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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
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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. **In this tort action, wherein the Skeltons (each of them, respectively)[1] are suing BI-LO[2] to recover indivisible damages resulting from intentionally tortious (and criminal) acts of third parties committed on the premises of BI-LO's grocery store (a violent robbery perpetrated against Mr. Skelton by unknown assailants), did the trial court err in denying BI-LO's motion to join the unknown assailants as indispensable parties under Rule 19, SCRCP, in light of the legislative intent underlying S.C. Code Ann. § 15-38-15?**

II. **In any event, in view of § 15-38-15 and BI-LO's "right [thereunder] 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 [the Skeltons]," did the trial court err in determining that the unknown assailants should not be included on the jury verdict form, i.e., in requiring that the "total fault" for the Skeltons' respective indivisible damages be apportioned without accounting for the undeniable fault of the unknown assailants?**

STATEMENT OF THE CASE

The Skeltons, a married couple, seek to recover indivisible damages—Mr. Skelton for personal injuries, Mrs. Skelton for related loss of consortium—arising out of an incident that occurred on December 17, 2009, wherein Mr. Skelton, a truck driver on the premises of a BI-LO grocery store to make a delivery, was attacked and robbed by unidentified third parties—described in the Skeltons'

[1] The "Skeltons" are Plaintiffs/Respondents Randy and Penelope Skelton.

[2] "BI-LO" refers to Defendants/Appellants BI-LO, LLC, and BI-LO, Inc., collectively.

complaint as "at least two [unknown] males." (*See generally* R. pp. 9-14.)[3] According to the Skeltons, after Mr. Skelton's delivery had been unloaded by BI-LO personnel, he left his truck (a tractor-trailer unit) parked at the loading bay behind the store and went inside to buy some snack items; he then walked out of the store's front door and around back to his truck; as he reached the door of his truck, he "was approached by [at least] two males," and these "unknown perpetrators threatened" him and "struck him with a blunt object violently on the back of his head and in his face" before they "ran away through a dilapidated, wooden, planked fence, separating the rear of the . . . store from a known high crime area . . . ." (R. p. 11, ¶ 10.) The Skeltons contend that BI-LO negligently failed to take reasonable measures to protect them from the unknown assailants and that their damages were proximately caused by BI-LO's negligence "combining and occurring with the intentional criminal acts of the [unknown assailants] . . . ." (R. pp. 12-13, ¶ 12.)[4]

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

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[3] This case was originally filed in Dorchester County on November 8, 2012. Following a series of procedural steps not relevant to this appeal, the litigation was dismissed in Dorchester County without prejudice, and this action was filed in Charleston County on June 24, 2015.

[4] The Skeltons also assert this theory of liability against BI-LO's co-defendant, Summerville Plaza, LLC, the owner of the property on which the subject BI-LO grocery store is operated; however, it is not a party to this appeal. (*See generally* R. pp. 9-14.)

parties to the case—named as John Doe 1 and John Doe 2 (hereinafter collectively referred to as the "Does")—and the trial court's ruling thereon. In short, BI-LO argued the Does should be added as parties to the case and their role in the underlying incident considered by the jury in apportioning fault in accordance with § 15-38-15. (*See generally* R. pp. 30-53, pp. 63-68.) The trial court denied BI-LO's motion to join the Does as party defendants and, indeed, ruled that the Does should not be included on the jury verdict form, prohibiting any fault from being apportioned to the Does. (*See generally* R. pp. 1-6.)

This appeal timely followed via notice served July 14, 2016.

ARGUMENT

I. In this tort action, wherein the Skeltons (each of them, respectively) are suing BI-LO to recover indivisible damages resulting from intentionally tortious (and criminal) acts of third parties committed on the premises of BI-LO's grocery store (a violent robbery perpetrated against Mr. Skelton by the Does), the trial court erred in denying BI-LO's motion to join the Does as indispensable parties under Rule 19 in light of the legislative intent underlying § 15-38-15.

