THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge



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Appellate Case No.
Case No. 2015-CP-40-01082

Karl T. Harbath, .....Respondent,

v.

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

Of whom Bennett-Hall Co., Inc. is the .....Appellant.

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## APPELLANT'S APPEALABILITY MEMORANDUM

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Appellant Bennett-Hall Co., Inc. submits this memorandum in response to the Clerk of Court's February 9, 2016 letter requesting the parties address the issue of appealability. Appellant has appealed the Circuit Court's order striking Appellant's third-party complaint and portions of the amended answer, and the Circuit Court's amended order, which struck findings of fault unsupported by the evidence but otherwise denied Appellant's Rule 59(e), SCRCP, motion to reconsider. These orders are immediately appealable because the Circuit Court struck a pleading—Appellant's third-party complaint and portions of Appellant's amended answer.

### BACKGROUND

Respondent Karl T. Harbath ("Respondent") and Defendant Stephen Sanders ("Sanders") were installing fiber optic cable at the Michelin plant in Lexington County, South Carolina in

February of 2012. Respondent was a temporary worker employed by Cornerstone Staffing Solutions ("Cornerstone"), and Sanders was a temporary worker employed by Appellant.

Both Cornerstone and Appellant supplied temporary workers, including Respondent and Sanders, to Black Box Network Services ("Black Box") for the installation of the fiber optic cable at the Michelin plant. During the course of their work on February 23, 2012, Respondent and Sanders were using a boom lift. The boom lift was rented from Defendant Sunbelt Rentals ("Sunbelt"). Respondent was injured during the course of directing Sanders, who was driving the boom lift.

Appellant and Black Box's staffing agreement ("the Agreement") contained an indemnification provision that stated the parties agreed to indemnify and hold the other party harmless, except to the extent disclaimed in the Agreement. (Amended Answer ¶ 53, attached as **Exhibit A**). The Agreement provided Appellant expressly disclaimed all liability resulting from Black Box (1) failing to adequately supervise or control Sanders; (2) allowing Sanders to use a vehicle, like the boom lift, without Appellant's prior approval in writing; and (3) assigning Sanders to duties different from his original duties. (Amended Answer ¶ 54). Read together, the indemnification and the disclaimer of liability clauses provide Black Box agreed to indemnify Appellant for Respondent's damages. (Amended Answer ¶¶ 53-54).

On February 19, 2015, Respondent filed a complaint alleging Appellant, Sanders, and Sunbelt were negligent. In the complaint, Respondent claimed he was a third-party beneficiary to Appellant and Black Box's Agreement. (Complaint ¶¶ 29, 32, 40). Appellant answered the complaint on May 8, 2015. Appellant and Sanders disputed liability for Respondent's injury and asserted affirmative defenses as to liability and proximate causation. On June 8, 2015, Appellant filed an amended answer and third-party complaint against Black Box for contractual

indemnification. Appellant disclaimed liability for Respondent's losses and claims, and it also required indemnification from Black Box under the Agreement. (Amended Answer ¶¶ 47-62).

Respondent filed a motion to strike portions of Respondent's amended answer and the third-party complaint on June 26, 2015. Black Box filed a motion to dismiss the third-party complaint on other grounds. At the conclusion of the hearing on these two motions, the Circuit Court granted Respondent's motion and found BBNS's motion was moot. Accordingly, the Circuit Court struck Appellant's third-party complaint and portions of Appellant's amended answer. (Order, attached as **Exhibit B**). Appellant filed a motion to reconsider the order granting Respondent's motion to strike. (Motion to Reconsider, attached as **Exhibit C**).[1] Although the Circuit Court struck certain factual findings of fault in the order, which were unsupported by the evidence and not at issue before the Circuit Court, it otherwise denied the motion to reconsider. (Amended Order, attached as **Exhibit D**).

This appeal followed.

## ARGUMENTS

### I. Section 14-3-330 Expressly Provides An Order Striking A Pleading, Such As Appellant's Third-Party Complaint, Is Immediately Appealable.

Generally, section 14-3-330 determines whether a party may immediately appeal an order before a final judgment. Absent some other specialized statute, an order must fall into one of the several categories under section 14-3-330. The orders on appeal fall under section 14-3-330(2), which allows for the immediate appeal of "[a]n order affecting a substantial right made in an action when such order . . . strikes out an answer or any part thereof or any pleading." The Supreme Court has held an order affects a substantial right when the order "would discontinue an

[1] Appellant includes the Motion to Reconsider as an exhibit because it is a fair representation of the arguments that Appellant will raise in this appeal in Appellant's briefing.

action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993).

As expressly provided under section 14-3-330(2), Appellant may immediately appeal an order that affects a substantial right when it strikes "any pleading" like Appellant's third-party complaint. In First General Services of Charleston, Inc. v. Miller, the Supreme Court held the Circuit Court erred in dismissing a third-party complaint for equitable indemnification. 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994). There, the appellant had immediately appealed the order dismissing the third-party complaint. Id. at 441, 445 S.E.2d at 447. Although the Court did not address appealability, the appealability of an order affects subject matter jurisdiction, which may be raised *sua sponte* by the Court. See Eagle Container Co., LLC v. Cty. of Newberry, 366 S.C. 611, 632, 622 S.E.2d 733, 743 (Ct. App. 2005) rev'd on other grounds by, 379 S.C. 564, 666 S.E.2d 892 (2008) (providing appealability determines subject matter jurisdiction, which may be raised *sua sponte* by the Court). The fact that the First General Court addressed the merits of an order dismissing a third-party complaint for equitable indemnification indicates that such an order is immediately appealable. See id. Otherwise, the First General Court should have dismissed the appeal as not immediately appealable. See id.

Here, the Circuit Court's order struck Appellant's third-party complaint for contractual indemnification against Black Box, which discontinues the third-party action and strikes Appellant's defense. See § 14-3-330(c)(2); Mid-State Distributors, 310 S.C. at 335 n.4, 426 S.E.2d at 780 n.4 (providing an order affects a substantial right when the order "would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense"). Pursuant to the Agreement, Sanders was under the direction, control, and supervision

of Black Box. (Amended Answer ¶ 55). The Agreement contained an indemnification provision that stated the parties agreed to indemnify and hold the other party harmless, except to the extent disclaimed in the Agreement. (Amended Answer ¶ 53). Appellant disclaimed liability from Black Box failing to supervise Respondent, allowing Sanders to operate a boom lift without Appellant's written approval, and assigning Sanders to duties different from his original job duties. (Amended Answer ¶¶ 47-62). Respondent's claims fall within the scope of the Agreement, and Respondent has claimed to be a third-party beneficiary under the Agreement. (Complaint ¶¶ 29, 32, 40).

