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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2015-CP-10-3566
Randy Skelton and Penelope Skelton,	)	
	)	
Plaintiffs,	)	**ORDER DENYING DEFENDANTS BI-LO, LLC AND BI-LO, INC.'S' MOTION TO ADD JOHN DOE 1 AND JOHN DOE 2 AS INDISPENSABLE PARTIES**
	)	
v.	)	
	)	
Summerville Plaza, LLC; Bi-Lo, LLC; and Bi-Lo, Inc.,	)	
	)	
	)	
Defendants.	)	

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 SCRCP RULE 19.

SCRCP 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.

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!

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

This 17 day of June, 2016.
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2015-CP-10-_____
Randy Skelton and Penelope Skelton,	)	
	)	
Plaintiffs,	)	SUMMONS
	)	
v.	)	
	)	
Summerville Plaza, LLC; Bi-Lo, LLC; and Bi-Lo, Inc.,	)	
	)	
	)	
Defendants.	)	

FILED
2015 JUN 24 AM 11:40
JULIE ARMSTRONG
CLERK OF COURT

TO: DEFENDANTS SUMMERVILLE PLAZE, LLC, BI-LO, LLC AND BI-LO, INC.:

YOU ARE HEREBY SUMMONED and required to answer the Plaintiffs' Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon the subscriber, Matthew E. Yelverton, at his office located at 15 Middle Atlantic Wharf, Suite 101, Charleston, South Carolina, 29401, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

(*signature page to follow*)

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By: _____
Attorneys for the Plaintiffs

June 24, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2015-CP-10-_____
Randy Skelton and Penelope Skelton,	)	
	)	
Plaintiffs,	)	COMPLAINT
	)	
v.	)	
	)	
Summerville Plaza, LLC; Bi-Lo, LLC; and Bi-Lo, Inc.,	)	
	)	
	)	
Defendants.	)	

The Plaintiffs, Randy Skelton and Penelope Skelton, complaining of the Defendants, allege and say as follows:

1. The Plaintiffs are citizens and residents of the State of South Carolina, County of Pickens.

2. Upon information and belief, Defendant Summerville Plaza, LLC (hereinafter referred to as "Summerville Plaza") is a corporation incorporated and existing under the laws of the State of South Carolina with its principle place of business located in Dorchester County, South Carolina.

3. Upon information and belief, Defendant Bi-Lo, LLC is a corporation incorporated and existing under the laws of the State of Delaware, but is and at all times relevant hereto was doing business in Dorchester County and other counties in South Carolina as the owner and/or operator of numerous retail grocery stores including a store known as store number 296, located at 1452 Boone Hill Road, Summerville, South Carolina.

4. Upon information and belief, Defendant Bi-Lo, Inc. is a corporation incorporated and existing under the laws of the State of Delaware, but is and at all times relevant hereto was doing business in Dorchester County and other counties in South Carolina as the owner and/or

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2015-CP-10-3566
RANDY SKELTON AND PENELOPE SKELTON ,	)	
PLAINTIFF,	)	
vs.	)	**ANSWER OF DEFENDANTS BI-LO, LLC AND BI-LO, INC.** (JURY TRIAL REQUESTED)
SUMMERVILLE PLAZA, LLC; BI-LO, LLC; AND BI-LO, INC.,	)	
DEFENDANTS.	)	

The Defendants above-named, Bi-Lo, LLC and Bi-Lo, Inc., hereby answer the Plaintiffs' Complaint as follows:

1. Each and every allegation of the Plaintiffs' Complaint not hereinafter expressly admitted, qualified and/or explained is denied.

2. The Defendants admit, on information and belief, the allegations contained in Paragraph 1 of the Plaintiffs' Complaint.

3. Paragraph 2 of the Plaintiffs' Complaint is not directed to the Defendants; accordingly, no response is required from the Defendants. By way of further response, to the extent that Paragraph 2 of the Plaintiffs' Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendants, those allegations are denied, and strict proof thereof is demanded.

4. In response to Paragraphs 3 and 4 of the Plaintiffs' Complaint, the Defendants admit only that BI-LO, LLC is a Delaware company that conducts some of its business in Dorchester County, including the operation of the store in question. By way of further response, to the extent that Paragraphs 3 and 4 of the Plaintiffs' Complaint attempt to allege or do allege any

cause of action, claim, act, error or omission as to the Defendants, those allegations are denied, and strict proof thereof is demanded.

5. Paragraph 5 of the Plaintiffs' Complaint is a statement and/or conclusion of law, and the Defendants are not required to admit or deny the same. By way of further response, to the extent that Paragraph 5 of the Plaintiffs' Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendants, those allegations are denied, and strict proof thereof is demanded.

6. Paragraph 6 of the Plaintiffs' Complaint is not directed to the Defendants; accordingly, no response is required from the Defendants. By way of further response, to the extent that Paragraph 6 of the Plaintiffs' Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendants, those allegations are denied, and strict proof thereof is demanded.

7. Paragraphs 7, 8 and 9 of the Plaintiffs' Complaint are statements and/or conclusions of law, and the Defendants are not required to admit or deny the same. By way of further response, to the extent that Paragraphs 7, 8 and 9 of the Plaintiffs' Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendants, those allegations are denied, and strict proof thereof is demanded.

8. The Defendants lack sufficient information with which to fully respond to the allegations contained in Paragraph 10 of the Plaintiffs' Complaint; accordingly, these allegations are denied, and strict proof thereof is demanded.

9. The Defendants deny the allegations contained in Paragraphs 11, 12 and 13 of the Plaintiffs' Complaint, and the "Wherefore" paragraph following Paragraph 13 of the Plaintiffs' Complaint, and strict proof thereof is demanded.

10. In response to Paragraph 14 of the Plaintiffs' Complaint, the Defendants reiterate each and every prior paragraph of this Answer as fully and completely as if set forth herein verbatim.

11. The Defendants admit, on information and belief, the allegations contained in Paragraph 15 of the Plaintiffs' Complaint.