The trial court erroneously relied on *Chester v. South Carolina Department of Public Safety*[5] and held the Does should not be joined as indispensable parties. (R. pp. 3-4.) In order to properly apportion damages and provide complete relief among the parties, a jury must be allowed to consider the total fault of all parties

[5] 388 S.C. 343, 698 S.E.2d 559 (2010).

and potential tortfeasors—especially those tortfeasors who, by the Skeltons' own admission, directly caused their alleged indivisible damages. The text, structure, and purpose of § 15-38-15 reflect the legislative intent to include all tortfeasors, whether or not parties to the litigation, in the apportionment of fault to prevent the unwarranted imposition of joint and several liability on a defendant who is less than 50% at fault.

Prior to the passage of § 15-38-15, South Carolina courts followed the common law doctrine of pure joint and several liability; in cases of indivisible damages against multiple defendants, each defendant found liable was obligated for (i.e., on the hook for) the entire judgment amount without regard to the defendants' respective degrees of fault. *Rourk v. Selvey*, 252 S.C. 25, 164 S.E.2d 909 (1968) (finding reversible error where the trial court allowed jury to apportion damages between defendants according to degree of their culpability). Thus, a co-defendant who may have only been 1% at fault for the plaintiff's indivisible damages was nonetheless liable for 100% of the judgment in the plaintiff's favor.

To counter the resulting "'inequities' suffered by low-fault, 'deep pocket' defendants,"[6] many jurisdictions enacted legislation to limit the scope of the

[6] *Debenedetto v. CLD Consulting Eng'rs, Inc.*, 903 A.2d 969, 977 (N.H. 2006) (citations omitted).

common law rule. South Carolina did so in 2005, enacting § 15-38-15, which provides as follows:

> (A) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent 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. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.
>
> (B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).
>
> (C) The jury, or the court if there is no jury, shall:
>
> (1) specify the amount of damages;
>
> (2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and

(3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).

(a) For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.

(b) After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral argument, with the length

> of such argument subject to the discretion of the trial judge, on the determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.
>
> (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.
>
> (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).
>
> (F) 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.

(emphasis added).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "In interpreting a statute, the language of the statute must be construed in a sense which harmonizes with its subject matter and accords with its general purpose." *Hinton v. Dep't of Probation, Parole & Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004). Moreover, a statute must be read as a

whole, and sections that are part of the same general statutory scheme should be construed together and each given effect if it can be done by any reasonable construction. *Id.*; *see also Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). Put simply, "a statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003).

In making this determination, the Court must presume the legislature did not intend a futile act but rather intended its statutes to accomplish something. *See, e.g., Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). And "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." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); *see also Hodges*, 341 S.C. at 87, 533 S.E.2d at 582 (2000) ("'A choice of language in a act will not be construed with literality when to do so will defeat the lawmakers' manifest intention, and a court will reject the ordinary meaning of words used in a statute when, to accept the ordinary meaning, will lead to a result so plainly absurd that it can not possibly have been intended by the legislature.'")

(quoting *S.C. Bd. of Dental Exam'rs v. Breeland*, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946) (citations omitted)).

Pursuant to subsection (A) of § 15-38-15, joint and several liability does not apply to a defendant whose conduct is determined to be less than 50% of the total fault for the plaintiff's indivisible injuries—the total fault being comprised of the fault of all defendants plus any fault of the plaintiff; rather, such a defendant is only liable for that percentage of the indivisible damages determined by the jury or the trier of fact. On its face, the intent of the statute is clear—the legislature sought to avoid the strict imposition of unjustly disproportionate liability on a party who played only a minor role in causing a plaintiff's damages and, instead, wanted to limit that party's responsibility to that percentage of plaintiff's damages corresponding to the party's level of fault. And, under subsection (D), a defendant has "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 [the plaintiff]." (emphasis added). The only way to interpret subsection (D) consistent with the legislative purpose of § 15-38-15—to shield defendants from the inequities inherent in joint and several liability when they are less than fifty percent at fault—is to allow the jury to consider the fault of all tortfeasors in apportioning fault.