Appellant may be able to assert an "empty chair" defense at trial by claiming Black Box was required to supervise the temporary works and indemnify Appellant for their failure to do so, but the defense may be meaningless if Black Box is not named as a third-party defendant.[2] The jury would have to apportion the verdict among Respondent, Appellant, and the other named defendants. See S.C. Code Ann. § 15-38-15(C)(2-3) (providing the apportionment of liability among the plaintiff and defendants must equal one hundred percent). If Black Box is not on the verdict form as a third-party defendant or Appellant cannot add Black Box to the verdict form as a non-party, Appellant's share of the liability may be artificially increased, especially when Respondent is claiming he was a third-party beneficiary under the Agreement. Appellant has an existing right to enforce the Agreement now in this action to defend itself.

Appellant assumes Respondent will argue the orders on appeal are not immediately appealable under Tatnall v. Gardner, 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002). In Tatnall,

[2] Appellant also intended to brief the issue of whether the South Carolina Contribution Among Tortfeasors Act allows a non-party to be listed on the verdict form. S.C. Code Ann. § 15-38-15(D). The Supreme Court recently heard oral argument on this issue in December 2015. John William Machin v. Carus Corp., Appellate Case No. 2015-000901. If the Supreme Court ruled a non-party cannot be added to the verdict form, a third-party action would be the only other option to add Black Box to the verdict form.

this Court dismissed without prejudice an appeal in which the appellant appealed an order from the Circuit Court denying a motion to amend the pleadings to assert a third-party complaint. Id. at 137, 564 S.E.2d at 378. Tatnall is distinguishable from this case because the Circuit Court merely denied a motion to amend, and thus, a different subsection of section 14-3-330(2) applied. Id. at 138, 564 S.E.2d at 379; see also Baldwin Construction Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004) (providing the denial of a motion to amend an answer is not immediately appealable). The motion to amend the pleadings had to be an "order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." Id. at 137, 564 S.E.2d at 378 (citing § 14-3-330(2)(a)). The appellant also argued the order denying the motion to amend was immediately appealable under section 14-3-330(1) as an order "involving the merits." Id. at 138, 564 S.E.2d at 379. The Tatnall Court concluded an order denying a motion to amend did not prevent "a judgment from being rendered in the action" or involve the merits because the appellant could appeal at the conclusion of the action or file a separate, first-party suit for indemnity. Id.

Tatnall is simply not on point with this case because different provisions of section 14-3-330 apply here. The issue in this case is not whether the orders prevent a judgment from being rendered under section 14-3-330(2)(c) or involved the merits under section 14-3-330(1), but whether the orders affected a substantial right by striking a pleading. The Legislature expressly provided for the immediate appeal of an order striking "any pleading in any action," which includes an order striking a third-party complaint. Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003) ("The legislature's intent should be ascertained primarily from the plain language of the statute."); Rule 7(d), SCRCP (providing a

third-party complaint is a pleading). Accordingly, the orders on appeal are immediately appealable.

## II. Appellant's Third-Party Complaint Is Ripe For Adjudication.

"The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." Spivey ex rel. Spivey v. Carolina Crawler, 367 S.C. 154, 160, 624 S.E.2d 435, 438 (Ct. App. 2005). An issue that is contingent, hypothetical, or abstract is not ripe for judicial review. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996). Instead, there must be a real and substantial controversy which is ripe and appropriate for judicial determination. James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 733 (2010).

In First General, a home renovation company sued a homeowner for failure to pay the outstanding balance owed, and the homeowner filed counterclaims against the home renovation company based on his dissatisfaction with their work. 314 S.C. at 441, 445 S.E.2d at 447. In turn, the home renovation company filed a third-party complaint against its subcontractor, alleging claims of indemnity and contribution. Id. The third-party defendant moved to dismiss the third-party complaint, which the Circuit Court granted. Id. The Supreme Court upheld the dismissal of the contribution third-party claim, but the Court found the Circuit Court had erred in dismissing the equitable indemnification claim. Id. at 444, 445 S.E.2d at 448.

As to the contribution claim, the Court held that claim was not ripe because a third-party complaint must be premised upon an existing right. Id. at 443-44, 445 S.E.2d at 448. The right to contribution from the subcontractor did not exist until the home renovation company made a payment to the homeowner. Id. (citing S.C. Code Ann. § 15-38-20(B) ("*The right of*

*contribution exists only in favor of a tortfeasor who has paid* more than his pro rata share of the common liability . . . .")). Because the home renovation company had not yet made a payment, its right to contribution did not exist, and thus, the third-party complaint was not ripe. Id. at 444, 445 S.E.2d at 448.

However, the Circuit Court had erred in dismissing the third-party claim for equitable indemnification because that claim already existed. Id. The claim for equitable contribution existed because the homeowners had claimed the home renovation company was negligent in its restorations to a certain part of the house where the subcontractor was responsible for those repairs. Id. at 443, 445 S.E.2d at 448. Unlike the contribution claim, the Court found the equitable indemnification claim was an existing right, thus, ripe for adjudication. Id. at 444, 445 S.E.2d at 448 ("Since a third-party complaint is premised upon an existing right of the third-party plaintiff, First General's impleader action against Servicemaster for contribution is not ripe. . . . Accordingly, First General may properly implead Servicemaster under Rule 14(b) as a third-party defendant for indemnity, but not for contribution." (citation omitted)). Similarly, in Jourdan v. Boggs/Vaughn Contracting, Inc., this Court found a Circuit Court's dismissal of a counter-claim for equitable indemnification was also premature because the allegations of the Complaint were not determinative of the right to indemnity. 324 S.C. 309, 313, 476 S.E.2d 708, 711 (Ct. App. 1996).