12. The Defendants deny the allegations contained in Paragraph 16 of the Plaintiffs' Complaint, and strict proof thereof is demanded.

13. The Defendants also deny the allegations contained in the final "Wherefore" Paragraph of the Plaintiffs' Complaint, which is the remainder of the Plaintiffs' Complaint, and strict proof thereof is demanded.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE:
(Comparative Negligence)

14. The Defendants, on information and belief, would allege and show that any injuries and damages sustained by the Plaintiffs as alleged in the Complaint, which are denied, were due to and were caused and occasioned by the Plaintiffs' own acts of comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness, which acts on the part of the Plaintiffs combined and contributed and concurred with any negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Defendants, which is denied, without which the alleged incident and resulting alleged damages would not have occurred or have been sustained, and the Defendants do plead such comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Plaintiffs as the direct and proximate cause of the injuries and damages sustained by the Plaintiffs as alleged in the Complaint. Accordingly, the Defendants are entitled to a

determination as to the percentage with which the Plaintiffs' own comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness contributed to this incident and the Plaintiffs' alleged injuries and damages and to the reduction of any sum awarded to the Plaintiff by an amount equal to the percentage of the Plaintiffs' own comparative negligent, careless, reckless, heedless, willful and wanton conduct.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Unconstitutionality of Punitive Damages)

15. The Plaintiffs' claim for punitive damages violates the Fifth, Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States in the following particulars:

a. The Plaintiffs' claims for punitive damages violate the Fifth Amendment for the following reasons:

i) The double-jeopardy clause is violated because multiple awards of punitive damages can be imposed upon the Defendants for the same act or omission, and because an award of punitive damages can be imposed upon the Defendants, even though the Defendants were convicted or acquitted of a factually related defense in an underlying criminal proceeding; and

ii) The self-incrimination clause is violated because Defendants can be compelled to give testimony against themselves;

b. The Plaintiffs' claims for punitive damages violate the Sixth and Fourteenth Amendments because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas punitive damages are a fine or penalty and are quasi-criminal in nature and, as such require the "beyond the reasonable doubt" standard of proof;

c. The Plaintiffs' claims for punitive damages violate the Defendants' right to access to the courts guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of unlimited punitive damages chills the Defendants' exercise of that right;

d. The Plaintiffs' claim for punitive damages violate the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:

i) The standard or test for determining the requisite mental state of defendant for imposition of punitive damages is void for vagueness;

ii) Insofar as punitive damages are not measured against actual injury to the Plaintiff and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of Defendants' alleged egregious conduct;

iii) In cases involving more than one defendant, the evidence of the net worth of each is admissible, and the jury is permitted to award punitive damages in differing amounts based upon the affluence of a given defendant;

iv) The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that the defendant is denied equal protection of law; and

v) Punitive damages may be imposed without a requisite showing of hatred, spite, ill will or wrongful motive.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Improper Claim for Punitive Damages)

16. Punitive damages are inappropriate in this case since the Defendants did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(S.C. Code Ann. 15-32-510 et. seq.)

17. The Defendants do plead the limitations on damage awards found in S.C. Code Ann. 15-32-510 et. seq., and request bifurcation in accordance with these code sections.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Intervening and Superseding Negligence)

18. The Defendants would allege and show that any injuries and damages sustained by the Plaintiff as alleged in the Complaint, which are denied, were due to and were caused and occasioned by the intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of some other party or parties over whom the Defendants had no supervision or control, and the Defendants do plead such intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Plaintiffs as alleged in the Complaint.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(No Duty to Warn of the Unknowable)

19. The Defendants had no duty to warn about possible dangers or hazards, if any, which were not known or which were not capable of being known.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Assumption of the Risk)

20. The Plaintiffs' claims are barred by the doctrine of assumption of the risk and/or applicable statutory law of the State of South Carolina in that assuming, but not admitting, the area in question was dangerous, the Plaintiffs discovered and were aware of such, assumed such risk and proceeded unreasonably, thus resulting in the alleged injury.

FURTHER ANSWERING AND FOR
A FURTHER AND AFFIRMATIVE DEFENSE
(Failure to State a Claim)

21. The Plaintiffs' Complaint fails to state any claims upon which relief can be granted as to the Defendants, and the Plaintiffs' Complaint should, therefore, be dismissed pursuant to Rule 12(b)(6), *SCRCP*.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Assumption of the Risk)

22. The Defendants would allege and show that the Plaintiffs were, at all times, fully aware of the alleged dangers as set forth in the Complaint, and that the Plaintiffs were negligent and careless in failing to take necessary precautions and that the Plaintiffs assumed any alleged risk incident to the allegations set forth in the Complaint, and that this negligent, careless, reckless, heedless, willful and wanton assumption of the risk was the proximate cause of the Plaintiffs' alleged injuries and damages as set forth in the Complaint; therefore, the Plaintiffs are herein barred from recovery.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Laches, Waiver and/or Estoppel)

23. The Plaintiffs' claims are barred by the doctrines of laches, waiver and/or estoppel.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Substantial Compliance)

24. The Defendants would allege and show that they have substantially performed all requirements, contractual or otherwise, in a workmanlike manner.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Reliance on Additional Defenses)

25. The Defendants hereby give notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend their Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiffs' Complaint, the Defendants pray that the same be dismissed, together with the costs and disbursements of this action, and for such other and further relief as this Court deems proper. The Defendants also request a trial by jury.

YOUNG CLEMENT RIVERS, LLP

By: _____

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

Charleston, South Carolina

July 21, 2015

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 21 day of July, 2015.

