FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015-CP-40-01082

Karl T. Harbath

PLAINTIFF(S)

Stephen Sanders, Bennett-Hall Co., Inc., Sunbelt Rentals, Inc.

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

After careful consideration, Defendant Bennett-Hall's Motion for Reconsideration is granted insofar as paragraph one of the Facts section of the "Order Striking Portions of the Amended Answer of Defendant Bennett-Hall Co., Inc." has been altered. The motion is respectfully denied in all other respects. The Amended Order is attached.

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Tanya L. Gee **Judge Code** 2756 **Date** 12/10/2015

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Karl T. Harbath, Plaintiff, -vs- Stephen Sanders, Bennett-Hall Co., Inc., and Sunbelt Rentals, Inc. Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No.: 2015-CP-40-01082 **AMENDED ORDER STRIKING PORTIONS OF THE AMENDED ANSWER OF DEFENDANT OF BENNETT-HALL CO. INC.**

This matter came before the Court on Motion of the Plaintiff to strike portions of the amended answer of Defendant Bennett-Hall Co., Inc. ("Bennett-Hall") based upon the exclusivity doctrine, the Contribution Among Joint Tortfeasors Act, and due to the fact that the statute of limitations for Bennett-Hall to bring an indemnification action would be tolled until settlement or final judgment.

After careful review of the pleadings, the motion by Plaintiff, memoranda of counsel, and the oral arguments, Plaintiff's Motion to Strike portions of the Amended Answer is granted and Black Box Network Services will not be added as a Defendant in this tort action. Any ruling(s) relating to the alleged contractual indemnification are held in abeyance until such time as those matters become ripe for the Court's consideration.

Factual Background

The following facts are undisputed in this personal injury case. On February 23, 2012, Plaintiff Karl T. Harbath, acted as a spotter guiding a very heavy piece of machinery called a boom lift. Defendant Stephen Sanders drove the boom lift in question in and around the

Michelin Plant located in Lexington, South Carolina. On the day of the accident, Sanders moved the boom lift and ran over Mr. Harbath's right leg. Mr. Harbath is now a below-the-knee amputee.

At the time of his injuries, Mr. Harbath was directly employed by Cornerstone Staffing Solutions ("Cornerstone"), and Defendant Sanders was directly employed by Bennett-Hall Co., Inc. ("Bennett-Hall"). Both subcontractors for whom Harbath and Sanders worked had a common employer, Black Box Network Services ("Black Box"), which installed cable at the Michelin Plant. The boom lift was rented from Defendant Sunbelt Rentals, and Mr. Harbath alleges that agents or employees of Sunbelt provided training regarding the operation of the boom lift to Sanders.

Mr. Harbath asserted a Workers' Compensation claim against his direct employer, Cornerstone, for his injuries on the job.

In this tort action, Mr. Harbath has alleged direct negligence claims against Bennett-Hall, Sanders, and Sunbelt Rentals. Mr. Harbath also sued Bennett-Hall alleging vicarious liability for the acts and omissions of its employee, Sanders.

Procedural History

On February 18, 2015, Mr. Harbath filed this action in Richland County. Defendant Sunbelt answered on April 28, 2015, and Defendants Bennett-Hall and Sanders filed a joint answer on May 8, 2015. Sanders then attained separate counsel from that of his employer, Bennett-Hall. On June 8, 2015, Defendant Bennett-Hall filed an Amended Answer and Third Party Complaint against Black Box Network Services, Inc. ("Black Box") asserting contractual indemnification. Defendant Bennett-Hall's Amended Answer also included allegations attempting to make the actual and/or statutory employer a party to the suit for purposes of fault

allocation, "even if immune from suit." (Amended Answer, ¶43) Finally, Defendants Bennett-Hall and Sanders moved for offset against the actual and/or statutory employer. \(Amended Answer, ¶44).