Appellant's claim for contractual indemnification is ripe because Appellant has an existing right to enforce its contract with Black Box. See Spivey, 367 S.C. at 160, 624 S.E.2d at 438 (providing the appellate courts must only decide actual controversies injuriously affecting the rights of some party to the litigation). Unlike a claim for contribution that does not ripen until a tortfeasor has paid more than his pro rata share of liability, a claim for contractual

indemnification is not hypothetical or contingent. See James, 390 S.C. at 193, 701 S.E.2d at 733 (providing there must be a real and substantial controversy appropriate for judicial determination, as distinguished from a contingent, hypothetical, or abstract dispute). If the First General Court found a claim for equitable indemnification was ripe at the time the third-party complaint was filed, it is even more so here when there is an express contract requiring Black Box to indemnify Appellant for Black Box's failure to supervise the temporary workers at the Michelin plant. Id. at 444, 445 S.E.2d at 448.

In this case, the Circuit Court found Appellant's third-party complaint was not ripe for adjudication. (Amended Order at p. 6). Appellant intended to brief this issue on appeal because the Circuit Court erred in interpreting First General as standing for the proposition that Appellant cannot file a contractual indemnification claim against Black Box until judgment is entered against Appellant. (Id.). The Circuit Court reasoned the contractual indemnification claim had not yet ripened because First General held the statute of limitations for an equitable indemnification claim did not begin to run until after a judgment was entered against the party. See id. at 444, 445 S.E.2d at 449 ("As to the indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant."). The statute of limitation was only an alternative grounds for dismissal, which did not affect whether the claim was ripe. See id. at 444, 445 S.E.2d at 448 (holding the Circuit Court also erred in finding the third-party action for indemnity was time barred). The Circuit Court ignored that the First General Court specifically found that the lower court had erred in granting a motion to dismiss for the third-party equitable indemnification claim. See id. at 443, 445 S.E.2d at 448. Thus, the Circuit Court erred in finding Appellant's contractual indemnification claim was unripe under First General.

This is also a fairly novel issue in South Carolina. First General and Jourdan addressed the dismissal of claims for equitable indemnification. First General, 314 S.C. at 444, 445 S.E.2d at 448 (finding the Circuit Court erred in dismissing a third-party complaint for equitable indemnity); Jourdan, 324 S.C. at 313, 476 S.E.2d at 711 (finding a Circuit Court's dismissal of a counter-claim under Rule 12 for equitable indemnification was also premature). However, Appellant has asserted a third-party claim for contractual indemnification.

A party cannot assert an equitable indemnification claim if the party is a mere joint tortfeasor. See Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992). Accordingly, a claim for equitable indemnification will be barred if a jury found the parties to be joint tortfeasors. See id. That is not an issue with a claim for contractual indemnification. See Lightner v. Duke Power Co., 719 F. Supp. 1310, 1312 (D.S.C. 1989) ("[A]t least in the absence of a contractual or legal relation between the parties, one who is himself negligent cannot maintain an action for indemnity."); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) (holding the joint tortfeasor rule inapplicable where there is a contractual relationship between the two parties). Therefore, a determination of whether a contractual indemnification claim is ripe may require a different analysis than in First General and Jourdan. This issue is more suitable for briefing and oral argument than determining through appealability memoranda. Appellant respectfully requests the Court allow the appeal to proceed so Appellant may brief this issue on appeal.

## III. Section 14-3-330 Of The South Carolina Code Provides An Order Striking Portions Of An Answer Is Immediately Appealable.

Section 14-3-330(2) also provides an order "affecting a substantial right made in an action when such order . . . (c) strikes out an answer or any part thereof" is immediately appealable. See also Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994) (providing an

order striking any defense is immediately appealable if that defense cannot be raised again later in the proceedings). The Circuit Court struck three paragraphs from Appellant's Amended Answer, which will prevent Appellant from raising these defenses again later in the proceedings.

In paragraph 43 of the Amended Answer, Appellant moved for any actual and/or statutory employers, such as Black Box, to be added to the verdict form for purposes of fault allocation under section 15-38-15(D).[3] Appellant also asserted a right to contribution[4] or indemnity against any actual or statutory employer pursuant to section 42-1-580 of the Workers' Compensation Act in paragraph 42.[5] Finally, in paragraph 44, Appellant sought a proportional credit or offset under section 15-38-15(E) for any amounts paid by an actual and/or statutory employer. When the Circuit Court struck these paragraphs, it made conclusive findings that these defenses were meritless. (Amended Order p. 6-10). Appellant will not be able to raise these defenses later in the proceedings. Accordingly, the orders are immediately appealable.

## CONCLUSION

Appellant respectfully requests this Court to find the orders on appeal are immediately appealable under section 14-3-330. In the alternative, Appellant requests the Court allow the appeal to proceed but require the parties to address appealability in the briefs as an issue on

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[3] "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." S.C. Code Ann. § 15-38-15 (emphasis added).

[4] Appellant admits a claim for contribution is not ripe until Appellant has paid more than its pro rata share of liability. First General, 314 S.C. at 443-44, 445 S.E.2d at 448. However, paragraph 42 also raises a claim for indemnity, which is immediately appealable and ripe as discussed in this memorandum.

[5] "When the facts are such at the time of the injury that a third person would have the right, upon payment of any recovery against him, to enforce contribution or indemnity from the employer, any recovery by the employee against the third person shall be reduced by the amount of such contribution of indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied." S.C. Code Ann. § 42-1-580.

appeal, which in turn would give the parties an opportunity to argue the appealability at oral argue should the Court grant one in this appeal.

Respectfully submitted,

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February 19, 2016
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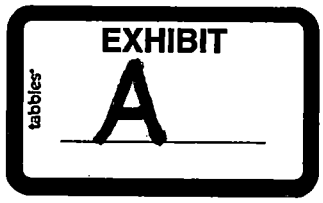


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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | FIFTH JUDICIAL CIRCUIT |
| | ) | |
| Karl T. Harbath, | ) | Civil Action No.: 2015-CP-40-01082 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | **AMENDED ANSWER AND THIRD-PARTY COMPLAINT OF DEFENDANTS STEPHEN SANDERS AND BENNETT-HALL CO., INC.** |
| | ) | |
| Stephen Sanders, Bennett-Hall Co., Inc., and Sunbelt Rentals, Inc., | ) | |
| | ) | |
| Defendants, | ) | *(Jury Trial Demanded)* |
| | ) | |
| vs. | ) | |
| | ) | |
| Black Box Network Services, Inc. | ) | |
| | ) | |
| Third-Party Defendant. | ) | |
| | ) | |





Defendants Bennett-Hall Co., Inc. and Stephen Sanders (collectively, "Defendants"), by and through their counsel, and reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure or any other dispositive motions, respond to the Complaint of Plaintiff Karl T. Harbath ("Plaintiff") and assert a Third-Party Claim against Black Box Network Services, Inc. ("BBNS").