Laura S. Ruddy

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS C/A: 2015-CP-10-3566
Randy Skelton and Penelope Skelton, Plaintiffs, -vs- Summerville Plaza, LLC, Bi-Lo, LLC, and Bi-LO, Inc., Defendants.	)	**ANSWER TO PLAINTIFFS' COMPLAINT OF DEFENDANT SUMMERVILLE PLAZA, LLC**

Defendant, Summerville Plaza, LLC, by and through its undersigned counsel, hereby answers the Complaint of the Plaintiffs, as follows:

1. All allegations of the Plaintiffs' Complaint not specifically admitted herein are hereby denied.

2. The allegations of Paragraphs 1 and 2 are admitted.

3. Answering Paragraphs 3, 4 and 5 of the Complaint, the allegations of these paragraphs are directed to another defendant, and therefore require no response from this Defendant. To the extent a response is required, Defendant denies the same and demands strict proof thereof.

4. The allegations of Paragraphs 6 and 7 state conclusions of law and therefore do not require a response. To the extent that a response may be required, said allegations are hereby denied.

5. The allegations of Paragraphs 8, 9, 10, and 11 are denied.

6. The allegations of Paragraph 12 (and its subparts) and Paragraph 13 state conclusions of law and therefore do not require a response. To the extent that a response may be required, said allegations are hereby denied.

7. The allegations in Paragraph 14 require no response.

8. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 15 of the Complaint, and therefore denies the same and demands strict proof thereof.

9. The allegations of Paragraph 16 (and its subparts) state conclusions of law and therefore do not require a response. To the extent that a response may be required, said allegations are hereby denied.

FOR A FIRST DEFENSE
(Comparative Negligence)

10. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 9 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

11. Any damages suffered by Plaintiffs are the direct and proximate result of their comparative negligence and Plaintiffs' recovery should be barred or, alternatively, reduced proportionately to Plaintiffs' comparative negligence.

FOR A SECOND DEFENSE
(Failure to Mitigate)

12. The responses to the allegations in the Complaint, which are contained in paragraphs 1 through 11 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

13. Plaintiffs failed to mitigate their damages as required by law.

FOR A THIRD DEFENSE
(Sole Negligence of Third Parties)

14. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 13 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

15. Plaintiffs' damages, if any, are the direct and proximate result of the sole negligence of third parties not affiliated with this Defendant and not under its domain or control.

FOR A FOURTH DEFENSE
(Intervening Cause)

16. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 15 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

17. If Plaintiffs sustained the damages alleged in the Complaint, an intervening cause or causes led to the alleged damages, and any act or omission on the part of Defendant was not the proximate cause of Plaintiffs' alleged damages.

FOR A FIFTH DEFENSE

18. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 17 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

19. Plaintiffs' recovery against Defendant, if any, should be reduced or barred by any settlement, judgment, or payment of any kind received from any other individual or entity in connection with the subject matter of the incident described in the Complaint.

FOR A SIXTH DEFENSE

20. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 19 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

21. To the extent Plaintiffs are seeking punitive damages, Plaintiffs have not pled the punitive damages claim with the requisite particularity.

FOR A SEVENTH DEFENSE

22. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 21 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

23. Plaintiffs are not entitled to an award of punitive damages because such damages violate the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

a. the judiciary's ability to correct a punitive damages award at the appellate level only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;

b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

c. to the extent an award of punitive damages is excessive, such award violates due process guarantees;

d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

e. even if it could be argued that a standard governing imposition of punitive damages exists, the standard is void for vagueness; and

f. Plaintiffs' claim for punitive damages violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth and status of the Defendant.

FOR AN EIGHTH DEFENSE

24. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 23 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

25. With respect to Plaintiffs' claim for punitive damages, Defendant incorporates by reference any and all standards of limitation regarding the determination of and/or enforceability of punitive damage awards which arose in the decisions of *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group., Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) and their progeny.

FOR A NINTH DEFENSE

26. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 25 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

27. Defendant reserves the right to assert any additional defenses as may become available through investigation and discovery and to adopt and assert any defenses raised or asserted by any other party to this action.

FOR A TENTH DEFENSE

28. The responses to the allegations of the Complaint, which are contained in paragraphs 1 through 27 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

29. Further answering the Complaint and by way of a Motion to Dismiss, Plaintiffs' claims should be dismissed because they are barred by workers' compensation exclusivity.

FOR AN ELEVENTH DEFENSE

30. The response to the allegations of the Complaint, which are contained in paragraphs 1 through 29 hereinabove, are realleged and incorporated herein as fully as if repeated verbatim.

31. Plaintiffs' Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, said Defendant prays that the same be dismissed with attorneys' fees, costs, and for such other relief as this Honorable Court deems just and proper.

BY: _____

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July 20, 2015
Charleston, South Carolina

State of South Carolina)	In Common Pleas Court
County of Charleston)	Ninth Judicial Circuit
Randy Skelton,)	Transcript of Record
and Penelope Skelton,)	2015-CP-10-3566
Plaintiff,)	
V.)	
Summerville Plaza, LLC,)	
and BI-LO, LLC,)	
Defendant.)	

June 15, 2016

Charleston, South Carolina

B E F O R E:

The Honorable J. C. Nicholson, Jr., Presiding Judge

A P P E A R A N C E S:

Matthew E. Yelverton, Esquire

Attorney for the Plaintiff

Jeffrey J. Wiseman, Esquire

Attorney for the Defendant

SHARON L. VIZER

CIRCUIT COURT REPORTER

I N D E X

NO EXHIBITS WERE INTRODUCED

Wednesday, June 15, 2016

THE COURT: What's next, Caroline?

THE CLERK: Your Honor, position number 44, 2015-3566, Skeleton vs. Summerville Plaza.

THE COURT: Anybody here on that?

MALE SPEAKER: Yes, sir.

THE COURT: All right. Who is here representing who?

MR. WISEMAN: Your Honor, Jeff Wiseman from Young Clement, Rivers, and I represent BI-LO, LLC and BI-LO Inc.

THE COURT: Okay.

MR. YELVERTON: Morning, Your Honor. Matt Yelverton. I represent the plaintiffs, Randy Skelton, and his wife, Penelope Skelton.

