THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

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

Appellate Case No. 2016-001486
Trial 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.

INITIAL REPLY BRIEF OF APPELLANTS

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BI-LO makes the following counterpoints in reply to the Skeltons' brief.

ARGUMENT
(Counterpoints in Reply to Respondents' Brief)

1. This appeal is not premature: The Subject Order[1] is immediately appealable and properly on appeal.

The Skeltons argue that this appeal should be dismissed "because [(a)] it is interlocutory and [(b)] [it] does not involve a substantial right." (Respondents' Br. p. 1 (bold print omitted).) Respectfully, they are mistaken.

To be sure, the Subject Order is interlocutory; however, that alone does not mean it cannot be appealed immediately. "The right of appeal arises from and is controlled by statutory law," and while, ordinarily, it is true that an appeal cannot be taken 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). The Subject Order falls within those certain classes of interlocutory orders where the right to an immediate appeal is granted by statute.

The controlling statute is S.C. Code Ann. § 14-3-330. *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

[1] The Subject Order is, of course, the trial court's order denying BI-LO's motion to join the Does as party defendants and disallowing them from the verdict form. (*See generally* Order.)

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 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;
>
> . . . .

In short, § 14-3-330(1) (i.e., subsection (1) of the statute) provides for an immediate appeal of an interlocutory order "involving the merits," and § 14-3-330(2) (subsection (2)) provides for an immediate appeal of certain orders affecting a "substantial right." *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).).

Notably, subsections (1) and (2) of § 14-3-330 are *not* mutually exclusive,

i.e., a given decision may be appealable under both subsections;[2] indeed, BI-LO contends the Subject Order is immediately appealable under both of them; however, in their brief, the Skeltons address the question of the Subject Order's appealability *solely* in reference to *subsection (2)*,[3] without addressing—and, therefore, without in any way refuting—BI-LO's contention that the Subject Order is also immediately appealable under *subsection (1)*.

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 . . . ." S.C. Code Ann. § 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

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[2] *See Link v. School Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178-79 (1990).

[3] (*See generally* Respondents' Br. pp. 1-2.)

added).[4]

Here, the Subject Order is appealable under *both* subsections (1) and (2). 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] . . . ." (Compl. ¶ 12.)

It is also notable that, in their prior briefing on the Subject Order's appealability, the Skeltons actually acknowledge that § 15-38-15(D) confers a

[4] 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, so inequitable as to be 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).

substantial right upon BI-LO—though they (incorrectly) maintain the right is protected by the Subject Order:

> [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.

(Respondents' Mem. in Opp. to Petition for Reinstatement 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*,"[5] the Skeltons trumpeted the fact that the Subject Order still allows BI-LO to argue that the Does "are responsible for *one hundred percent* of [the Skeltons'] damage[s]." (Respondents' Mem. in Opp. to Petition for Reinstatement p. 1 (emphasis added).) (emphasis added.) But, as the Skeltons themselves recognized—referring as they did 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

[5] The actual language from § 15-38-15(D) is as follows, with the specific part that the Skeltons reference set off in italics: "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).

Does but also to argue that it is the Does, not BI-LO, that are liable for *any part* of the Skeltons' alleged damages. 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 acknowledged it has under § 15-38-15(D).

Lastly, the Skeltons' citation to *Stone v. Thompson*, 418 S.C. 599, 795 S.E.2d 49 (Ct. App. 2016), is misplaced. Insofar as subsection (1) is concerned—though, again, the Skeltons did not actually address the question of appealability under this subsection of § 14-3-330—BI-LO would note that the *Stone* Court's determination that the lower court's finding of a common law marriage did not involve the merits, and thus was not immediately appealable under subsection (1), was based on the unique nature of divorce proceedings, such that the appealability analysis is inapplicable to the instant case. *See Id.* at 605, 795 S.E.2d at 52 ("Nonetheless, Thompson claims her 'defense' to Stone's divorce action—that a common law marriage does not exist—has been finally determined by the family court. We find, however, that inherent in any divorce proceeding is an initial determination of the existence of a valid marriage, which a party certainly could

not appeal prior to the adjudication of the other relevant issues before the court. To accept Thompson's interpretation would seriously inhibit the efficiency of the family court by allowing any party to delay divorce proceedings with an interlocutory appeal by contending a valid marriage does not exist."). The *Stone* Court's analysis of subsection (2) is likewise unavailing to the Skeltons here because the question of whether Stone and Thompson were married was merely a finding that could be reversed on appeal if erroneous; unlike the Subject Order, the finding at issue in *Stone* did not affect a substantial right. *See Id.* at 606, 795 S.E.2d at 53 ("We first find Thompson conflates the idea of a fundamental constitutional right to marry, or not to be married, with a substantial right in a legal proceeding.[6] In any event, the order does not affect a substantial right because Thompson will not be prevented from correcting any alleged errors in the family court's interlocutory order following final judgment on the remaining issues.").

2. The Does are "*subject to* service of process."[7]

The plain language of Rule 19(a), SCRCP, is "*subject to* service of process." (emphasis added). The Skeltons equate the words "subject to" with *actually capable of being served with process*. That "subject to" in Rule 19(a) does not

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[6] Respectfully, it appears that the Skeltons are similarly mistaken. (*See* Respondents' Br. pp. 1-2 (arguing, "If declaraing a marriage does not involve a substantial right, it is hard to imagine that disallowing a non-party to be placed on a verdict form does.").)