Defendants deny each and every allegation of Plaintiff's Complaint not hereinafter specifically admitted, by demanding strict proof thereof, and further responds as follows:

**FOR A FIRST DEFENSE AND BY WAY OF ANSWER**

1. Each and every allegation contained in the Complaint not specifically admitted is denied, and strict proof thereof is demanded.

2. Defendants admit the allegations in Paragraph 2.

3. Responding to the allegations in Paragraph 3, Defendants admit Bennett-Hall Co., Inc. is a foreign corporation incorporated in the State of North Carolina and authorized to do

business in the State of South Carolina. Defendants further admit Bennett-Hall Co., Inc. has done business in Richland County. Defendants deny the remaining allegations in Paragraph 3.

4. Responding to the allegations in Paragraph 4, Defendants admit Stephen Sanders was an employee of Bennett-Hall Co., Inc. Defendants lack sufficient knowledge or information upon which to form a belief as to the remaining allegations in Paragraph 4, and therefore deny the same.

5. Defendants lack sufficient knowledge or information upon which to form a belief as to the allegations in Paragraphs 5, 6, and 7, and therefore deny the same.

6. Paragraph 8 constitutes a conclusion of law to which no response is required. However, to the extent Plaintiff contemplates a response from Defendants, Defendants lack sufficient knowledge or information upon which to form a belief as to the allegations in Paragraph 8 and therefore deny same.

7. Defendants admit the allegations in Paragraph 9 with regard to their respective names.

8. Paragraph 10 constitutes a conclusion of law to which no response is required. However, to the extent Plaintiff contemplates a response from Defendants, Defendants lack sufficient knowledge or information upon which to form a belief as to the allegations in Paragraph 10 and therefore deny same.

9. In response to the allegations in Paragraph 11, Defendants restate their responses the above-numbered paragraphs and incorporates same by reference

10. Defendants lack sufficient knowledge or information upon which to form a belief as to the allegations in Paragraphs 12 and 13, and therefore deny same.

11. Responding to the allegations in Paragraph 14, Defendants admit Bennett-Hall Co., Inc., supplied temporary workers to BBNS to supplement BBNS's work force for a project at the Michelin plant in Lexington County, South Carolina. Defendants lack sufficient knowledge or information upon which to form a belief as to the remaining allegations in Paragraph 14, and therefore deny same.

12. Defendants lack sufficient knowledge or information upon which to form a belief as to the allegations in Paragraph 15, and therefore deny same.

13. Defendants admit the allegations in Paragraph 16.

14. Responding to the allegations in Paragraphs 17, 18, 19, 20, 21, 22, and 23, Defendants admit Plaintiff and Stephen Sanders were working together for BBNS at the Michelin plant in Lexington County, South Carolina. Defendants further admit Plaintiff was guiding Mr. Sanders as Mr. Sanders drove a boom lift during the course of the work. Defendants further admit Plaintiff was injured by the boom lift as he was guiding Mr. Sanders. Defendants deny the remaining allegations in Paragraphs 17, 18, 19, 20, 21, 22, and 23.

15. Responding to the allegations in Paragraph 24, Defendants admit that personnel in the vicinity of Plaintiff's injury responded, as well as emergency medical technicians. Defendants lack sufficient knowledge or information upon which to form a belief as to the remaining allegations in Paragraph 24, and therefore deny same.

16. Defendants deny the allegations in Paragraph 25.

17. In response to the allegations in Paragraph 26, Defendants restate their responses the above-numbered paragraphs and incorporates same by reference

18. Defendants deny the allegations in Paragraphs 27, 28 (including sub-parts), 29, 30, and 31.

19. Responding to the allegations in Paragraph 32, Defendants crave reference to the contract between BBNS and Bennett-Hall Co., Inc., which speaks for itself. Defendants deny any allegations in Paragraph 32 inconsistent with the terms of said contract.

20. Defendants deny the allegations in Paragraphs 33 and 34.

21. In response to the allegations in Paragraph 35, Defendants restate their responses the above-numbered paragraphs and incorporates same by reference

22. Responding to the allegations in Paragraph 36, Defendants admit Sanders was an employee of Bennett-Hall Co., Inc. Defendants lack sufficient knowledge or information upon which to form a belief as to the remaining allegations in Paragraph 36, and therefore deny same.

23. Defendants deny the allegations in Paragraph 37, 38, and 39 to the extent they apply to Stephen Sanders' work on the jobsite at the Michelin Plant in Lexington County, South Carolina. Defendants would show that BBNS was responsible for direction, supervision, and control of workers assigned by Bennett-Hall Co., Inc. to work at the Michelin plant, as well as reporting any issues with Mr. Sanders' work to Bennett-Hall Co., Inc. Defendants deny any remaining allegations in Paragraphs 37, 38, and 39.

24. Responding to the allegations in Paragraph 40, Defendants crave reference to Bennett-Hall Co., Inc.'s contract with BBNS, which speaks for itself. Defendants deny any allegations in Paragraph 40 that are inconsistent with said contract.

25. Defendants deny the allegations in Paragraphs 41, 42 (including subparts), 43, and 44.

26. In response to the allegations in Paragraph 45, Defendants restate their responses the above-numbered paragraphs and incorporates same by reference

27. The allegations in Paragraphs 46, 47, 48, 49 (including subparts), 50 and 51 are directed to a party other than Defendants. To the extent Plaintiff contemplates a response from Defendants for these paragraphs, they are denied.

28. Defendants deny Plaintiff is entitled to the relief (from Defendants) he seeks in his unnumbered WHEREFORE at the conclusion of his Complaint.

**FOR A SECOND DEFENSE**

29. The Complaint fails to set forth sufficient facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure.

**FOR A THIRD DEFENSE**

30. The claims set forth in the Complaint are barred, in whole or in part, by the applicable statute of limitations.

**FOR A FOURTH DEFENSE**

31. Defendants would show that even if they were negligent, as alleged in the Complaint, which is specifically denied, Defendants' negligence is not the direct or proximate cause of any damages alleged by Plaintiff and therefore Defendants are not liable to Plaintiff for any sum whatsoever.

**FOR A FIFTH DEFENSE**

32. Defendants would show that any damages complained of were due to and proximately caused by Plaintiff's own negligence, recklessness, willfulness, or carelessness. Therefore, in accordance with the principles of comparative negligence, Plaintiff's claims should be reduced in proportion to Plaintiff's own negligence, recklessness, willfulness, and carelessness or must be denied if Plaintiff's negligence exceeds fifty percent.