THE COURT: Okay. Let me see. What is this? A motion -- motion for what? It doesn't say. It just says motion, slash, motion by defendant.

MR. WISEMAN: Your Honor, this is a motion to join as indispensable parties John Does one and two.

THE COURT: You want to join -- bring in John Doe?

MR. WISEMAN: Yes. Yes, Your Honor, two of them.

THE COURT: Two of them?

MR. WISEMAN: Yes, Your Honor.

THE COURT: Like who?

MR. WISEMAN: Pardon, Your Honor?

THE COURT: Why two John Does? Why don't you have a Jane Doe and a John Doe, have a couple?

MR. WISEMAN: According to the plaintiff there was two unknown male assailants.

THE COURT: Oh, okay.

MR. WISEMAN: And I can explain the purpose of this motion, Your Honor, and the background. This case is a --

THE COURT: What's your objection bringing in more parties?

MR. YELVERTON: Well, they are not indispensable parties, Your Honor, and there's case law directly on point that I'm happy to talk about. So if there's two John Does that are brought in in an effort to essentially, you know, address the --

THE COURT: Well, they probably want to address the liability issue down the road.

MR. WISEMAN: Yes, Your Honor, allocation of fault.

MR. YELVERTON: Well, the defendants are free to argue an empty chair at trial.

THE COURT: All right. You don't agree to it.

I'll be glad to hear you.

MR. WISEMAN: Sure, Your Honor. This case is a case that arises out of an assault and battery that the

plaintiff alleges occurred behind a BI-LO in Summerville back in 2009. The plaintiff was a delivery driver. He alleges that he made a delivery, walked back behind the BI-LO and was jumped by at least two people.

THE COURT: What was he delivering?

MR. WISEMAN: Groceries.

THE COURT: Groceries?

MR. WISEMAN: Yeah. We prefer a third party vender delivering groceries.

THE COURT: Okay.

MR. WISEMAN: And so he jumped and he sustains a bunch of injuries. What is an absolute agreed upon fact in this case, Your Honor, is that the injuries sustained by the plaintiff were caused by these two people. The plaintiff has pled as much, and the plaintiff's own expert -- the plaintiff's own liability expert agrees that it's undeniable that the injuries were caused by these two people.

The only thing that we don't know, what this case is about, is whether BI-LO and/or Summerville Plaza, the landlord, also did something in combination with these acts that contributed to these acts, allowed these acts to happen that also caused these injuries.

So what we know is -- and, again, the plaintiffs have pled that these acts caused his injuries and their

own expert agrees that these acts caused the injuries. So the one thing we are trying to figure out is --

THE COURT: I assume they allege that you were negligent in security or whatever --

MR. WISEMAN: Yes, Your Honor.

THE COURT: -- I assume.

MR. WISEMAN: Absolutely, Your Honor, and so what we are trying to figure out is --

THE COURT: What does that have to do with the actual assault, and why would they be essential because of the assault when your allegation against you is you were negligent in not providing proper security?

MR. WISEMAN: Well, the allegation against me is that the acts of these two assailments in combination with whatever negligent security theory they have against us caused these injuries. That's in their pleadings so --

THE COURT: Well, why are they essential, especially since you don't know who they were?

MR. WISEMAN: They are essential, Your Honor, because, as you know, Your Honor, the South Carolina laws of joint and several liability has changed since 2005, and the new law being that you can't be joint and severally liable. In other words, you can't be made to pay the entire verdict of an indivisible injury unless

you are held by a jury to be at least 50 percent at fault, and the only way to figure that out is to have a jury verdict form under the statute.

THE COURT: But those two folks didn't have anything to do about the security.

MR. WISEMAN: Those folks did have something to do with the injuries --

THE COURT: I understand that.

MR. WISEMAN: -- and that's why we're here, Your Honor.

THE COURT: Yeah, I understand that but they didn't have anything to do about the security.

MR. WISEMAN: No, Your Honor, that's correct but they do -- their actions in combination with the alleged actions of ours -- you know, again, of course, we deny that there was never security.

THE COURT: I understand.

MR. WISEMAN: But their actions in combination with their actions -- these aren't my words. These are their words. These are from their complaint. So the actions of these two assailants in combination with the alleged acts of our folks is what caused these injuries. That is a plea of joint and several liability. They are basically saying we want to hold BI-LO and/or Summerville Plaza jointly and severally liable for this indivisible

injury yet we don't want the jury to ever have to determine the actual portion of fault of these two folks. The statute gives us the right to have defendants -- to have the jury apportion fault among the defendants.

Now, they chose not to sue these folks, and for obvious reasons. These folks have hid -- you know, they've concealed their identity. They concealed who they are. The police officers have never found them and, of course, you know --

THE COURT: Does anybody know who they are?

MR. WISEMAN: No, Your Honor.

THE COURT: All right.

MR. WISEMAN: And, of course, the other thing is they -- you know, they are going after the folks that have money, you know. And so the purpose of the joint and several liability change in law was to avoid a situation where a party like my folks who likely have less than -- it's if we have any -- likely have less than 50 percent of liability, of culpability as to these injuries --

THE COURT: That's as to the same acts, where the same acts caused the damage.

MR. WISEMAN: Your Honor, as I read the law --

THE COURT: If you have a BI-LO employee involved in the beating I would tend to agree with you.

MR. WISEMAN: Your Honor, as I read the law is you can have a series of acts that if they combine to form one indivisible injury that's when we start talking about joint and several liability, and that's exactly what they pled. You know, now, of course, they are not saying John Doe wanted to have anything to do with security but they are saying their acts in combination with our acts -- and it's right in our brief, it's right in their complaint, is what caused these injuries.

So what we have is we have this plea and we have an absolute fact that two people caused these injuries. And then we have an allegation that two other entities may have caused these injuries. And what they want is they want the jury verdict form to only have the two people that may have caused the injuries and not have the two people that we absolutely know did. That's in contravention to what the South Carolina Legislature intended with the changing of the joint and several liable law.

