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.

BRIEF OF RESPONDENTS

LAW OFFICE OF PAUL E. TINKLER
Paul E. Tinkler (SC Bar No. 5580)
154 King Street, Third Floor
P.O. Box 366
Charleston, South Carolina 29402
(843) 853-5203

YELVERTON LAW FIRM, LLC
Matthew E. Yelverton (SC Bar No. 69734)
60 Folly Road
Charleston, South Carolina 29407
(843) 574-8822

THE BOGGS LAW FIRM
Cameron G. Boggs
P.O. Box 65
Greenville, South Carolina 29602
(864) 233-8066

ATTORNEYS FOR RESPONDENTS

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.

BRIEF OF RESPONDENTS

LAW OFFICE OF PAUL E. TINKLER
Paul E. Tinkler (SC Bar No. 5580)
154 King Street, Third Floor
P.O. Box 366
Charleston, South Carolina 29402
(843) 853-5203

YELVERTON LAW FIRM, LLC
Matthew E. Yelverton (SC Bar No. 69734)
60 Folly Road
Charleston, South Carolina 29407
(843) 574-8822

THE BOGGS LAW FIRM
Cameron G. Boggs
P.O. Box 65
Greenville, South Carolina 29602
(864) 233-8066

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases: **Page**

Statutes:

Rules:

STATEMENT OF ISSUES ON APPEAL

I. WHETHER, IN A PREMISES LIABILITY CASE, AN ORDER DENYING A MOTION TO ADD AN UNIDENTIFIED PERSON AS A PARTY-DEFENDANT IS IMMEDIATELY APPEALABLE.

II. WHETHER, IN A PREMISES LIABLITY CASE, AN UNIDENTIFED PERSON IS SUBJECT TO SERVICE OF PROCESS.

III. WHETHER, IN A PREMISES LIABILTY CASE, AN UNIDENTIFIED INTENTIONAL TORTFEASOR IS AN INDISPENSIBLE PARTY.

IV. WHETHER SOUTH CAROLINA CODE SECTION 15-38-15 (THE CONTRIBUTION AMONG TORTFEASORS ACT) CHANGES THE COMMON LAW, THEREBY ALLOWING A NON-PARTY TO BE INCLUDED ON THE VERDICT FORM.

ARGUMENT

I. This appeal is premature because it is interlocutory and does not involve a substantial right.

This Court previously dismissed this appeal on the ground that it is interlocutory. After Appellants' motion to reconsider, the Court reinstated the appeal while granting leave to argue appealability. Respondents submit that the Court was correct when it initially dismissed the appeal. If the case is allowed to proceed to trial, the Court may never be required to address the novel issue raised in this appeal, for example, if there is a verdict in favor of Appellants. Appellants contend that the right to add a party is a substantial right. They cite no authority in support of their contention. In *Smith v. Lake Bay East LLC*, 228 N.C. App. 72, 743 S.E.2d 684 (2013), the North Carolina Court of Appeals held to the contrary, observing: "the appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." 743 S.E.2d at 686. Also contrary to Appellants' position is *Stone v. Thompson*, No. 5459 (S.C. Ct. App. Filed Dec. 7, 2016), which held that the family court's determination of a common-law marriage was not immediately appealable. There the appellant argued that the determination that she was married involved a "substantial right" and was therefore immediately appealable under § 14-3-330(2). The Court of Appeals disagreed, observing that "[g]enerally [subsection 2] has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." If declaring a marriage does not involve a "substantial right," it is hard to imagine that disallowing a non-party to be

placed on a verdict form does. If the lower court has erred, that error can readily be corrected by granting a new trial after a verdict.

Appellants would have this Court make a novel declaration that a non-party belongs on the verdict form in a case that has not been tried. A full development of the facts has not taken place. Traditionally appellate courts will not hear a novel issue on less than a fully-developed record. *See Williams v. Streb*, 270 S.C. 650, 243 S.E.2d 926 (1978). This appeal should be dismissed and the case should be remanded for trial so that the record may be fully developed and then appealed only if indicated.