In denying BI-LO's motion, the trial court erroneously relied on the

Supreme Court's decision in *Chester*. (*See* R. pp. 3-4.) *Chester* involved a multi-car accident where three state agencies were alleged to be negligent as a result of smoke obscuring visibility on the highway. 388 S.C. at 345, 698 S.E.2d at 560. Because multiple vehicles and state agencies were involved, there were numerous potential plaintiffs and defendants. *Id.* Several individuals brought suit against the Chester Estate in Hampton County, and the estate then filed a separate lawsuit in Dorchester County naming only three state agencies. *Id.* After filing suit, the estate settled several of the Hampton County claims and received money in the settlements. *Id.* The state agencies contended, and the trial judge agreed, that the South Carolina Tort Claims Act (the "TCA") abrogated the common law regarding forcing a plaintiff to sue a defendant for purposes of fault allocation and allowed the state agencies to name several additional defendants under Rule 19. *Id.* Specifically, the state agencies invoked S.C. Code Ann. § 15-78-100(c), which states, "In all actions brought pursuant to [the TCA] when an alleged joint tortfeasor is named as a party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined." *Id.* The Supreme Court reversed the trial court, holding § 15-78-100(c) only allowed fault allocation between named defendants. *Id.* at 346, 698 S.E.2d at 560. The Court based its decision on two key points: (1) to bring parties who have previously

settled back into the case would "thwart our strong public policy favoring the settlement of disputes," and (2) the defendants already had an adequate remedy—the setoff for whatever the plaintiffs had received from the settling defendants. *Id.*

The trial court's reliance on *Chester* is misplaced for several reasons. First, the *Chester* opinion addressed § 15-78-100(C), which is part of the TCA, unlike § 15-38-15, which is part of the South Carolina Contribution Among Tortfeasors Act. *Id.* The Court held, "A ruling that a *TCA defendant* can compel a plaintiff to join other alleged tortfeasors as defendants in that suit would overturn" the well-settled law that "a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." *Id.* at 345–46, 698 S.E.2d at 560 (emphasis added). Clearly, the Court was not convinced the legislature, in passing the TCA—*not § 15-38-15*—meant to overturn the "Plaintiff chooses" common law rule. However, § 15-38-15, unlike the TCA, directly eliminated the automatic imposition of joint and several liability and expressly provided defendants a substantive "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." § 15-38-15(D) (emphasis added). In this regard, it should be noted that § 15-38-15 did not merely provide for a defendant's retention of the already acquired common law right to raise an "empty chair" defense. The right expressly provided under § 15-38-15(D) is not simply the right to make an all-or-

nothing "empty chair" argument pointing to another non-party tortfeasor but the right to point to "another potential tortfeasor, whether or not a party," and assert that they are liable for *any part* of the plaintiff's alleged damages, a right defendants did not have at common law. *See Rourk*, 252 S.C. 25, 164 S.E.2d 909.

Second, the TCA deals with the limited abrogation of governmental immunity and, unlike the § 15-38-15, *does not address the issue of joint and several liability.* The TCA does not address joint and several liability because governmental entities have never been subject to joint and several liability, and for that reason, the Court in *Chester* never considered joinder of nonparties in the present context. In the present case, the trial court's order misapprehends the fundamental differences between the TCA and § 15-38-15 and improperly conflates the issues as one in the same.

Lastly, the Court in *Chester* based its ruling, in part, on the fact the non-settling defendants already had an adequate remedy—a setoff for whatever the plaintiffs received from the settling defendants. Here, BI-LO has no adequate remedy and is left without recourse because *there will never be any settlement with the Does—though there is no question that they "contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by [the Skeltons]*." Therefore, assuming, *arguendo*, that it is only party defendants who

may be included in the apportionment determination under § 15-38-15(C),[7] the *only* way to harmonize such a view of subsection (C) with the general subject matter and purpose of § 15-38-15, especially in light of subsection (D), is to add the Does as party defendants to this litigation and allow the jury to consider their fault in its overall fault apportionment.

