—described by the Skeltons as “at least two [unknown] males”<sup>1</sup>—while on the premises of a BI-LO grocery store to make a delivery. (*See generally* Complaint [**Exhibit A**].) According to the Skeltons, their damages were proximately caused by BI-LO’s negligence “combining and occurring with the intentional criminal acts of the [unknown assailants] . . . .” (Complaint ¶ 12 [**Exhibit A**].)<sup>2</sup>

This appeal arises out of BI-LO’s motion to join the unknown assailants as

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<sup>1</sup> (Complaint ¶ 10 [**Exhibit A**].)

<sup>2</sup> The Skeltons also make this claim against BI-LO’s co-defendant, Summerville Plaza, LLC, but it is not a party to this appeal. (*See generally* Complaint [**Exhibit A**].)

parties to the case—named as John Doe 1 and John Doe 2 (the “Does”)—and the trial court’s ruling thereon. In short, BI-LO argued the Does should be added as parties and their role in the underlying incident considered by the jury in apportioning fault in accordance with S.C. Code Ann. § 15-38-15. (*See generally* BI-LO’s motion [**Exhibit B**].) The trial court denied BI-LO’s motion, its order (the “Subject Order”) not only refusing to add the Does as parties but also *affirmatively ruling they should not be included on the jury verdict form*. (*See generally* Subject Order [**Exhibit C**].)

This appeal followed.

## ARGUMENT

### **I. The Subject Order is immediately appealable and properly on appeal.**

According to the Skeltons, BI-LO’s appeal should be dismissed because “[1] [t]he appeal is interlocutory and [2] does not involve a substantial right.” (Skeltons’ Supporting Memo p. 2.) Respectfully, they are mistaken.

To be sure, the Subject Order is interlocutory, but that alone does not mean it cannot now be appealed. “The right of appeal arises from and is controlled by statutory law,” and while, ordinarily, it is true that appeal may not be pursued until after final judgment, a party may appeal an interlocutory order where the right to do so is granted by statute. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). In this case, the Subject Order is one of those

interlocutory orders for which the statutory law provides a right of immediate appeal.<sup>3</sup>

Though not mentioned by the Skeltons, S.C. Code Ann. § 14-3-330 is the controlling statute here. Id. (“The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by . . . § 14-3-330 . . . . Absent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to be immediately appealable.”). In pertinent part, it provides as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such

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<sup>3</sup> In this regard, i.e., in regard to the fact that the issue now before the Court is one of statutory law, BI-LO notes the Skeltons’ apparent effort to underscore their position via reference to the age of this litigation. (Skeltons’ Supporting Memo p. 1 (“This action . . . was filed on November 8, 2012); id. at p. 2 (“After this case has been pending for years, [BI-LO] moved to add unidentified parties . . . [;] [u]pon denial of that motion, which borders on frivolous, they have now appealed an interlocutory order. They seek only to delay a trial.”).) Beyond disputing and denying any frivolousness or dilatory tactics, which, of course, it does, BI-LO would make clear that, with respect to the present question of appealability, these charges are beside the point and provide no support for the Subject Motion.

final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

....

The Subject Order is immediately appealable under both subsections (1) and (2) above. *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 7, 630 S.E.2d at 467 (addressing subsection (1)'s allowance of immediate appeals of orders involving the merits, "An order 'involves the merits,' as that term is used in Section 14-3-330(1) . . . and is immediately appealable when it finally determines some substantial matter forming the whole or *part* of some cause of action or defense.") (emphasis added) (footnote omitted)); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146, (2015) (holding that, under the circumstances, a bifurcation order was immediately appealable because it "*effectively* grant[ed] the [defendants] *potential* summary judgment on [certain] issues.") (emphasis added); *id.*, 773 S.E.2d at 147 n. 2 (noting that the order *sub judice* "implicated a substantial right . . . [and] [j]ust because *part* of the prejudice stemming from the order may be cured at a later date does not remove it from the purview of section 14-3-330(2)(a)") (emphasis in original).); *see also Salmonsens v.*

CGD, Inc., 377 S.C. 442, 452-53, 661 S.E.2d 81, 87 (2008) (“Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial courts order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable.”) (quoting Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).).