**FOR A SIXTH DEFENSE**

33. Defendants assert that they claims against them are barred or limited by the contributing, concurring, intervening, or superseding fault, negligence, or breach by persons or entities other than Defendants, including Plaintiff, and that any fault or negligence by Defendant, the existence of which is denied, was passive and secondary in light of the primary and active fault, negligence, or breach by others, including Plaintiff. Defendants assert such fault, negligence, or breach as a basis for the elimination or reduction of any liability by Defendants, the existence of which is denied.

**FOR A SEVENTH DEFENSE**

34. Plaintiff has failed to act reasonably to prevent, mitigate, or otherwise lessen the alleged damages.

**FOR AN EIGHTH DEFENSE**

35. Defendants allege Plaintiff knew or should have known of the dangers attendant to the conduct described in the particulars hereinabove, and also knew or should have known that by engaging in this conduct he assumed the risk of being involved in the incident in the fashion in which he was involved. Defendants further allege that Plaintiff nevertheless freely and voluntarily engaged in this conduct even though he knew or should have known of the attendant risks of doing so and that in doing so, he assumed the risk of being involved in the incident and sustaining the injuries and damages for which he is now complaining. For that reason, Defendants are not liable to Plaintiff for any sum whatsoever. Alternatively, Plaintiff's assumption of risk should be considered as a facet of Plaintiff's comparative negligence.

**FOR A NINTH DEFENSE**

36. Defendants plead the applicability of the Economic Development, Citizens and Small Business Protection Act of 2005, effective July 1, 2005, which amended S.C. Code Ann. §§ 15-38-15 [joint and several liability], and other pertinent statutory sections, and invokes the remedies and procedures provided therein. Specifically, Defendants submits they are entitled to a proper apportionment of fault among all potential tortfeasors, including Plaintiff, whether they are named as a defendant or not.

**FOR A TENTH DEFENSE**

37. Any recovery by Plaintiff must be reduced or offset by amounts Plaintiff has received or will receive from others for the same injuries claimed in this lawsuit.

**FOR AN ELEVENTH DEFENSE**

38. Defendants did not engage in any willful, malicious or other action entitling Plaintiff to an award of punitive damages. Furthermore, punitive damages, as currently awarded in South Carolina, are also violative of the United States Constitution and South Carolina Constitution, as well as the holdings of State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424, 121 S.Ct. 1678 (2001), and Phillip Morris USA v. Williams, 127 S.Ct. 1057, 1063 (U.S. 2007), and the cases upon which they are based. In the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury's award of actual damages, as explicated within Exxon Shipping Company v. Baker, 128 S. Ct. 2605 (2008).

**FOR A TWELFTH DEFENSE**

39. Defendants plead any and all applicable protections afforded to it under the South Carolina Fairness in Civil Justice Act of 2011, codified at S.C. Code Ann. §15-32-510 to 15-32-540, as a defense to Plaintiffs' claims or request for an award of punitive damages.

**FOR A THIRTEENTH DEFENSE**

40. Defendants hereby incorporate and assert all defenses, counterclaims, set-offs, and credits pled by other parties in this action, to include any pleadings filed after this Answer, and specifically, without limitation, all defenses, set-offs, and credits pled to Plaintiff's claims, to the extent not inconsistent with their Answer herein and their denial of liability of any kind.

**FOR A FOURTEENTH DEFENSE**

41. Upon information and belief, Plaintiff has sought and received benefits under the South Carolina Workers' Compensation Act. Under S.C. Code section 42-1-540 and the facts of this claim, the South Carolina Workers' Compensation Act provides the exclusive remedy for the damages alleged by Plaintiff, and Defendants hereby plead the South Carolina Workers Compensation Act, S.C. Code Ann. section 42-1-10 et seq, as an exclusive remedy and a bar to this action, including but not limited to any defense that BBNS was the statutory employer of Plaintiff, Defendant Sanders, and Defendant Bennett-Hall Co., Inc.

**FOR A FIFTEENTH DEFENSE**

42. In the alternative, if it is finally determined that the South Carolina Workers' Compensation Act does not bar this action, Defendants plead the application of S.C. Code section 42-1-580 to this action and further allege that the actual and/or statutory employer(s) of Plaintiff has or shares common or full liability for the alleged damages to Plaintiff. Such

common or full liability of the actual and/or statutory employer(s) of Plaintiff includes but is not limited to:

a. Failure to provide a safe environment for Plaintiff;

b. Failure to provide proper safety equipment to Plaintiff;

c. Failure to provide proper warnings and/or safeguards;

d. Failure to recognize Plaintiff's injuries, if any, in a timely manner;

e. Failure to properly respond to Plaintiff's requests for medical care;

f. Causing and/or contributing to the acts and/or omissions alleged in the Complaint;

g. Other such acts or omissions to be proven at trial.

Defendants therefore have or will have the right of contribution or indemnity against such actual and/or statutory employer(s) and any recovery by Plaintiff against Defendants must therefore be reduced by the amount of such contribution or indemnity owed by the actual and/or statutory employer(s) of Plaintiff.

43. Further, pursuant to S.C. Code section 15-38-15 (2005, as amended), Defendants hereby move that the actual and/or statutory employer(s) of Plaintiff be made a party or parties to this action for purposes of allocation of fault. Defendants specifically request that such actual and/or statutory employer(s), even if immune from suit pursuant to section 42-1-540 or other law, be listed on the verdict form for purposes of allocation of fault.

44. In the alternative, Defendants seek a proportional credit or offset pursuant to section 15-38-15(E) for the amounts paid by the actual and/or statutory employer(s) of Plaintiff for this incident, or the amount for which such actual and/or statutory employer(s) are or could have been liable, whichever is greater.

**FOR A SIXTEENTH DEFENSE**

45. Venue is improper in this case.

**FOR A SIXTEENTH DEFENSE**

46. Defendants have not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding Plaintiffs' allegations. Defendants reserve any additional and affirmative defenses as may be revealed or become available during the course of Defendants' investigation and/or discovery in this case and consistent with the South Carolina Rules of Civil Procedure.