THE COURT: You got a copy of that statute?

MR. WISEMAN: I do, Your Honor. It's probably pretty poor but --

THE COURT: I want you to highlight the pertinent parts you are referring to.

MR. WISEMAN: Your Honor, what I'll do is I'll give

you a copy of my brief which quotes extensively from the statute. May I approach, Your Honor? May I approach, Your Honor?

THE COURT: Yes, sir.

MR. WISEMAN: This is our brief and it quotes the statute. So what we want to do, Your Honor --

THE COURT: I mean, you e-mail it to me 20 minutes ago.

MR. WISEMAN: I did, Your Honor.

THE COURT: It doesn't do a whole lot of good 20 minutes ago.

MR. WISEMAN: I apologize for that, Your Honor.

THE COURT: Okay? While you were sitting in the courtroom you e-mailed it to me.

MR. WISEMAN: I actually e-mailed it before I left.

THE COURT: Oh, before you left.

MR. WISEMAN: Yes, Your Honor.

THE COURT: Okay. All right. That didn't do me a whole lot of good.

MR. WISEMAN: I apologize, Your Honor, but it's a short brief and I've kept -- and it does quote directly from the statute.

The statute says, Your Honor, that upon motion a defendant is entitled to have a jury verdict form go back to the jury which allocates liability among the

defendants and it must equal 100 percent.

In other words, that's an obvious intent by the Legislature to have the situation where the jury is allocating fault among those people who are culpable has to add up to a hundred percent.

THE COURT: But the statute doesn't give you the right to bring in parties that you think may be culpable as to the injury itself that weren't involved in the -- the plaintiff can sort of pick and choose who he sues. The statute doesn't give you the authority to say, Hey, bring in these folks.

MR. WISEMAN: That's correct, Your Honor, but Rule 19 does. Rule 19 does allow me to make a motion to join --

THE COURT: Well, I understand, but you are trying to say Rule 19, I should grant Rule 19 because of the liability statute 38-15-15, and I'm not so sure that's the purpose of Rule 19.

MR. WISEMAN: Well, and I'll explain to you why we think Rule 19 applies, Your Honor.

THE COURT: I think you're sort of stretching it but I'm listening to you.

MR. WISEMAN: I appreciate that, Your Honor. Rule 19 basically says, look, we are going to allow you to bring in these parties, you know, if there's no adequate

remedy, and our argument is there is no other adequate remedy as to us unless we bring in these parties.

We believe that A, it's undeniable that these two defendants, John Doe one and two, caused some level of injury to the plaintiff and therefore should be on the jury verdict form.

We believe that two, we have a statutory right as given to us by the Legislature to have the jury determine the culpability or the percentage of fault as to the parties that caused this injury.

THE COURT: I won't argue that with you.

MR. WISEMAN: Okay. And then the third point, Your Honor, is -- and there are a fair amount of cases, and this is kind of a developing area of law in South Carolina and there's been cases that said, look, we are not going to let you force onto the jury verdict form certain parties that are no longer defendants.

And the reasoning behind those cases -- and, for instance, they cite this case called Chester in their brief and I also talk about Chester in our brief. The reasoning behind the case is that it said we are not going to allow a defendant to, you know, force a nonparty onto this verdict form is because in those situations the non -- there's been a couple different scenarios, but the main scenario would have been when that nonparty has

already settled out of the case. So they either were sued initially and settled out and no longer a named defendant or they were never sued but they paid money and, you know, were not in.

So the courts have said, look, we're not going to let you put them on the jury verdict form and the reason is because you have an adequate remedy and your adequate remedy is you get a set off for whatever was paid, and that's what Chester talks about.

Chester says -- and Chester is close -- is somewhat on point because in Chester it's a Tort Claims Act case. In that case the defendants --

THE COURT: You don't have an adequate remedy here to sue the people that did the beating?

MR. WISEMAN: No, Your Honor. I couldn't sue them. They are concealing their identity.

THE COURT: You can't bring them in as a third party and sue them as a third party?

MR. WISEMAN: No, because I don't have any relationship with them to have a derivative liability there.

THE COURT: Okay. All right.

MR. WISEMAN: My only remedy, Your Honor, is the remedy that's given to me by the Legislature is to have this verdict form, and all we want is a verdict form to

show that John Doe one and John Doe two --

THE COURT: Oh, I know what you want. You don't have to explain that to me. Okay?

MR. WISEMAN: Absolutely, Your Honor. So the cases that have said we're not going to allow you to insert these folks into the case have relied on the idea that the defendants that are making this motion have another remedy. In other words, that they get the credit or the set off from what was paid by these defendants.

The cases also said, look, we're not going to thwart -- we are not going to thwart the promotion of settlement either. We want to promote settlements so if we allow you to reach out and grab the defendants who have settled and put them back in the case on the jury verdict form we are no longer promoting settlement, and we're not going to thwart that policy.

In this case we don't have that. They knew these John Does existed, they have not sued them. They agree that they caused injuries and yet the only remedy that I would have is for them to be on the verdict form.

Of course, there's no settlement so I don't get a set off, and I can't sue them myself. So the only remedy I have is to have them be on the verdict form and therefore have the jury decide how much at fault are they and how much at fault is BI-LO and how much at fault is

Summerville Plaza, and then if it's 50 percent or more then he gets his joint and several liability.

So it doesn't thwart his ability to prove any of those issues. All it does is prevents the legal fiction of the situation where we have a verdict form that has two parties who may be at fault and omits two parties who we know who are at fault. So that's all we are trying to do is thwart this -- prevent this legal fiction and have an --

THE COURT: It's not a legal fiction. Those two parties didn't have anything to sue with security. So don't call it a legal fiction.

MR. WISEMAN: Well, Your Honor, I would say it's a legal fiction --

THE COURT: But thank you very much. I understand your argument.

MR. WISEMAN: Fair enough, Your Honor.

THE COURT: Yes, sir?

Thank you very much.