BI-LO has a right to an apportionment of fault—to have its “percentage of fault, if any,” determined by a jury and the “damages . . . for the same indivisible injury” allocated in proportion to the “tortious conduct . . . attributable to each defendant whose actions are a proximate cause of the indivisible injury . . . .” Section 15-38-15(C). The jury is statutorily required to apportion fault so that the total percentage of fault equals 100%, reflecting the legislature’s intent to see that the jury is in a position to fairly evaluate and accurately determine the total fault and the portion thereof justly born by, or among (where fault is 50% or greater and joint and several liability applies), all culpable. Id.; *see also* § 15-38-15(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.”) (emphasis added).<sup>4</sup>

Here, by disallowing the Does from the verdict form, the Subject Order involves the merits, finally determining a substantial matter forming part of a defense otherwise available to BI-LO (the verdict form being, after all, the sole means by which the jury speaks on the merits of a case); denies BI-LO its rights under, and the protection of, § 15-38-15, foreclosing (at least potentially and to some material degree) its ability to argue the Does’ fault in defense of itself; and, simultaneously, prevents the jury’s full consideration of fault, guarantying that any apportionment thereof will bear no resemblance to substantial justice, because it will *not* account for the Does, i.e., “the intentional criminal acts of the [unknown assailants] . . . .” (Complaint ¶ 12 **[Exhibit A]**.)

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<sup>4</sup> And, BI-LO respectfully submits, to find a contrary legislative intent would be inconsistent with the language and purpose of the statute and, in any event, absurd. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.”); id. at 85-87, 533 S.E.2d at 581-82 (explaining that the statutory text is considered the best evidence of legislative intent, though the “purpose of an enactment will prevail over the literal import of the statute” and the court will “reject [even] the ordinary meaning of words used in a statute” when to accept them would lead to a plainly absurd result that could not possibly have been intended by the legislature).

**CONCLUSION**

For the foregoing reasons, BI-LO has properly exercised its right to an immediate appeal of the Subject Order, this appeal should not be dismissed, and the Skeltons' motion should be denied.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Charleston, South Carolina

Dated: 8/30/16



operator of numerous retail grocery stores including a store known as store number 296, located at 1452 Boone Hill Road, Summerville, South Carolina.

5. Upon information and belief, Defendants Bi-Lo, LLC and Bi-Lo, Inc. (hereinafter collectively referred to as "Bi-Lo") are affiliated under common ownership and/or management, and one or both of the Defendants have duties to take reasonable measures to protect persons who are lawfully upon their premises against criminal acts committed by third parties.

6. Upon information and belief, Summerville Plaza, LLC operates and manages Summerville Plaza, which is anchored by a Bi-Lo grocery store, and has duties to take reasonable measures to protect persons who are lawfully upon their premises against criminal acts committed by third parties.

7. As the owner and/or operators and/or managers of store number 296 identified herein, the Defendants expressly and impliedly invited members of the general public, including Randy Skelton, to enter, visit, shop or work at the store and surrounding premises, including the store's parking area, loading area and pathways to and from each. Upon information and belief, these premises are owned, maintained and/or operated by the Defendants, their principals, agents, servants, and/or employees.

8. Upon information and belief, before December 17, 2009, the Defendants, through their principals, agents, servants and/or employees knew, or in the exercise of reasonable care should have known of the high potential of violent criminal conduct by third parties generally on or about the exterior premises of its stores, and the resulting threat to patrons or others in the parking lot, loading areas and areas contiguous to its stores.

9. Specifically, on the afternoon of December 17, 2009, the Defendants, through their principals, agents, servants and/or employees, knew of, or in the exercise of reasonable care should have known of and prepared for, the presence of individuals like those who violently

perpetrated an armed robbery and assault of the Plaintiff, Randy Skelton, on the premises of their stores, including store number 296, said perpetrators engaged in or posing a threat of violence and crime upon the Defendants' patrons including Randy Skelton.