II. The "Does" cannot be added as parties because they are not subject to service of process.

After four years of litigation and after the statute of limitations had run, Appellants moved under Rule 19 to add the Does as parties. Rule 19(a) provides:

> (a) 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 an 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. [*emphasis added.*]

Appellants contend that the unidentified assailants are indispensible parties and therefore must be joined. Then they assert that these unidentified individuals are subject to service of process. However, this analysis is backwards. Rule 19(a) requires the court to first consider whether joinder is feasible. Only if joinder is not feasible, the court then must consider, under Rule 19(b), whether the absent party is indispensible.

We will therefore address whether joinder is feasible. Appellants make the novel argument that the Does are subject to service of process simply because they committed a tort in South Carolina. If they are subject service of process, then, by all means, Respondents encourage Appellants to serve them. Appellants cite no case supporting the notion that an unidentified person is "subject to service of process." Merely because the Does committed a tortious act in South Carolina years ago does not mean they may be served now. Appellants do not explain how exactly one serves a person who is not identified. If the court granted Appellants' motion, what would Appellants do about service? Contrary to the argument by Appellants' counsel below, one cannot serve an unidentified party by publication, except in a case involving real estate, because it is an action *in rem*. This action, however, would necessarily involve the exercise of *in personam* jurisdiction. Even if the assailants had been identified, but left the state and could not be found, they would not be subject to service of process.

There is another reason joinder is not feasible. The two-year statute of limitations on claims for assault and battery has run against the Does. Appellants have waited for years after the attack and only as the case was almost ready to be tried, attempted to add the Does as parties. Even if they could somehow be identified and located at this point and added as parties, they would be dismissed. Clearly joinder is not feasible, so the Court must analyze the question whether the Does are indispensible under Rule 19(b).

III. The John Does are not indispensable parties under Rule 19(b).

Appellants claim that the Does are indispensible, but their conduct of this case does not reveal that they really believe it. They waited until after the case had been

pending for four years and after the statue of limitations had run to move to add the Does as parties. Even, if there had been any hope in 2012 of identifying the Does and making them civilly liable for their attack on the plaintiff, by 2016 that prospect had totally evaporated.

Rule 19(b) provides:

> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Analyzing these factors: a judgment rendered in the absence of the Does is not prejudicial to Appellants because they retain the right to argue to the jury that the injury is the fault of the Does and not themselves. This is a "measure" under the second factor that lessens or avoids any prejudice to Appellants. The third factor - whether a judgment would be adequate - is established. Since Plaintiffs/Respondents would not have *any* remedy (much less an adequate one) if the case is dismissed for nonjoinder, the fourth factor clearly dictates that the unidentified "John Does" cannot be deemed indispensible under Rule 19(b). The circuit court correctly denied Appellants' motion to add the Does as parties.

IV. A non-party cannot be included on the verdict form.

Appellants argue that a non-party must be placed on the verdict form. They have cited no case law to support that position. There apparently is no appellate court precedent in South Carolina directly addressing the issue. However, there is a federal