MR. WISEMAN: And I have two more points, Your Honor.

THE COURT: Thank you very much.

MR. WISEMAN: I apologize. Thank you, Your Honor.

MR. YELVERTON: Please the Court, Your Honor, may I approach --

THE COURT: Yes, sir.

MR. YELVERTON: I've got some pages that I printed out for you, highlighted the relevant portion. I also printed out a copy of my memo that you received earlier.

Your Honor, the plaintiff did not assert any causes of action in assault, battery or any of the kind. The plaintiff's causes of action rely on negligent security and premises liability. To start the discussion you have to start with the Rule 19, and Rule 19 starts with a person who is subject to service of process --

THE COURT: I've already read that but go ahead.

MR. YELVERTON: Yes, sir.

THE COURT: I've already read it and John Doe is not the subject. Okay?

MR. YELVERTON: Yes, sir, they are not. And additionally, complete relief can be granted. The defendants have -- the defendants among them have over six million dollars in insurance, so complete relief can be granted, and the complete relief contemplated in the statute relates to the plaintiff, Your Honor, not the defendant. He can site to no case where it says the defendant is entitled to complete relief under Rule 19. This is a plaintiff's analysis.

Now, finally, paragraph two of Rule 19 says that, you know, if the person alleged to have a -- to be an

indispensable party asserts or claims an interest relating to the subject of the action. Well, obviously John Doe one and two cannot claim an interest by definition and thus number two in 19 doesn't apply.

Now, assuming that these were actually real people, assuming these people were identifiable even though there's been a litigation going -- or the act occurred seven years ago and the complaint was filed 2012, there was a criminal investigation, these people aren't being found. They don't exist. Okay.

But even if they could the Court, the Supreme Court in Chester cited the controlling law in this case and that is the U. S. Supreme Court's decision in Synthes, and I handed your -- it's Temple V. Synthes. I handed that up for you. And that stands for the longstanding proposition that the plaintiffs get to choose who to sue.

And the Chester court, which the logic in the Chester court is directly on point. It is under the Tort Claims Act but it is directly -- the logic is directly transferable to this case. And it says, look, you guys -- and in that case, by the way, just to address an issue raised by counsel, there wasn't a bunch of settlements. There was a bunch of parties and the plaintiffs chose who to sue. It was a multi-car accident in Chester.

And what Chester said was, look, you can't use Rule

19 to try to circumvent this longstanding principle. The Supreme Court has said that the plaintiffs get to choose who to sue. They said if you want you can argue the empty chair at trial all you'd like but you don't get to confuse the jury by putting these people on the jury form, these people that did the assault, not to have anything to do with negligent security or premises liability. So Chester is controlling.

And, Your Honor, I would urge you to look at Chester and as it's quoted in my memo and his --

THE COURT: Thank you very much. I appreciate it. Anything you want to say very briefly?

MR. WISEMAN: Yes, Your Honor. I'll be very brief.

THE COURT: Extremely brief.

MR. WISEMAN: Yes, Your Honor. I can serve a John Doe by publication.

THE COURT: Okay. All right. I understand.

MR. WISEMAN: 303 South Carolina 108.

THE COURT: All right. The motion is denied. I do not think the joint statutes you've been referring to expands Rule 19 to allow the defendants to bring those parties in independent of the plaintiff suing them and the plaintiff has the right to pick who they are going to sue. And I don't think -- if the Legislature wanted to expand Rule 19 and give the defendants the authority to

bring in parties they should have done it in the statute. Motion denied.

MR. WISEMAN: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. WISEMAN: Would you like somebody to prepare a written order, Your Honor?

THE COURT: Pardon?

MR. YELVERTON: I'm happy to draft the order, Your Honor.

THE COURT: Yes, sir.

(WHEREUPON, the hearing was concluded.)

C E R T I F I C A T E

I, Sharon L. Vizer, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 15th day of June 2016.

I do further certify that I am neither of kin, counsel nor have an interest to any party hereto.

September 6, 2016

s/Sharon L. Vizer

SHARON L. VIZER

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2015-CP-10-3566
RANDY SKELTON AND PENELOPE SKELTON,	)	
PLAINTIFF,	)	**MOTION OF DEFENDANTS BI-LO, LLC AND BI-LO, INC. TO JOIN JOHN DOE I AND JOHN DOE 2 AS INDISPENSABLE PARTIES**
vs.	)	(JURY TRIAL REQUESTED)
SUMMERVILLE PLAZA, LLC; BI-LO, LLC; AND BI-LO, INC.,	)	
DEFENDANTS.	)	

PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Defendants BI-LO, LLC and BI-LO, Inc. (collectively referred herein as Bi-Lo), by and through their undersigned attorneys, will move before the Presiding Judge of the Ninth Judicial Circuit, Charleston County, for an Order joining as indispensable defendants John Doe 1 and John Doe 2.

NOW COMES the Defendants above-named, Bi-Lo, LLC and Bi-Lo, Inc. and hereby moves this Honorable Court pursuant to Rule 19 of the *South Carolina Rules of Civil Procedure* for an order joining as indispensable parties defendants John Doe 1 and John Doe 2.

This motion is based on the following:

1. Plaintiff alleges on December 17, 2009, after making a delivery to a Bi-Lo grocery store, "he was approached by two males" and these "unknown perpetrators threatened" the Plaintiff and "struck him with a blunt object violently on the back of his head and in his face." The Plaintiff further alleges these unknown persons "violently assault[ed] and robb[ed]" the Plaintiff and then "ran away...."

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 then 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>

Respectfully Submitted,

YOUNG CLEMENT RIVERS, LLP

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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 12th day of February, 2016.