**FOR A SEVENTEENTH DEFENSE**
**(Third-Party Complaint Against Black Box Network Services, Inc. for Contractual Indemnity)**

47. Black Box Network Services, Inc. ("BBNS") is a foreign corporation incorporated in the State of Pennsylvania and authorized to do business in the State of South Carolina.

48. On August 23, 2010, Bennett-Hall Co., Inc. entered into an "Agreement for Supplying Temporary Technical Personnel" ("Agreement") with BBNS.

49. The Agreement provided Bennett-Hall Co., Inc. would supply employees ("assigned workers") to BBNS on a temporary basis to work under BBNS's direction, control and supervision.

50. BBNS outlined specified labor skills and tool requirements for various types of technicians it needed, including "Level 1," "Level 2," and "Level 3" technicians. There was nothing in the labor skill and tool requirements for a "Level 2" technician (or a Level 1 technician, of which a Level 2 technician was required to also have the same skills) that required a "Level 2" technician to operate a vehicle.

51. Sanders was employed by Bennett-Hall Co., Inc. and assigned to BBNS as a "Level 2" technician at the Michelin plant in Lexington County, South Carolina.

52. On February 23, 2012, Sanders and Plaintiff were working together for BBNS at the Michelin plant. Plaintiff alleges he was injured by Sanders while Sanders was driving a boom lift during the course of the work.

53. Bennett-Hall Co., Inc's Agreement with BBNS included an "Indemnification" provision, which provided the following:

> Each party will, **except to the extent disclaimed in this agreement**, indemnify and hold the other party harmless from and against all costs and expenses, including attorney's fees and the reasonable costs of investigation from:
>
> a. Claims for personal injury or property damage to the extent caused by an indemnified party's negligence in the performance of its obligations under this Agreement.
>
> . . . .
>
> b. A breach of the indemnifying party's obligations under this Agreement.

(emphasis added).

54. The Agreement also contained a "Disclaimer of Liability" provision in which Bennett-Hall Co., Inc. expressly disclaimed liability for any claim, loss, or liability of any kind resulting from:

> a. BBNS's failure to adequately supervise or control assigned workers or safeguard its premises, processes, or systems . . . .
>
> b. BBNS requesting or permitting the assigned workers to use any vehicle, regardless of ownership, in connection with the performance of services for BBNS unless Bennett-Hall Co., Inc. had given its prior approval in writing.

c. BBNS assigning the assigned workers to duties different from their original duties or BBNS making substantial changes to the assigned worker's job duties or risks without the prior written approval of Bennett-Hall Co., Inc.

d. Claims for special, indirect, consequential, punitive, or lost profit damages.

e. Property damage or personal injury, including death, arising out of or resulting from acts or omissions of the assigned workers.

55. Pursuant to the Agreement, Sanders was under BBNS's direction, control, and supervision when Plaintiff's injury occurred.

56. BBNS required Sanders to operate a boom lift during the course of his work, which was not included in the labor specifications and tool requirements for a "Level 2" technician.

57. Bennett-Hall Co., Inc. did not provide prior written approval to allow BBNS to permit or assign Sanders to operate a vehicle, such as a boom lift. Pursuant to the Agreement, Bennett-Hall Co., Inc. expressly disclaimed any liability resulting from BBNS permitting or assigning Sanders to operate a boom lift without the prior written approval of Bennett-Hall Co., Inc. Plaintiff's claims are within the scope of this provision of the Agreement.

58. BBNS failed to adequately supervise Sanders and Plaintiff during the course of their work so as to ensure only authorized personnel operated tools and/or vehicles that were outside the scope of those set forth in the specified labor skills and tool requirements for "Level 2" technicians. Pursuant to the Agreement, Bennett-Hall Co., Inc. expressly disclaimed any liability resulting from BBNS's failure to adequately supervise or control Sanders. Plaintiff's claims are within the scope of this provision of the Agreement.

59. Pursuant to the Agreement, Bennett-Hall Co., Inc. expressly disclaimed any liability resulting from claims for special, indirect, consequential, punitive, or lost profit damages. Plaintiff's claims are within the scope of this provision of the Agreement.

60. Pursuant to the Agreement, Bennett-Hall Co., Inc. expressly disclaimed any liability for personal injury claims such as Plaintiff's that arose out of or resulted from Sanders' acts or omissions. Plaintiff's claims are within the scope of this provision of the Agreement.

61. Moreover, pursuant to the Indemnification provision of the Agreement, Bennett-Hall Co., Inc. and BBNS agreed indemnity would not extend to liability resulting from BBNS permitting or assigning Sanders to operate a vehicle; BBNS failing to adequately supervise Sanders; claims for special, indirect, consequential, punitive, or lost profit damages; or personal injury claims arising out of or resulting from Sanders' acts or omissions.

62. Therefore, BBNS is liable to Bennett-Hall Co., Inc. for the costs of defense and indemnity for any verdict against Bennett-Hall Co., Inc. or settlement.

WHEREFORE, having fully answered Plaintiffs' Complaint and having asserted affirmative defenses and a Third-Party Claim against BBNS, Defendants Stephen Sanders and Bennett-Hall Co., Inc. respectfully request that:

a. Plaintiff take nothing by this action from Defendants;

b. A judgment of dismissal be entered in favor of Defendants;

c. If a judgment is entered in favor of Plaintiff, Bennett-Hall Co., Inc. respectfully request this Court to order BBNS to indemnify Bennett-Hall Co., Inc. for all costs associated with Plaintiff's claims against Bennett-Hall Co., Inc. in this lawsuit or settlement.

d. Defendants be awarded such other and further relief as this Court deems proper.

Respectfully Submitted,

COLLINS & LACY, P.C.