district court case on point. *Fagnant v. K-Mart Corp.* 2013 WL 6901907 (D.C.S.C. 2013) involved an incident in a parking lot of a K-Mart store that resulted in personal injuries to the plaintiff. The assailant had been dismissed as a party defendant. K-Mart asserted that it had the right to have the dismissed defendant on the verdict form in order to effectuate the intent of South Carolina Code § 15-38-15. Judge Harwell disagreed, finding that § 15-38-15 did not change the common law rule that "a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." He observed that the South Carolina Supreme Court in *Chester v. South Carolina Department of Public Safety,* 698 S.E.2d 559 (S.C. 2010) did not allow fault allocation among non-party tortfeasors, even though that case was decided after the passage of § 15-38-15 *et. seq.* (South Carolina Contribution Among Tortfeasors Act). The special verdict procedure outlined in § 15-38-15(C)(3) only provides for jury findings regarding allocation of fault when there are "two or more defendants" who were previously found liable. There is no procedure for non-party potential tortfeasors, except the clarification that the defendant retains the common-law right to argue at trial that some other person was responsible for the injury – "the empty chair" defense. Thus, Judge Harwell predicted that the South Carolina Supreme Court would hold that non-parties cannot be added to the verdict form. The legislature used the word "defendant" in the sections involving apportioning fault, but used the term "potential tortfeasor" in the section preserving the empty chair defense. If the legislature had intended for all "potential tortfeasors" to be included in the apportionment of fault, it could have so stated. It is notable that *Fagnant* involved a person who not only was identified, she also *had been a party to the case*. Here Appellants want to include *unidentified non-parties* on the verdict form. There is no

legislative or judicial authority to justify such a radical change in long-standing common law practice.

Moreover, the apportionment of fault can only take place among *negligent* parties. The statute does not apply to tortfeasors who contribute to the injury by intentional or reckless acts. The legislature only intended for fault to be apportioned among *negligent* parties. This intent is expressed in the plain language of § 15-38-15(F): "This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional or conduct involving the sue, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs." In this case, since it is agreed that the Does intentionally assaulted the Plaintiff, the entire section does not apply to them. To hold otherwise would dramatically change the common law in various areas of liability. For example, in a claim of negligent bailment, where an unknown thief steals a valuable item of personal property as a result of the negligent handling by the bailee, the defendant could argue that the thief should be on the verdict form and that liability should be apportioned accordingly. In such a circumstance, a jury could conceivably find that the thief is responsible for 99% of the fault and the negligent bailee 1%. The plaintiff would receive only 1% of her damages.

Another hypothetical case: an unknown person steals a check, forges the accountholder's name and cashes the check at the bank. The customer should be allowed to sue the bank for its negligent negotiation of the check without having the unidentified person on the verdict form to apportion liability. Clearly the legislature did not intend the radical departure from the common law urged by Appellants. The

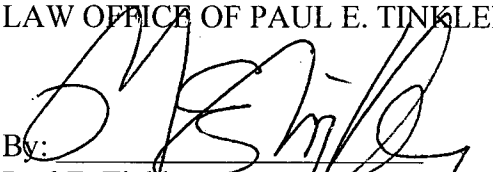
legislature included subsection F to state explicitly that the Act does not apply to intentional tortfeasors.

CONCLUSION

Because this appeal is interlocutory and does not involve a substantial right, it should be dismissed and remanded for trial so that the substantive issue may be addressed -if necessary- upon a full record. Alternatively, if the Court decides to address the merits of the appeal now, the appeal should be dismissed on its merits because the "Does" cannot be added as parties and cannot appear on the verdict form at trial.

Respectfully submitted,

LAW OFFICE OF PAUL E. TINKLER



By:

Paul E. Tinkler (S.C. Bar No. 5580)
154 King Street, 3rd Floor
Charleston, South Carolina 29401
P.O. Box 366 (29402)
(843) 853-5203

YELVERTON LAW FIRM, LLC
Matthew E. Yelverton (S.C. Bar 69734)
60 Folly Road
Charleston, South Carolina 29407
(843) 574-8822

THE BOGGS LAW FIRM
Cameron G. Boggs
P.O. Box 65
Greenville, South Carolina 29602
(864) 233-8066

ATTORNEYS FOR RESPONDENTS

Charleston, South Carolina
This 7th day of June 2017

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondents' Final Brief complies with Rule 211(b), SCACR, and that no matter has been included which is irrelevant to this appeal.

June 7, 2017

Paul E. Tinkler
LAW OFFICE OF PAUL E. TINKLER
154 King Street, Third Floor
P.O. Box 366
Charleston, SC 29402
(843) 853-5203
(843) 853-4206 FAX
ATTORNEY FOR RESPONDENTS