And in light of the clear legislative intent underlying § 15-38-15, the trial court erred in holding the Does are not indispensable parties under Rule 19(a). In relevant part, Rule 19(a) provides that "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (a) in that person's absence, the court cannot accord complete relief among existing parties." In interpreting the factors that go into a determination of whether a party is indispensable, the United States Supreme Court[8] has identified several factors that should be considered by a Court, including the fact that "the defendant may properly wish to avoid . . . sole responsibility for a liability he shares with another." *Provident Tradesmen Bank &*

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[7] To be clear, BI-LO sought to join the Does as party defendants because, if they were so joined, there could be no question that they would be included in the apportionment of liability; however, BI-LO does not concede that § 15-38-15 requires the Does to be joined as party defendants to be included in the apportionment of liability. As reflected in BI-LO's Issue/Argument II, BI-LO contends that, under § 15-38-15, the Does should be included in the apportionment of liability in any event.

[8] South Carolina's Rule 19 is identical to the federal rule.

Trust Co. v. Patterson, 390 U.S. 102, 110 (1968). Furthermore, § 15-38-15's protection against joint and several liability clearly depends on the relative fault of others. If indisputably culpable nonparties are not included in the forced calculation of 100% of the fault, the unavoidable result is "in [their] absence complete relief cannot be accorded among those already parties." And even though the Does have successfully concealed their identities, whether or not they are South Carolina citizens, in light of the actions attributed to them by the Skeltons, South Carolina has personal jurisdiction over them; thus, they are "subject to service of process." *See* S.C. Code Ann. § 36-2-802 ("A court may exercise personal jurisdiction over a person domiciled in . . . this State as to any cause of action."); S.C. Code Ann. § 36-2-803 ("(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's: . . . (3) commission of a tortious act in whole or in part in this State . . . ."); *see also* S.C. Code Ann. § 15-9-710 (regarding service by publication).

The Skeltons contend complete relief can be accorded because BI-LO has enough insurance to cover their damages in full. (*See* R. p. 55.) Respectfully, the Skeltons miss the point. Whether BI-LO has sufficient insurance coverage is entirely irrelevant to this inquiry. Moreover, under the Skeltons' view, the Rule 19 would operate for the sole benefit of plaintiffs, but there is nothing in the rule—and

the Skeltons cited no authority—to support the notion that a Rule 19 analysis only focuses on whether a plaintiff can be accorded relief. Indeed, the plain language of Rule 19—"in his absence complete relief cannot be accorded among *those already parties*"—demonstrates otherwise. (emphasis added). Again, assuming, *arguendo*, that it is only party defendants who may be included in the apportionment determination under § 15-38-15(C), BI-LO will suffer obvious and irreparable prejudice if the Does are not added as party defendants in this action, and the only way to accord complete relief between the parties—and to honor the legislative intent underlying § 15-38-15—is to add the Does as party defendants and permit the jury to consider their fault in its overall fault apportionment.

II. In any event, in view of § 15-38-15 and BI-LO's "right [thereunder] 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 [the Skeltons]," the trial court erred in determining that the Does should not be included on the jury verdict form, i.e., in requiring that the "total fault" for the Skeltons' respective indivisible damages be apportioned without accounting for the undeniable fault of the Does.

In any event, i.e., regardless of whether the trial court erred in denying BI-LO's joinder motion, the trial court erroneously held the Does should not be included on the jury verdict form, i.e., in requiring that the "total fault" for the Skeltons' respective indivisible damages be apportioned without accounting for the undeniable fault of the Does. (R. pp. 4-6.) In South Carolina, there is an open

question regarding the handling of a situation in which the defendants assert that another party bears at least some responsibility for a plaintiff's injury but that party is either never joined or is dismissed from the action. *See, e.g., Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 197, 730 S.E.2d 890, 899 (Ct. App. 2012) (avoiding a decision on whether it was error to not include a non-party on the verdict form when apportioning fault among the defendants because the defendant requesting apportionment to the non-party had been deemed reckless and was thus not afforded the protections of the statute).[9]

The trial court reasoned that because subsection (C), which provides for the apportionment of percentages of fault, fails to specifically mention the fault of non-parties as a consideration in determining fault, section (D) "simply codified a defendant's" right to assert an "empty chair" defense at trial rather than provide a substantive right to allocate fault to nonparties. As explained above, this simply cannot be true because the right expressly provided under § 15-38-15(D) is not