10. On December 17, 2009, at the approximate time of 5:30 p.m., Randy Skelton arrived in his tractor trailer at Defendant Bi-Lo's store number 296 to make a delivery. He drove his tractor trailer around the store to the loading bay at the rear that was maintained by Defendants for the use of delivery persons and potential customers, with the intention of delivering his load. After Bi-lo employees unlocked the rear entrance to the building, Randy Skelton entered the storage area while his delivery was unloaded. Once Bi-lo employees unloaded the delivery, and as is customary for the delivery drivers, Randy Skelton entered the main part of the Bi-lo store. After purchasing snack items from the store, Randy Skelton proceeded out of the front door of the store and walked around the side of the store towards his tractor trailer, which was still located in the rear of the store at the closed loading bay. As he reached the door of his tractor trailer cab, he was approached by at least two males. These unknown perpetrators threatened Randy Skelton and struck him with a blunt object violently on the back of his head and in his face. The perpetrators, after violently assaulting and robbing Randy Skelton, ran away through a dilapidated, wooden, planked fence, separating the rear of the Bi-Lo store from a known high crime area, Haven Oaks Apartments.

11. The violent assault of Randy Skelton, as herein described, took place in an area of the premises of the Bi-Lo store that was poorly lit, had no security or security cameras, and was separated from a known high crime area by an approximately eight foot tall plank fence that the Defendants, with even cursory observation, could determine was not sufficient to stop foot traffic from the known high crime area to the unlit, unsecured rear of the Bi-Lo store where Plaintiff Randy Skelton had parked his tractor trailer.

12. The injuries and damages suffered by Randy Skelton and the resulting injuries, damages and losses suffered by his wife, Penelope Skelton, were a proximate result of the carelessness, negligence, recklessness, willfulness, wantonness, and heedlessness of the Defendants combining and occurring with the intentional criminal acts of the perpetrators in one or more of the following respects:

- a. In failing to adequately and properly monitor and control its premises;
- b. In failing to employ appropriate and effective measures for the protection and security of the patrons, guests and employees invited upon its premises;
- c. In failing to hire a sufficient number of competent security personnel for the protection and security of invited visitors on its premises;
- d. In failing, upon information and belief, to train its security personnel adequately and effectively;
- e. In failing to properly, competently and efficiently supervise its security personnel;
- f. In failing to warn the stores patrons of the full nature and extent of the crime committed on and about the premises, the incidence of such crimes, location of such crimes and Defendants' concomitant lack of adequate security measures;
- g. In failing to investigate the implementation of effective methods of deterring and/or preventing criminal acts by third parties upon the exterior premises of its stores;
- h. In failing to implement adequate procedures to ensure that existing security procedures, if any, were followed;
- i. In failing to maintain the exterior premises of its stores/property in such a way as to deter criminal activity its failings including, but not limited to, failure to provide adequate lighting, failure to monitor its premises with security cameras and failure to erect and/or maintain a barrier between its premises and a known high crime area adjacent to its premises;
- j. In failing to exercise that degree of care that a prudent and reasonable corporate owner, property manager and/or retail grocery store operator would exercise under the same or similar circumstances where criminal acts of third parties were predictable;

- k. In failing to exercise that degree of care that a prudent and reasonable corporate owner, property manager and/or retail grocery store operator would exercise under the same or similar circumstances where criminal acts of third parties had immediately occurred; and
- l. In other such ways as a judge or jury may determine.

13. As a direct and proximate cause of the negligence of the Defendants, Plaintiff Randy Skelton was seriously and permanently injured, causing him great pain and suffering, physical and mental anguish, permanent disability, specifically severe and debilitating, traumatic brain injury and post traumatic stress disorder, medical expenses, lost wages, and loss of earning capacity. Plaintiff Randy Skelton will continue to suffer pain and mental anguish and will continue to incur medical expenses and lost wages.

WHEREFORE, Plaintiffs Randy Skelton and Penelope Skelton demand judgment against Defendants Summerville Plaza, LLC, Bi-Lo, LLC and Bi-Lo, Inc., jointly and severally for all compensatory damages, medical bills, lost wages, pain and suffering, disability, including, but not limited to, a traumatic brain injury, loss of enjoyment of life, mental anguish, punitive and exemplary damages, plus interest, cost, and attorney's fees for having to bring this action and such other and further relief as this Honorable Court or a jury may deem just and proper.

**FOR A SECOND CAUSE OF ACTION**  
(Loss of Consortium)

14. Each and every allegation of this Complaint which is not inconsistent with the following is hereby realleged and reincorporated by reference as if set forth verbatim herein.