Mr. Harbath timely filed a motion to strike the amended answer of Defendant Bennett-Hall, arguing that: (1) Bennett-Hall's introduction of an immune defendant would defeat a substantial right of the Plaintiff to choose his defendants; (2) the contractual indemnification between Bennett-Hall and Black Box would introduce a contractual dispute into the tort case, inviting confusion of the issues and a trial within a trial; (3) the contractual indemnification claim could be timely brought after a settlement or verdict against Bennett-Hall; (4) because Black Box is an upstream employer, it could not be a tortfeasor and fault allocation to Black Box would be inappropriate; and finally, (5) Bennett-Hall's request to add Black Box to the instant action for purposes of contribution is premature as no settlement or verdict has yet triggered Bennett-Hall's obligation to pay.

Bennett-Hall urges this Court to deny Mr. Harbath's motion to strike, arguing that judicial economy would be served by allowing discovery and a trial on both the tort and contract cases together. Bennett-Hall submitted no arguments or case law refuting Mr. Harbath's main argument: that Black Box could not be properly added as a Defendant because Black Box cannot be a joint tortfeasor or a potential tortfeasor under the Contribution Among Joint Tortfeasors Act.

Law

I. Defendant's Amended Answer attempting to add an immune defendant violates Plaintiff's substantial right to choose his defendants.

Mr. Harbath argues that because both he and Mr. Sanders worked for the same common employer, the subcontractor Black Box, that Black Box is the statutory employer of both Sanders

and Harbath. Defendants did not come forth with any evidence or arguments to the contrary in any memoranda or at oral argument.[1] I find that Black Box Network Services ("Black Box") is an upstream employer pursuant to section 42-1-410 of the South Carolina Code, and that as a result Black Box is immune from suit by the employee/plaintiff by virtue of the exclusivity doctrine as set forth in section 42-1-540.

I further find that Mr. Harbath purposefully alleged various instances of direct negligence against Bennett-Hall, Sanders, and Sunbelt Rentals, but not Black Box. Plaintiff argues and this Court agrees that the Plaintiff has a substantial right to pick the defendants in his case. *Neeltec Enterprises, Inc., v. Long,* 397 S.C. 563, 725 S.E.2d 926 (2012). In *Neeltec*, the defendant requested that the plaintiff remove him from the suit to substitute two different defendants. *Id.* at 566, 725 S.E.2d at 927. Plaintiff did not consent to the substitution, and the circuit court granted the defendant's motion to remove him from the suit and substitute the other defendants. *Id.* Plaintiffs appealed this decision immediately to the Court of Appeals, which dismissed the appeal as interlocutory. The South Carolina Supreme Court, however, recognized that the circuit court's order affected a substantial right held by the Plaintiff, making the order immediately appealable pursuant to Section 14-3-330(2)(a). *Id.* That the plaintiff is the architect of the complaint was again recently recognized by the South Carolina Supreme Court in *Morrow v. Fundamental Long-Term Care Holdings, LLC., et al.*, 412 S.C. 534, 773 S.E.2d 144 (2015).

This Court also relies on *Chester v. S.C. Dept. of Pub. Safety, et al.,* 388 S.C. 343, 698 S.E.2d 559 (2010). In that case, Chester brought suit against three state agencies pursuant to the Tort Claims Act. *Id.* at 344, 698 S.E.2d at 559. The defendants moved to join other alleged joint

[1] To the contrary, it seems that Bennett-Hall acknowledges that Black Box is immune from suit because Paragraph 43 of the Amended Answer attempts to add Black Box as a party for purposes of fault-allocation "even if immune from suit."

tortfeasors on the basis that doing so was the only way to effectuate the defendants' right to a proportionate verdict under section 15-78-100(c) of the South Carolina Code. *Id.* Chester argued that the trial court lacked authority to force her to add additional alleged co-tortfeasors, and the South Carolina Supreme Court agreed. *Id.* at 346, 698 S.E.2d at 561.