_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2015-CP-10-3566
Randy Skelton and Penelope Skelton,	)	
	)	
Plaintiffs,	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO ADD JOHN DOE 1 AND JOHN DOE 2 AS INDISPENSABLE PARTIES**
	)	
v.	)	
	)	
Summerville Plaza, LLC; Bi-Lo, LLC; and Bi-Lo, Inc.,	)	
	)	
	)	
Defendants.	)	

Plaintiff's Randy Skelton and Penelope Skelton hereby submit this memorandum in opposition to Defendants Bi-Lo, LLC's and Bi-Lo, Inc.'s Motion to Add John Doe 1 and John 2 as Indispensable Parties.

FACTUAL BACKGROUND

This action arises out of an assault of Plaintiff Randy Skelton on December 17, 2009 by unknown men in the loading bay of a Bi-Lo grocery store ("Bi-Lo") located at the Summerville Plaza Shopping Center on Boone Hill Road in Dorchester County, South Carolina. Plaintiff alleges that he was assaulted at night in an area that Bi-Lo knew or should have known was frequented by delivery drivers and customers, and which was devoid of sufficient lighting, cameras, security personnel and other necessary security measures. As a result of Plaintiff's injuries, he suffered a permanent brain injury and damages in far excess of $1,000,000.00.

Plaintiffs Randy and Penelope Skelton brought suit in November of 2012 against Summerville Plaza, LLC as well as Bi-Lo, LLC and Bi-Lo, Inc., the leasee and the entity to which Randy Skelton was delivering goods and of which he was a customer on the night that he was assaulted. The Plaintiffs' claims against the named Defendants lie in premises liability and are based upon negligent security. The Plaintiffs have relied on *Bass v. Gopal, Inc.*, 395 S.C.

129, 134 (2011) and *Lord v. D&J Enters.*, 407 S.C. 544 (2014) in defeating Defendant Bi-Lo's Motion for Partial Summary Judgment.

The Defendants now, almost seven years after Mr. Skelton was injured on their premises, moved to joint John Doe 1 and John Doe 2 as indispensable parties.

I. A JOHN DOE CANNOT BE NAMED AS AN INDISPENSABLE PARTY UNDER A PLAIN READING OF SCRCP RULE 19.

SCRCP 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.

John Doe 1 and John Doe 2 are not subject to service of process. After seven years of litigation and a criminal investigation, they have not been identified. Therefore, the first requirement of Rule 19: i.e. "a person who is subject to service," cannot be satisfied

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 INDISPENSIBLE 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 indispensible 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 Court's logic in that case is directly on point with Plaintiffs' positon.

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 breaches 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. As further support for their position, Plaintiffs would urge the Court to consider the persuasive analysis set forth by defense attorney Robert R. Sansbury, III in the defense litigators magazine "The Defense Line" entitled: *Pointing the Finger: An Examination of South Carolina Law Regarding Allocation of Fault to Non-Party Tortfeasors.* The Defense Line, Fall 2013 at 42. This article eloquently outlines the Supreme Court's unwillingness in *Chester*, even after the passage of the South Carolina Contribution Among Tortfeasors Act, to allow fault allocation to non-party tortfeasors.

III. JOHN DOE 1 AND JOHN DOE 2 SHOULD NOT BE INCLUDED ON THE JURY VERDICT FORM.

Defendants' Motion appears to lay the foundation for the proposition 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's and Defense bars have hotly 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." It appears to be the position of the Defendants 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.

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 in the scheme. 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 Exaimnation 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.

IV. THE STATUTE OF LIMITATION BARS DEFENDANTS' ATTEMPTS TO JOIN ADDITIONAL PARTIES.

Rule 19, SCRCP allows a Court to join, whenever possible, persons materially interested in an action so that a complete determination may be made. Under the Discovery Rule, the statutory limitations period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371-72 (S.C. Ct. App. 2004). The date when a Plaintiff learns of a potential new Defendant has absolutely no bearing on the timing of the statute of limitations. (*Id.* at 371)

In *Gilman v. City of Beaufort* 368 S.C. 24 (2006), an unreported South Carolina Court of Appeals decision, the Court found that our courts have not specifically addressed the question of whether an indispensable party may assert the statute of limitations as an affirmative defense

when the party has attempted to be joined pursuant to Rule 19, SCRCP, after the applicable statute of limitations has expired. *Id.* However, the Court found that it is well established that the statute of limitations operates as a defense to limit the remedy available from an existing cause of action, and unless the action is commenced before the expiration of the limitations period, the Plaintiff's claim is barred. *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 230-31. The *Gilman* Court found nothing in Rule 19 that removes the statute of limitations as a defense when a party attempts to join another as necessary for just adjudication

Here, the Defendants knew of the alleged John Doe 1 and John Doe 2 assailants in December, 2009. Defendants have not attempted, at any point in this litigation to add John Doe 1 and John Doe 2 until now, almost 7 years after the incident giving rise to Plaintiffs' Complaint. Therefore, the Defendants should be barred from joining additional parties due to the applicable three year statute of limitations.

CONCLUSION

The Defendants, through their Motion to Join John Doe 1 and John Doe 2 as Indispensable Parties, are clearly attempting to bring in potential tortfeasors whom the Plaintiffs rightfully have elected not to sue. For the reasons stated above, this is improper. Rule 19, SCRCP, in no way supersedes or even creates an inconsistency with our Supreme Court's holding that "a plaintiff has a sole right to determine which co-tortfeasor(s) she wills sue." As such, Defendants' Motion to Join John Doe 1 and John Doe 2 should be denied.

Respectfully submitted,

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By: _____
Attorneys for the Plaintiffs

June 14, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2015-CP-10-3566
RANDY SKELTON AND PENELOPE SKELTON,	)	
PLAINTIFF,	)	**MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS BI-LO, LLC AND BI-LO, INC. TO JOIN JOHN DOE I AND JOHN DOE 2 AS INDISPENSABLE PARTIES**
vs.	)	
SUMMERVILLE PLAZA, LLC; BI-LO, LLC; AND BI-LO, INC.,	)	
DEFENDANTS.	)	

COMES NOW the Defendants BI-LO, LLC and BI-LO, Inc. (collectively referred herein as Bi-Lo), by and through their undersigned attorneys, and presents this Memorandum in Support of the Motion to Join John Doe 1 and John Doe 2 as Indispensable Parties.