By: _____

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Kerri A. Rupert, Esquire
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ATTORNEYS FOR DEFENDANTS BENNETT-HALL CO., INC. AND STEPHEN SANDERS

Columbia, South Carolina
June 3, 2015

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND | ) | FIFTH JUDICIAL CIRCUIT |
| Karl T. Harbath, | ) | Civil Action No. 2015-CP-40-01082 |
| Plaintiff, | ) | **CERTIFICATE OF SERVICE** |
| vs. | ) | |
| Stephen Sanders, Bennett-Hall Co., Inc., and Sunbelt Rentals, Inc., | ) | |
| Defendants, | ) | |
| vs. | ) | |
| Black Box Network Services, Inc. | ) | |
| Third-Party Defendant. | ) | |



The undersigned does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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***Counsel for Defendant Sunbelt Rentals, Inc.***

CT Corporation System
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(Two Insignia Financial Plaza)
Greenville, SC 29601

Black Box West Columbia
400 Northeast Drive, Ste. C
Columbia, SC 29203

***Black Box Network Services***

Columbia, South Carolina
June 3, 2015

EXHIBIT B

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

Received 10/26

IN A CIVIL CASE

CASE NUMBER: 2015CP4001082

Karl T Harbath

PLAINTIFF(S)

Stephen Sanders
Bennett-Hall Co Inc

DEFENDANT(S)

FILED
2015 OCT 14 PM 12:38
RICHLAND COUNTY
JEANETTE W. McBRIDE
C.C.P. & G.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**

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

**INFORMATION FOR THE PUBLIC 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** _____ **Judge Code** _____ **Date** _____

**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 14 October 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Melissa Garcia Mosier

Thomas McRoy Shelley III
Catharine H. Garbee Griffin

John Andrew Delaney
Catherine Farrell Wrenn

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Court Reporter** _____

**Clerk of Court** Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF RICHLAND<br><br>Karl T. Harbath,<br><br>Plaintiff,<br><br>-vs-<br><br>Stephen Sanders,<br>Bennett-Hall Co., Inc., and<br>Sunbelt Rentals, Inc.<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTH JUDICIAL CIRCUIT<br><br>Case No.: 2015-CP-40-01082<br><br>**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 without first accounting for Mr. Harbath's whereabouts and ran over his right leg. As a result, Mr. Harbath became a below-the-knee amputee despite multiple attempts to save his leg.

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

[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."

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 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

[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.

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 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.**

Tanya A. Gee

The Honorable Tanya A. Gee

October 13, 2015

Columbia, South Carolina

SCANNED

EXHIBIT

C

STATE OF SOUTH CAROLINA )
) FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND )
) CIVIL ACTION NUMBER: 2015-CP-40-01082
Karl T. Harbath )
) **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
☐ Plaintiff, )
vs. )
Stephen Sanders, Bennett-Hall Co., Inc., and Sunbelt Rentals, Inc. )
☒ Defendant. )
**check box above indicating submitting party**

RICHLAND COUNTY, SC
2015 NOV -5 PM 3:53
JEANNETTE W. GRAMBLING
CLERK OF COURT

| Name, S.C. Bar №, and address of plaintiff's attorney: | Name, S.C. Bar №, and address of defendant's attorney: |
|---|---|
| Melissa G. Mosier, Esquire<br>SC Bar No: 78693<br>119 E. Main Street<br>Lexington, SC 29072<br>telephone: (803) 252-5523 fax: (803) 252-0127<br>e-mail: melissam@mcwhirterlaw.com other: | Kerri A. Rupert, Esquire<br>SC Bar No: 100557<br>Post Office Box 12487<br>Columbia, SC 29211<br>telephone: 803.256.2660 fax: 803.771.4484<br>e-mail: krupert@collinsandlacy.com other: |

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Motion to Reconsider
Estimated Time Needed: 30 minutes Court Reporter Needed: ☐YES / ☐NO

**SECTION II: Motion Type**

☐ Written motion attached
☐ Form Motion –

I hereby move for relief or action by the court as set forth in the attached proposed motion.

Kerri Rupert
Signature of Attorney for ☐Plaintiff / ☒Defendant

November 5, 2015
Date submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status
- ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act
- ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication
- ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter:
- ☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

**CLERK'S VERIFICATION**

DATE FILED

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(print name)

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SCCA/233 (11-03)

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



Pursuant to Rule 59(e), of the South Carolina Rules of Civil Procedure, Defendant Bennett-Hall Co., Inc. ("Bennett-Hall") moves this Court to reconsider its October 13, 2015 Order Striking the Amended Answer of Defendant Bennett-Hall Co., Inc.[1] First, Bennett-Hall respectfully requests this Court to strike certain findings of fact that are conclusions of fault and causation, which Bennett-Hall vehemently disputes. Specifically, Bennett-Hall disputes the following factual findings:

> On the day of the accident, Sanders moved the boom lift without first accounting for Mr. Harbath's whereabouts and ran over his right leg. As a result, Mr. Harbath became a below-the-knee amputee despite multiple attempts to save his leg.

Second, the third-party complaint and paragraphs 42 and 44 of the Amended Answer should not be struck because the worker's compensation statutes do not insulate an upstream employer, like Black Box Network Services (hereinafter "BBNS"), from liability where there is

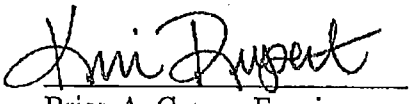
[1] The Court issued its Order on October 13, 2015. However, Bennett-Hall did not receive the Order until October 26, 2015. Bennett-Hall informed the Court via an email dated October 26 that it had not received notice of the Order until that morning, and that it considered October 26 to be the operative date for determining the deadline to file the a motion to reconsider under Rule 59(e).

an express indemnification agreement between the parties. Therefore, Bennett-Hall has a contractual claim for indemnity pursuant to sections 42-1-580 and 15-38-15(E) of the South Carolina Code. Finally, the Court should reconsider striking paragraphs 43 of the Amended Answer. Allocating fault on a jury verdict form to BBNS is an issue of unsettled law in South Carolina.

This motion will be supported by relevant statutory and case law, pleadings on file, affidavits (if any), a memorandum of law, and any oral argument allowed by the Court for this motion, which Bennett-Hall respectfully requests in connection with this filing.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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ATTORNEYS FOR BENNETT-HALL CO., INC.

Columbia, South Carolina
November 5, 2015

**CERTIFICATE OF SERVICE**
(2015-CP-40-01082)

The undersigned employee of Collins & Lacy, P.C., hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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**PLEADING: Motion to Reconsider the Order Striking Bennett-Hall Amended Answer**

Susan R. McLeod

Columbia, South Carolina
November 5, 2015

| | | |
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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND | ) | FIFTH JUDICIAL CIRCUIT |
| Karl T. Harbath, | ) | Civil Action No.: 2015-CP-40-01082 |
| Plaintiff, | ) | |
| vs. | ) | **MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO RECONSIDER THE ORDER STRIKING PORTIONS OF THE AMENDED ANSWER OF DEFENDANT BENNETT-HALL CO., INC.** |
| Stephen Sanders, Bennett-Hall Co., Inc., and Sunbelt Rentals, Inc., | ) | |
| Defendants. | ) | **(Argument Requested)** |



Defendant Bennett-Hall Co., Inc. ("Bennett-Hall") submits this Memorandum of Law in Support of its Motion to Reconsider the Order Striking the Amended Answer.