Here, I find that the Plaintiff has selected the defendants to sue, yet Defendant Bennett-Hall seeks to add a defendant that is immune from tort liability and which Plaintiff did not intend to sue and Plaintiff himself cannot sue.[2] The Court grants Plaintiff's Motion to Strike the Amended Answer of Defendant Bennett-Hall, and in particular the attempt to force the Plaintiff to add an immune defendant to this case – Black Box Network Services.

II. Defendant Bennett-Hall's Amended Answer seeks to inject a contract indemnification dispute into Plaintiff's tort case, despite the fact that the need for indemnification is not yet ripe.

In order for Defendant Bennett-Hall to prevail in its attempt to prove entitlement to contractual indemnification, Defendant Bennett-Hall asks this Court to permit a trial within a trial on a collateral issue. Not only does this violate the Plaintiff's substantial right to choose his defendants, but it opens the door to distracting the jury and confusing them from the issues central to the Plaintiff's tort case. The allegations Defendant Bennett-Hall makes against Black Box in its Amended Answer and at oral argument make it clear that two cases will go through the discovery and trial together – the contract case between Bennett-Hall and Black Box, and the

[2]Defendant Bennett-Hall makes much of the fact that Mr. Harbath's complaint refers to the contract between Bennett-Hall and Black Box. I find that the Plaintiff's mere reference to the contract is insufficient to support a finding that Mr. Harbath voluntarily injected a contractual dispute into this tort action or in any way waives any argument against allowing the Defendants to inject a contractual dispute into this tort action. I also find that the Plaintiff's reference to the contract between Bennett-Hall and Black Box serves a purpose insofar as it explains the relationship between the Plaintiff and various actors that allegedly caused his injuries.

Plaintiff's case against three potential tortfeasors. This invites unduly burdensome discovery, and it also invites unnecessary jury confusion that poses a substantial risk and unfair prejudice to the plaintiff at trial.

Furthermore, a contractual indemnification action against Black Box can be timely instituted in the event of a judgment against Bennett-Hall. In other words, there is no legal prejudice to Defendant Bennett-Hall in waiting until Plaintiff's tort action is over to institute a separate action for contractual indemnification – one that is ripe once and if Plaintiff receives a judgment against Defendant Bennett-Hall. *First Gen. Servs. of Charleston, Inc., v. Miller,* 314, S.C. 439, 444, 445 S.E.2d 446, 449 (1994) ("As to the indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant.").

For these reasons, the Court passes no judgment on the merits of Bennett-Hall's contractual indemnification claim, instead reserving any ruling in the event that Bennett-Hall should need to bring an action against Black Box after any judgment or settlement against it. The Court further finds that Bennett-Hall has failed to provide the Court with a good reason why the contractual indemnification claim must be asserted at this time and in the Plaintiff's tort case – to the contrary, this Court finds that allowing the same would unfairly prejudice the Plaintiff's case for the reasons stated above.

III. It is inappropriate to allow the jury to apportion fault to a Defendant that fails to qualify as a joint tortfeasor.

According to section 15-38-15(D) of the South Carolina Code, a defendant can only shift blame to a "potential tortfeasor." An employer immune from tort liability, as I find Black Box to be here, cannot possibly be a "potential tortfeasor."

Plaintiff has directed the Court's attention to *Indemnity Ins. Co. of North America v. Odom*, 237 S.C. 167, 116 S.E.2d 22 (1960). Odom states that prohibiting the consideration of an employer's negligence places no additional burden on the third-party defendant. *Id.* at 176, 116 S.E.2d at 27. The Court went on to say that an immune employer and a third party "are not joint tortfeasors" and "[t]here is no common liability of the employer and the defendants ... even [when] their concurring negligence caused his death." *Id. See also Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 407, 608 S.E.2d 425, 427-28 (2005). This is so because the employer's liability is bounded by the Workers Compensation Act, which is not concerned with the fault of the employer or its employees. *Id.*

I find that due to its status as a statutory employer, Black Box could not be liable to the Plaintiff, and consequently, no verdict for damages in favor of the Plaintiff could ever be entered against Black Box. As a result, per section 15-38-15(C)(3) of the South Carolina Code, Defendant Bennett-Hall does not have a justiciable claim for apportionment of fault against Black Box (or any other employer, statutory employer, or upstream employer broadly referred to in its Amended Answer).