BACKGROUND

This case arises out of an assault and battery that Plaintiff alleges happened behind the BI-LO grocery store. Specifically, Plaintiff alleges on December 17, 2009, after making a delivery to a BI-LO grocery store, "he was approached by two males" and these "unknown perpetrators threatened" the Plaintiff and "struck him with a blunt object violently on the back of his head and in his face." (Compl. at 10). The Plaintiff further alleges these unknown persons "violently assault[ed] and robb[ed]" the Plaintiff and then "ran away...." (Id.) The Plaintiff has sued only BI-LO and Summerville Plaza, LLC – the landlord and owner of the parking lot where the assault and battery is alleged to have occurred.

The Plaintiff has brought claims against BI-LO, seeking to hold it 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] ...." (Compl. at 12).

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.

ANALYSIS

I. DEFENDANTS JOHN DOE 1 AND JOHN DOE 2 ARE INDISPENSABLE PARTIES AND SHOULD BE JOINED AS DEFENDANTS

Defendants John Doe 1 and John Doe 2 are indispensable parties and should be joined as defendants. 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. Specifically, Plaintiffs pled 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] ...." (emphasis added).

Further, the Plaintiff's own liability expert admitted as much.

Q. As a starting point, you realize this is a lawsuit in which Mr. Yelverton is representing Mr. Skelton, and Mr. Skelton is suing for injuries that he sustained in this incident; correct?
A. Yes.
Q. Okay. And you realize that those injuries were inflicted upon him by two people that we know of; correct?
A. Yes.
Q. And you're taking Mr. Skelton at his word that he was assaulted by two individuals; correct?
A. Yes.
Q. You would agree with me that one thing we know for sure is that Mr. Skelton's injuries, if we take Mr. Skelton at his word which you're doing, we know

that those injuries were sustained because of the actions of these two individuals that we don't know who they are; correct?
MR. YELVERTON: Object to form.
THE WITNESS: Yes.
BY MR. WISEMAN:
Q. Okay. And the only thing we're trying to figure out in this lawsuit is whether Summerville Plaza and/or BI-LO also did something that might have also contributed to those injuries occurring as well; correct?
A. Yes.
(Zoovas Dep. pp. 99-100)

Therefore, the Plaintiffs seek to hold the Defendants fully liable for injuries that were inarguably and admittedly caused by two persons who are not defendants in this case. Thus, the Plaintiffs seek to hold these Defendants jointly and severally liable for the injuries that were caused by John Doe 1 and Joe 2. This is a *de facto* effort to seek to hold these Defendants jointly and severally liable for the indivisible injuries caused – admittedly – by John Doe 1 and John Doe 2. See, e.g., Rourk v. Selvey, 252 S.C. 25 (1968) (holding that the wrongdoing of two defendants that contributes to inherently indivisible injuries, both wrongdoers are jointly and severally liable for the entire harm).

The South Carolina legislature has changed the law on when a defendant can be jointly and severally liable for an indivisible injury and provided a new public policy 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. SC Code Ann. 38-15-15 *et al.* This statute was enacted in July 2005 as part of a Tort Reform Legislation and made sweeping changes to South Carolina tort law – the change in joint and several liability being one the of the cornerstones of that legislation. *After the Dust Settles, Changes in SC Tort Law*, 17 S. Carolina Lawyer 36 (2005). This statute's clear mandate should be given a "reasonable and practical construction consistent with the purpose and policy expressed in the statute." Liberty Mut. Ins. Co. v. S. Carolina Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) "Once the legislature has

made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." Id. (citing South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App.1989)).

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. Pursuant to S.C. Code Ann. § 15-38-15 (2016) *et al.* As such, BI-LO has a statutory right to an apportionment of fault to have its "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 ...." equals "one hundred percent." S.C. Code Ann. § 15-38-15(C)(3) (2016).

The legislature is 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). See id. 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). See id. See also, Rule 19 of the South Carolina Rules of Civil Procedure.

Further, to the extent that Plaintiff argues that Chester v. SC Department of Public Transp., 388 S.C. 343, 698 S.E.2d 559 (2010) controls this issue, that case is distinguishable and actually lends support for this motion. In that case, defendants in a Tort Claims Act ("TCA") case requested

a Rule 19 joinder of other tortfeasors as defendants in order to allow for a TCA mandated allocation of liability. The Plaintiff had settled with these tortfeasors and dismissed them from the case. The trial court agreed that the moving defendants were entitled under the TCA allocation statue (similar to the statute in this matter) to have these additional (settling) tortfeasor defendants joined for the purposes of the allocation form. See id. The South Carolina Supreme Court reversed the ruling based on two key points. First, the Court stated that to bring back into the case parties that have settled would "thwart our strong public policy favoring the settlement of disputes." Id. at 346. Second, the Court in Chester noted that the moving defendants already had an adequate remedy – a set off for whatever the plaintiffs had received from the settling defendants. In this case, the Defendants have no such adequate remedy as there has been no settlement. Therefore, the reasoning to deny the Rule 19 request in Chester simply does not apply to this case and Chester underscores the point that the Defendants in this case do not have an adequate remedy but to make the John Doe defendants in this matter.

Therefore, the Defendants above-named, Bi-Lo, LLC and Bi-Lo, Inc. and hereby respectfully submits that that this Honorable Court should issue an order joining as indispensable parties defendants John Doe 1 and John Doe 2.

<SIGNATURES ON NEXT PAGE>

Respectfully Submitted,

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By:_____

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Charleston, South Carolina

6/15/, 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 15 day of _____, 2016

_____

RECEIVED
JUN 02 2017
SC Court of Appeals

Certificate of Counsel

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material presented to the lower court that was proposed to be included in the appellate record by any party and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order, issued April 15, 2014, Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____

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Dated: 6/1/17