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

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SC Court of Appeals

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' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR REINSTATEMENT

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

First off, subsections (1) and (2) of § 14-3-330 are *not* mutually exclusive,[1] and, indeed, BI-LO contends the Subject Order is immediately appealable under *both*. (*See* Appellants' Petition for Reinstatement and/or Rehearing p. 4 ("The Subject Order is immediately appealable under *both* subsections (1) and (2) [of § 14-3-330].") (emphasis in original); *see also* Appellants' Return to Respondents' Motion to Dismiss Appeal p. 4 (same, except for emphasis).) The Skeltons' opposing memorandum, however, addresses the question of the Subject Order's appealability *solely* in reference to *subsection (2)*,[2] without addressing—and, therefore, without in any way refuting—BI-LO's contention that the Subject Order is immediately appealable under *subsection (1)*, too, because it "involves the merits."

While their memo does attempt to refute BI-LO's contention that the Subject Order is immediately appealable under subsection (2), it is unsuccessful. According to the Skeltons, the Subject Order does not deprive BI-LO of a substantial right; therefore, it is not immediately appealable. (Respondents' Memorandum in Opposition to Petition for Reinstatement pp. 1-2.) This is because, they say, BI-LO does not have a substantial right under § 15-38-15(C) to

[1] *See* Link v. School Dist. of Pickens County, 302 S.C. 1, 6, 393 S.E.2d 176, 178-79 (1990) (explaining that a given ruling may fall within the confines of both subsections (1) and (2) of § 14-3-330).

[2] (*See generally* Respondents' Memorandum in Opposition to Petition for Reinstatement.)

have the Does on the verdict form; thus, the Subject Order did not deprive BI-LO of a substantial right by disallowing the Does from the verdict form. (Id. at p. 1.) And, though they acknowledge that § 15-38-15(D) does confer a substantial right upon BI-LO, the Skeltons maintain that the Subject Order protects that right:

> [BI-LO] has a substantial right: Section 15-38-15(D) allows [BI-LO] to argue that [the] Doe[s] [are] liable in whole *or in part*. When this case is tried, [BI-LO] is free to maintain that [the] Doe[s] [are] responsible for *one hundred percent* of [the Skeltons'] damage. The [Subject] [O]rder does not deprive [BI-LO] of that right.

(Id. at pp. 1-2 (emphasis added).)

Tellingly, while conceding that BI-LO has a substantial right under § 15-38-15(D) to argue that the Does are "liable in whole *or in part*"—the actual statutory language is "liable for *any or* all of the damages alleged by any other party"—the Skeltons trumpet the fact that the Subject Order still allows BI-LO to argue that the Does "are responsible for *one hundred percent* of [their] damage." (emphasis added.) But, as the Skeltons' own memo recognizes—referring as it does to BI-LO's substantial right under § 15-38-15(D) "to argue that [the] Doe[s] [are] liable in whole *or in part*" (emphasis added)—BI-LO's right under § 15-38-15 is not only to make an all-or-nothing "empty chair" argument pointing to the Does but also to argue that it is the Does, not BI-LO, that are liable for *any part* of the Skeltons' alleged damages. (*See* Appellants' Petition for Reinstatement and/or Rehearing pp. 5-6 (regarding BI-LO's right to apportionment of fault under § 15-

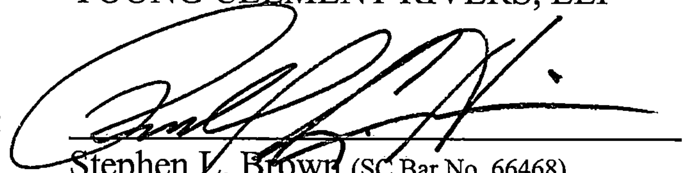
38-15); *see also* Appellants' Return to Respondents' Motion to Dismiss Appeal pp. 5-6 (same).) So, respectfully, the Skeltons' argument misses the point: Sure, the Subject Order still allows BI-LO to argue that the Does are responsible for 100% (and, conversely, that it is responsible for none) of the Skeltons' alleged damages, but because that is all the Subject Order allows—since it disallows the Does from the verdict form, thereby preventing BI-LO from arguing, and the jury from finding, that it is the Does, not BI-LO, that are liable *in part* for the Skeltons' alleged damages—it deprives BI-LO of a substantial right that even the Skeltons themselves acknowledge it has under § 15-38-15(D).

For the foregoing reasons—as well as, of course, all those set forth previously in its petition—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. *Cf.* Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 n. 7 (2000) ("[S]ome minimal inquiry will always be necessary on the part of an appellate court considering the appealability of an order which is alleged to have

deprived a party of a mode of trial."); Jean Hoefer Toal et al., Appellate Practice in South Carolina 156 (3d ed. 2016) ("Orders denying a party a mode of trial anomalous in terms of appealability . . . the appellate court must consider the merits of the question at issue in the lower court—whether the party was entitled to a particular mode of trial—to determine if the order is immediately appealable.").

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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

Charleston, South Carolina

Dated: 11/4/16

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PROOF OF SERVICE

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

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants above named, do hereby certify that I have served **APPELLANTS' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR REINSTATEMENT** on all other parties by depositing a copy of the same in the United States Mail, postage prepaid, on November 4, 2016, addressed as follows to their counsel:

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and

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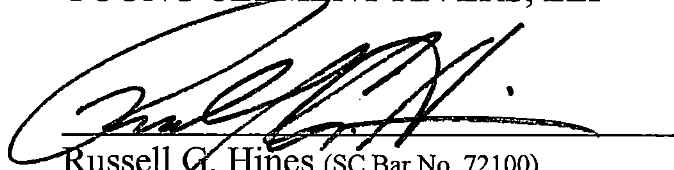
<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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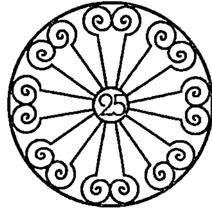

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Jenny Abbott Kitchings, Clerk of Court
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Re: Randy Skelton and Penelope Skelton v. Summerville Plaza, LLC; BI-LO, LLC; and BI-LO, Inc.
Appellate Case No. 2016-001486
Case No.: 2015-CP-10-3566
Claim 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 **Appellants' Reply to Respondents' Memorandum in Opposition to Petition for Reinstatement** and the original and one (1) copy of a **Proof of Service** regarding the same. Kindly file the originals and return one (1) court stamped copy of each document to me in 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
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K. Michael Barfield, Esquire, Barnwell Whaley Patterson & Helms
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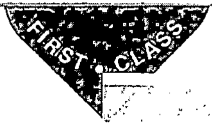

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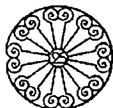

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