For these reasons, the Court grants Plaintiff's Motion to Strike Paragraph 43 as an inappropriate invitation for the jury to apportion fault to a non-tortfeasor.

IV. Defendant Bennett-Hall is not entitled to setoff or contribution against an immune employer under Gordon v. Phillips Utilities, infra.

In Paragraph 44 of the Amended Answer, Defendant Bennett-Hall seeks a proportional credit or offset against "an amount for which such actual and/or statutory employer(s) are or could have been liable, whichever is greater." And in Paragraph 42, Defendant Bennett-Hall seeks to assert a right of contribution or indemnity against "such actual and/or statutory

employer(s)." However, since an immune employer cannot be a joint tortfeasor, the Court grants Plaintiff's Motion to Strike these paragraphs.

The 2005 case *Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) provides guidance. In *Gordon,* an employee was injured on the job, and after receiving his workers' compensation benefits he sued a third party, Phillips. Phillips argued it had a right to setoff pursuant to section 42-1-580, and argued that section 15-38-20(A) gave a tortfeasor the right to seek contribution from a negligent employer. *Id.* at 406, 608 S.E.2d at 427.

Phillips further argued that in enacting section 42-1-580, the General Assembly intended to provide a remedy for a third party when an employer negligently contributed to an injury. *Id.* The trial court denied Phillips' motion for set-off, holding that the employer "could not be liable to its employee in tort because the workers' compensation laws exclude all other rights and remedies and thus [the third party defendant] did not have any right of contribution from [the employer.]" *Id.* at 406, 608 S.E.2d at 426-27. The Supreme Court affirmed the trial court.

In fact, the Court "found [section 42-1-580] inapplicable in a trial brought by the employee against a third party. The Supreme Court reiterated that "[t]he third party defendant and the employer are not joint tortfeasors." *Id.*

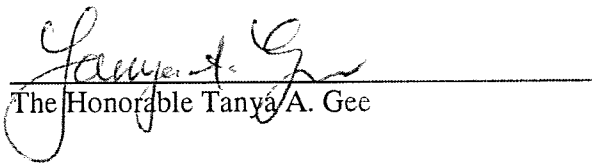
Like *Phillips,* Defendant Bennett-Hall asks this Court to apply section 42-1-580 in a way that our Supreme Court already expressly rejected approximately ten years ago. As a result, per section 15-38-15(E), Defendant Bennett-Hall does not currently have a claim for setoff or contribution against Black Box (or any other employer or upstream employer broadly referred to in its Amended Answer) and this Court grants Plaintiff's Motion Striking Paragraphs 42 and 44 of Bennett-Hall's Amended Answer.

I find that any right of contribution has not yet vested in Bennett-Hall. Therefore, although this Court grants Plaintiff's Motion Striking any and all references to Bennett-Hall's alleged right of contribution, this Court expresses no opinion on Bennett-Hall's alleged right of contribution at this time. All rulings on this matter are reserved until the issue of contribution becomes ripe for consideration following a settlement or judgment.

Conclusion

Based on the foregoing, this Court GRANTS Plaintiff's Motion to Strike Bennett-Hall's Amended Answer to the extent that paragraphs regarding allocation of fault, setoff and contribution appear in the Amended Answer. Additionally, this court strikes the addition and all allegations relating to the would-be Third Party Defendant, Black Box Network Services.

AND IT IS SO ORDERED.



The Honorable Tanya A. Gee

December 10, 2015

Columbia, South Carolina