[9] In this regard, BI-LO notes that § 15-38-15 includes safeguards to prevent undue prejudice to the plaintiff, and/or undue benefit to defendants, where apportionment would be inequitable. *See* §§ 15-38-15(C)(3)(a) ("[T]he court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.") and (F) ("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.").

merely the right to make an all-or-nothing "empty chair" argument pointing to another non-party tortfeasor but the right to point to "another potential tortfeasor, whether or not a party," and assert that they are liable for *any part* of the plaintiff's alleged damages, a right defendants did not have at common law. *See Rourk*, 252 S.C. 25, 164 S.E.2d 909.

Under § 15-38-15, 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 . . . ." § 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.*

While there is arguably some discrepancy in the statutory language, as subsection (C) appears to contemplate only the inclusion of named defendants on the verdict form while considering apportionment, to prevent the inclusion of non-parties would render subsection (D), which explicitly contemplates the apportionment of fault to a non-party, superfluous. *See, e.g., State v. Graves*, 269

S.C. 356, 363, 237 S.E.2d 584, 587 (1997) (noting that a statute must be construed so that "no word, clause, sentence provision or part shall be rendered a surplusage, or superfluous . . ."). Reading the statute as a whole, § 15-38-15 was enacted in the interests of justice to limit joint and several liability to instances where a defendant's conduct is at least fifty percent of the total fault of the indivisible damages—and, as noted above, it includes safeguards to prevent undue prejudice to the plaintiff, and/or undue benefit to defendants, where apportionment would be inequitable. *See* §§ 15-38-15(C)(3)(a) and (F). The only feasible way to give the statute its intended effect and purpose is to allow non-party fault allocation. *See Smalls v. Weeds*, 296 S.C. 364, 370, 360 S.E.2d 531, 534 (Ct. App. 1987) ("In construing statutory language, the statute must be read as a whole . . . and sections which are part of the same general statutory law of the state must be construed together, and each one given effect, if it and be done by any reasonable construction."). Otherwise, if the jury is not given the opportunity to apportion fault to non-parties, the "right to assert" the fault of non-parties is, to a great degree, illusory—especially for "low-fault, deep-pocket" target defendants who are more attractive to enterprising plaintiffs than "high-fault, empty-pocket" tortfeasors, i.e., especially in those cases where the "right" would be most important, and justly invoked, it would be largely useless and incapable of being meaningfully exercised. And the injustice to the target defendant is not

ameliorated by a setoff for any amounts recovered from tortfeasors whose conduct is not accounted for in the apportionment of fault because, in these situations, any amounts that may somehow be recovered from such "high-fault, empty pocket" tortfeasors will not be proportionate to any just determination of their degree of fault. Such an absurd result could not have been the intent of the legislature, and should not be endorsed by this Court. *See Duke Energy*, 415 S.C. at 355, 782 S.E.2d at 592; *see also Hodges*, 341 S.C. at 87, 533 S.E.2d at 582.

By disallowing the Does from the verdict form and the apportionment of fault, the trial court has denied BI-LO its rights under, and the protection of, § 15-38-15, and guaranteed that any apportionment of fault will bear no resemblance to substantial justice because it will *not* account for the undeniable fault of the Does. Neither justice nor the clear intent of § 15-38-15 would be served by forcing the jury to disregard the truth and allocate 100% of the fault for the Skeltons' respective indivisible damages among only party defendants where there is no question that the party defendants do not bear 100% of the fault because of undeniable fault of non-parties.

CONCLUSION

For the foregoing reasons, BI-LO 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.

Respectfully submitted,

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Dated: 6/21/17

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APPELLANTS' CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellants BI-LO, LLC and BI-LO, Inc. complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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Charleston, South Carolina

Dated: 6/21/17

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
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.

PROOF OF SERVICE

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I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellants above named, hereby certify that the **FINAL BRIEF OF APPELLANTS** and **APPELLANTS' CERTIFICATION FOR FINAL BRIEF** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on June 21, 2017, properly posted for delivery to the following addressees:

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Respectfully submitted,

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