[7] (emphasis added.)

mean actually capable of being served with process would seem to be proved by the plain language of Rule 19(b), which, in pertinent part, reads, "If *a person as described in subdivision (a)(1)-(2) hereof cannot be made a party* . . . ." (emphasis added).

BI-LO contends the Does are, without question, "subject to" service of process because, whoever they are, they, without question, according to the Skeltons' theory of liability, they "commi[tted] . . . a tortious act in whole or in part in this State[.]" Accordingly, whoever they are, wherever they may live, under S.C. Code Ann. § 36-2-803(A)(3), they are subject to personal jurisdiction in South Carolina based on their conduct—and, of course, if they are South Carolina citizens they are subject to personal jurisdiction under S.C. Code Ann. §36-2-802 based on their enduring relationship with the state.

3. The expiration of the statute of limitations does not change whether the Does are subject to service of process or indispensable parties.

The Skeltons cite the seeming expiration of the statute of limitations for them to bring a claim against the Does as reasons both why the Does are not subject to service of process and not indispensable parties. (*See* Respondents' Br. pp. 3-4.) The statute of limitations does not impact jurisdiction. Where applicable, it is an affirmative defense that must be pleaded and proved—and, indeed, it may be waived if not properly raised. *See* Rule 8(c), SCRCP (including statute of

limitations among the defenses "a party shall set forth affirmatively").

4. Regardless of whether the trial court erred in denying BI-LO's joinder motion, the trial court erroneously held that the Does should not be included on the jury verdict form.

It must be recognized that the position advanced by the Skeltons—i.e., that a non-party cannot be include on the verdict form for apportionment of fault—has very recently been adopted by our Supreme Court. *Smith v. Tiffany*, Op. No. 27715 (Shearouse Adv. Sh. No. 17 at 37) (S.C. Sup. Ct. filed April 26, 2017). But BI-LO nonetheless maintains that *Smith* is not dispositive of this appeal—or, alternatively, that it should be allowed to argue against the holding in *Smith*.

As the *Smith* Court recognized, in that case, the appellants "d[id] not contend that any provision of the [Contribution] [Act] is ambiguous." *Smith*, *supra*, at 41. Here, however, BI-LO points to § 15-38-15(D) and its express language providing 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." (emphasis added). Respectfully, the *Smith* Court did not reconcile this language with its holding.

The *Smith* Court viewed § 15-38-15(D) as merely a codification of the defendant's right to argue the empty chair defense. *Id.* at 42-43. But it cannot be the case, however, that all § 15-38-15(D) did was codify a pre-existing common

law right to point a finger at an empty chair because an empty chair defense is an all-or-nothing proposition and the terms of § 15-38-15(D) are not all-or-nothing.

For an empty chair defense to work, the defendant employing it has to prevail upon the jury that the absent wrongdoer not only was, indeed, a wrongdoer, but also that it was the absent wrongdoer and not the defendant that is to blame, i.e., a traditional empty chair defense could was either wholly successful and the defendant had zero liability or it was wholly unsuccessful and the defendant had 100% liability. Thus § 15-38-15, with its language expressly allowing a defendant to argue for a jury finding that another party, even a non-party, is liable for not just "all" but for "any," i.e., any part, of the damages, did not merely codify an existing common law right—notwithstanding its reference to a right being "retain[ed]," insofar as BI-LO can tell, the ability of a defendant to argue in favor of the partial liability of any potential tortfeasor, whether or not a party, has no predecessor under South Carolina common law. And, again respectfully, the *Smith* decision—wherein, it should be noted, the *Smith* Court itself seemed to view its own holding as inviting inequitable outcomes—did not reconcile this right afforded under § 15-38-15(D) with its holding. Moreover, despite the *Smith* Court's repeated references to its being bound by the legislative intent as drawn from the plain statutory language, the Court did not account for the cannon of construction that "regardless of how plain the ordinary meaning of the words in a statute, courts will

reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly,"[8] which would seem to be of particular import in this context, given the Court's expressly stated misgivings about the equities of the statute's operation. *Smith*, supra, at 44 ("If our mission were simply to achieve equity on a case by case basis, we would not necessarily disagree with Appellants and the dissent."); *id.* ("In honoring separation of powers, we adhere to the principle that a court must not reject the legislature's policy determinations merely because the court may prefer what it believes is a more equitable result.").

Lastly, the Skeltons' argument that the statute is inapplicable because the Does' conduct was intentional is misguided. In this regard, here is the plain language of the statute: "This section does not apply to *a defendant whose* conduct is determined to be wilful, 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." Section 15-38-15(F) (emphasis added). Clearly, subsection (F) operates to render the statute inapplicable to the particular defendant or defendants *whose* conduct falls into the stated categories. It operates as to the particular defendant or defendants whose bad conduct is cause for denial of the

[8] Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016).

protection of the statute. It would make no sense for the protection of the statute to be denied to a jointortfeasor(s) whose merely negligent conduct happens to combine with the independent bad acts of another/others—and such an absurd result could not possibly have been the intent of the legislature.

CONCLUSION

For the foregoing reasons, as well as those set forth in its principal brief, BI-LO again asks this Honorable Court to reverse the trial court and order joinder of the Does as party defendants and, in any event, i.e., whether or not the Court agrees that the Does should be joined as party defendants, order that the Does be included on the verdict form for apportionment of fault.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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May 15, 2017

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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 one copy of (1) **Initial Reply Brief of Appellants;** (2) **Appellants' Reply Designation of Matters to be Included in the Record on Appeal**; and (3) **Proof of Service** regarding the same.

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

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Kathleen B. Barnes
Secretary

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