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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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.

APPELLANTS' PETITION FOR REINSTATEMENT AND/OR REHEARING

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Jeffrey J. Wiseman (SC Bar No. 73121)
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Attorney for Appellants
BI-LO, LLC; and BI-LO, Inc.

COME NOW Appellants BI-LO, LLC; and BI-LO, Inc. (hereinafter collectively referred to in the singular as "BI-LO"), by and through their undersigned counsel, and, pursuant to Rules 221(a) and (c) and/or 260(a), SCACR, hereby petition this Honorable Court for reinstatement and/or rehearing and reconsideration of this matter, which it decided via order filed September 30, 2016, dismissing BI-LO's appeal (the "Order of Dismissal").

BACKGROUND

Respondents Randy Skelton ("Mr. Skelton") and Penelope Skelton ("Mrs. Skelton") (collectively 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"[1]—while on the premises of a BI-LO grocery store to make a delivery. (*See generally* Complaint [attached as Exhibit A to Appellants' Return to Respondents' Motion to Dismiss Appeal ("BI-LO's Return")].) 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

[1] (Complaint ¶ 10 [in Exhibit A of BI-LO's Return].)

assailants] . . . ." (Complaint ¶ 12 [in Exhibit A to BI-LO's Return].)[2]

This appeal arose out of BI-LO's motion to join the unknown assailants as 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 had argued that 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 [attached as Exhibit B to BI-LO's Return].) 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 that they should not be included on the jury verdict form.* (*See generally* Subject Order [attached as Exhibit C to BI-LO's Return].) BI-LO timely appealed.

The instant petition timely follows the Order of Dismissal.

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[2] 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 [in Exhibit A to BI-LO's Return].)

ARGUMENT

I. Most respectfully, the Order of Dismissal reflects that the Court overlooked or misapprehended the substance and effect of the Subject Order and/or the scope of the Court's appellate jurisdiction/BI-LO's appellate rights under S.C. Code Ann. § 14-3-330; the Subject Order is immediately appealable and BI-LO's appeal should be reinstated and, in due course, decided on the merits.

BI-LO, of course, concedes that the Subject Order is interlocutory, that "[t]he right of appeal arises from and is controlled by statutory law," and that a party may appeal an interlocutory order *only* 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); 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."). The Subject Order, however, *is* one of those interlocutory orders for which the statutory law provides a right of immediate appeal; contrary to the view reflected by the Order of Dismissal, the Subject Order *does* fall within the certain classes of interlocutory orders over which § 14-3-330 provides the Court with appellate jurisdiction—and BI-LO with the right to appeal.

As explained in BI-LO's Return, § 14-3-330 provides as follows, in pertinent part:

> 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 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* Salmonsen 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).); *see, e.g.,* Nauful v. Milligan, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972) ("The interlocutory adjudication in this case determines that the defenses interposed by defendant are without merit and that he is liable to the plaintiff on the claim asserted in the complaint, leaving only the amount of the damages at issue. It thus finally decides the merits of every issue in the case, except that of damages. We think that such a determination involves the merits and comes within the class of interlocutory or intermediate orders from which an immediate appeal is allowed under [§ 14-3-330's predecessor in the 1962 Code].").

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).[3]

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

[3] 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).

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 [in Exhibit A to BI-LO's Return].)

II. Most respectfully, BI-LO requests that the Court substantively address the points made in BI-LO's Return and set forth its appealability analysis in reasonably substantive detail.

In pertinent part, Rule 220(b), SCACR, provides, "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Again, most respectfully—out of an abundance of caution[4]—in accordance with Rule 220(b), BI-LO asks the Court to substantively address the points made in BI-LO's Return—wherein it argued, as it now reiterates, that the Subject Order is immediately appealable under *both* subsections (1) and (2) of § 14-3-330—and set forth its appealability analysis in

[4] *See, e.g.,* Camp v. Springs Mortg. Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) ("Camp also contends his complaint sufficiently states a cause of action for interference with future contracts . . . . The Court of Appeals did not address this issue nor did Camp petition for rehearing for the court to consider it. We therefore decline to address this issue.").

reasonably substantive detail. *Cf.* Carey v. Snee Farm Cmty. Found., 388 S.C. 229, 232, 694 S.E.2d 244, 245-46 (Ct. App. 2010) ("We conclude the trial court's reasoning for granting summary judgment in this case is not clear from the record. Accordingly, relying on *Bowen*, we vacate the order on appeal and remand for a written order identifying facts and accompanying legal analysis.").

CONCLUSION

For the foregoing reasons, BI-LO asks the Court to grant the instant petition and, in so doing, first and foremost, vacate the Order of Dismissal, deny the Skeltons' motion to dismiss, and reinstate BI-LO's appeal so that it may be decided on the merits in due course; or, at an alternative minimum, i.e., if the Court adheres to the view that the Subject Order is not immediately appealable (despite BI-LO's argument to the contrary), substantively address the points made in BI-LO's Return and set forth its appealability analysis in reasonably substantive detail.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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By: _____

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

Charleston, South Carolina

Dated: 10/14/16

THE STATE OF SOUTH CAROLINA
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Appeal from Charleston County
Court of Common Pleas

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

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OCT 17 2016
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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' PETITION FOR REINSTATEMENT AND/OR REHEARING** on all other parties by depositing a copy of the same in the United States Mail, postage prepaid, on October 14, 2016, addressed as follows to their counsel:

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and

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Dated: 10/14/16

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October 14, 2016

VIA FED-EX & FACSIMILE
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
YCR File: 903-20120985

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and seven (7) copies of the *Appellants' Petition for Reinstatement and/or Rehearing* and the original and one (1) copy of the *Proof of Service* regarding the same. Also enclosed is a firm check in the amount of $25.00 to cover the cost associated with this filing.

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 (via U.S. Mail and email)
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