15. For all times herein alleged, Plaintiffs have been lawfully wedded husband and wife.

16. That as a result of the negligence, gross negligence, willfulness, wantonness, recklessness and heedlessness of all Defendants, Plaintiff Penelope Skelton was damaged and injured and will in the future continue to be damaged and injured as follows:

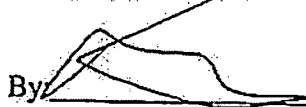
- a. In losing the consortium, love, affection and society of her husband; and
- b. In such other ways as a judge or jury may determine.

WHEREFORE, Plaintiff Penelope Skelton, individually, demands judgment against Defendants Summerville Plaza, LLC, Bi-Lo, LLC and Bi-Lo, Inc., jointly and severally for all compensatory damages, medical bills, lost wages, pain and suffering, disability, including, but not limited to, a traumatic brain injury, loss of enjoyment of life, mental anguish, punitive and exemplary damages, plus interest, cost, and attorney's fees for having to bring this action and such other and further relief as this Honorable Court or a jury may deem just and proper.

Respectfully submitted,

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By   
Attorneys for the Plaintiffs.

June 24, 2015  
Charleston, South Carolina



2. The Plaintiff has brought claims against Bi-Lo, seeking to hold Bi-Lo responsible for the actions of these “unknown perpetrators” (referred herein as John Doe 1 and John Doe 2). The Plaintiffs specifically allege that the “injuries and damages suffered by [Plaintiff] ... were a proximate result of the carelessness, negligence, recklessness, willfulness, wantonness, and heedlessness of [Bi-Lo] combining with the intentional criminal acts of [John Doe 1 and John Doe 2] ....”

3. As required by Rule 19 of the *South Carolina Rules of Civil Procedure*, Bi-Lo merely seeks to join as defendants John Doe 1 and John Doe 2 as, in their absence, complete relief cannot be accorded to Bi-Lo.

4. There is no question that Plaintiffs’ claimed injuries are caused by the acts of John Doe 1 and John Doe 2. Further, the Plaintiffs admit as much as they have pled that their injuries are caused by a combination of alleged acts – including alleged acts by John Doe 1 and John Doe 2.

5. The South Carolina legislature has changed the law on when a defendant can be jointly and severally liable for an indivisible injury. It is clear that the South Carolina Legislature has mandated the law and the public policy of the State of South Carolina is that a party should not be liable and made to pay the entire amount of damages to a plaintiff when that defendant’s fault is less than fifty percent of the total apportioned fault. In this case, there is no question that a portion of the Plaintiffs’ injuries are attributable to the actions of John Doe 1 and John Doe 2. The only real issue in this case is whether Bi-Lo did anything that *combined* with the acts of John Doe 1 and John Doe 2 to cause these injuries.

6. Bi-Lo has a statutory right to an apportionment of fault pursuant to S.C. Code Ann. § 15-38-15 (2016) *et al* to have his “percentage of fault, if any,” determined by a jury so that the “damages ... for the same indivisible injury” apportioned in such a way that the alleged “tortious

conduct ... attributable to each defendant whose actions are a proximate cause of the indivisible injury ....” This statutory right of apportionment requires a jury to apportion fault so that the total percentage of fault equals “one hundred percent”- clearly intending an accurate finding by the jury of the total fault of any culpable party so that each party only is liable for its apportioned fault (unless he is jointly and severally liable by being found to be 50% or more at fault). To allow such an apportionment without including John Doe 1 and John Doe 2 would create a legal fiction unintended by the South Carolina Legislature and inconsistent with the clear stated intention of the S.C. Code Ann. § 15-38-15 (2016) *et al.* As such, the absence of John Doe 1 and John Doe 2 would mean that complete relief cannot be afforded Bi-Lo (should the jury decide that the damages suffered by the Plaintiffs were proximately caused, in part or in whole, by Bi-Lo).

7. The relief sought in this motion is consistent with South Carolina law and will not unduly prejudice any party.

Bi-Lo will supplement this motion with a memorandum of law and supporting exhibits.

WHEREFORE, the Defendants above-named, Bi-Lo, LLC and Bi-Lo, Inc. and hereby PRAYS that this Honorable Court:

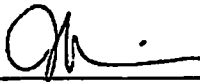
- a. Issue an order joining as indispensable parties defendants John Doe 1 and John Doe 2
- b. Issue such further relief as this Honorable Court determines to be just.

<SIGNATURES ON NEXT PAGE>

Exhibit B

Respectfully Submitted,

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Charleston, South Carolina

2/12, 2016

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to  
all counsel of record in this proceeding this 12<sup>th</sup> day of  
February, 2016.

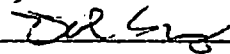
  
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Exhibit B

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-10-3566

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

FILED  
 2015 JUN 17 PM 2:48  
 CHRISTOPHER STRONG  
 CLERK OF COURT

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.

gm  
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

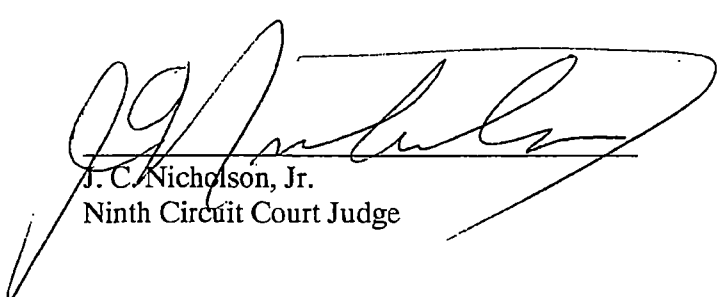
General Assembly is presumed to be aware of the common law.”). As noted above, the Supreme Court emphatically reaffirmed—*after* the enactment of the statute at issue—the long recognized rule that “a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue.” *Chester*, 698 S.E.2d 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

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

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Charleston County  
Court of Common Pleas

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

---

Appellate Case No. 2016-001486  
Circuit Court Case No. 2015-CP-10-3566

---

Randy Skelton and Penelope Skelton,

Respondents,

v.

Summerville Plaza, LLC; BI-LO, LLC; and BI-LO, Inc.,

Defendants,

Of whom BI-LO, LLC; and BI-LO, Inc. are

Appellants.

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**PROOF OF SERVICE**

---

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants above named, do hereby certify that I have served **APPELLANTS' RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL** on all other parties by depositing a copy of the same in the United States Mail, postage prepaid, on August 30, 2016, addressed as follows to their counsel:

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*and*

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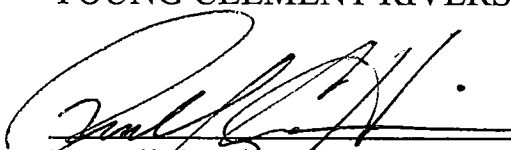
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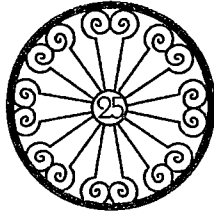
<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,  
YOUNG CLEMENT RIVERS, LLP

By:   
\_\_\_\_\_  
Russell G. Hines (SC Bar No. 72100)  
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Charleston, South Carolina

Dated: 8/30/16



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August 30, 2016

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AUG 31 2016

SC Court of Appeals

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Randy Skelton and Penelope Skelton v. Summerville Plaza, LLC; BI-LO, LLC;  
and BI-LO, Inc.  
Appellate Case No. 2016-001486  
Case No.: 2015-CP-10-3566  
Claim No.: Cin.: 2155422 001  
Date of Loss: 12/17/2009  
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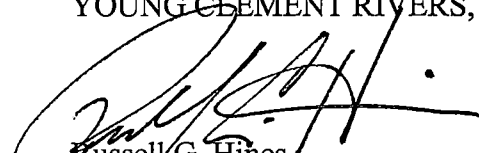
Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and seven (7) copies of the *Appellants' Return to Respondents' Motion to Dismiss Appeal* and the original and one (1) copy of the *Proof of Service* regarding the same.

Kindly file the originals and return one (1) court-stamped copy to me using the pre-stamped envelope provided. With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP



Russell G. Hines  
Partner

RGH/amj  
Enclosures

cc: Matthew E. Yelverton, Esquire, Yelverton Law Firm, LLC  
Cameron G. Boggs, Esquire, The Boggs Law Firm  
Paul E. Tinkler, Esquire, Law Offices of Paul E. Tinkler

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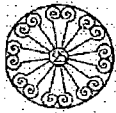
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