## INTRODUCTION

First, Bennett-Hall requests this Court to reconsider and strike certain findings of fact that are conclusions of fault and proximate cause, which were neither at issue in the underlying motions and were unsupported by any evidence. The Order states Stephen Sanders ("Sanders") moved the boom lift without first accounting for Mr. Harbath's whereabouts. Bennett-Hall denied this allegation in its Answer and Amended Answer. The Order also states Plaintiff Karl Harbath ("Plaintiff") became an above-the-knee amputee as a result of the accident, which was not pled in the Complaint. Bennett-Hall did not have any opportunity to dispute this finding. In addition, Plaintiff did not provide any evidence either in briefing or at the hearing to support these conclusions of fault and proximate cause.

Although Plaintiff has argued Black Box Network Services ("BBNS") is immune from suit under the worker's compensation statutes, Bennett-Hall has never disputed that generally, an upstream employer is immune from suit by a third party. This has never been Bennett-Hall's

defense. Rather, Bennett-Hall has asserted that its claim of contractual indemnification is an exception to this rule. The Order fails to recognize or address this exception. Therefore, the Court should reconsider striking Bennett-Hall's Third-Party Complaint and paragraphs 42 and 44 of its Amended Answer because the worker's compensation statutes do not insulate an employer from liability under an express indemnification agreement.

In addition, the Court should reconsider striking paragraphs 43 of the Amended Answer. The District Court for the District of South Carolina recently sought certification to South Carolina's Supreme Court on the issue of whether an employer who is immune from liability may be listed on the verdict form for purposes of fault allocation, which supports that this issue remains disputed based on the current state of the law.

## FACTS/PROCEDURAL BACKGROUND

Plaintiff and Defendant Stephen Sanders ("Sanders") were installing fiber optic cable at the Michelin plant in Lexington County, South Carolina in February of 2012. (Complaint ¶ 17). Plaintiff was a temporary worker employed by Cornerstone Staffing Solutions ("Cornerstone"), and Sanders was a temporary worker employed by Bennett-Hall. (Complaint ¶¶ 15-16).

Both Cornerstone and Bennett-Hall supplied temporary workers, including Plaintiff and Sanders, to BBNS for the installation of the fiber optic cable at the plant. (Complaint ¶ 14). During the course of their work on February 23, 2012, Plaintiff and Sanders were using a boom lift. (Complaint ¶ 17). The boom lift was rented from Defendant Sunbelt Rentals ("Sunbelt"). (Complaint ¶ 13). Plaintiff was injured during the course of directing Sanders, who was driving the boom lift. (Complaint ¶ 17). On February 19, 2015, Plaintiff filed a Complaint for negligence against Bennett-Hall, Sanders, and Sunbelt.

Bennett-Hall answered Plaintiff's Complaint on May 8, 2015. In the Answer, Defendant denied Plaintiff's allegation that "Sanders blindly proceeded and ran into his own spotter, the Plaintiff." (Complaint ¶ 21, Answer ¶ 14). Additionally, Bennett-Hall and Sanders disputed liability for Plaintiff's injury and asserted affirmative defenses as to liability and proximate causation. (Answer ¶¶ 14-16, 31-33).

On June 8, 2015, Bennett-Hall filed an Amended Answer and Third-Party Complaint against BBNS for contractual indemnification. As alleged in the Amended Answer and Third-Party Complaint, Bennett-Hall and BBNS had a contract setting forth the terms of Bennett-Hall's relationship with BBNS for staffing. (Amended Answer ¶¶ 47-62). Bennett-Hall disclaimed liability for certain losses and claims, and it also required indemnification from BBNS for certain claims and breach of the contract. (Id.).

Plaintiff filed a Motion to Strike the Amended Answer of Bennett-Hall on June 26, 2015. Additionally, BBNS filed a Motion to Dismiss the Third-Party Complaint on other grounds. At the conclusion of the hearing on these two motions, this Court granted Plaintiff's motion and found BBNS's motion was moot. Bennett-Hall has filed a Motion to Reconsider the Order granting Plaintiff's Motion to Strike.[1]

[1] The Court issued its Order on October 13, 2015. However, Bennett-Hall did not receive the Order until October 26, 2015. Bennett-Hall informed the Court via an email dated October 26 that it had not received notice of the Order until that morning, and that it considered this date to be the operative date for determining the deadline to file the a motion to reconsider under Rule 59(e).

## LAW/ANALYSIS

**I. Bennett-Hall Moves This Court To Issue An Order Omitting Findings Of Fact That Were Not Raised to the Court And Are Unsupported By The Evidence. Additionally, Bennett-Hall Requests This Court To Correct The Order's Title To Properly Reflect The Disposition Of The Case.**

Bennett-Hall respectfully requests this Court reconsider and strike certain findings of fact that are conclusions of fault and proximate causation, which were neither at issue in the underlying motions and were unsupported by any evidence. Specifically, the Order states,

> On the day of the accident, Sanders moved the boom lift without first accounting for Mr. Harbath's whereabouts and ran over his right leg. As a result, Mr. Harbath became a below-the-knee amputee despite multiple attempts to save his leg.

(Order p. 2). Plaintiff did not present any evidence – either in briefing or the hearing of his motion – to support that Sanders did not "account for Mr. Harbath's whereabouts" or that the accident caused him to become a below-the-knee amputee. Whether Sanders failed to account for Plaintiff's whereabouts is a disputed issue of fact in the case based on the pleadings of the parties. (Compare Complaint ¶ 21 with Amended Answer ¶ 14). Furthermore, Plaintiff did not even plead his Complaint that the accident caused him to become an amputee. (Complaint ¶ 25).

The Court made these conclusions of fault and causation without any evidence presented by Plaintiff, and without Bennett-Hall ever having the opportunity to defend against these allegations. See Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010) ("The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings."); see also Edwards v. Edwards, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) (holding an order that makes findings of fact without evidentiary support constitutes an abuse of discretion). For this reason, the Court's findings of fact exceeded the scope of Plaintiff's motion to strike,

especially by characterizing these facts are "undisputed" when Bennett-Hall vehemently disputes them. (Order p. 1). See Turbeville v. Floyd, 288 S.C. 171, 174, 341 S.E.2d 651, 652 (1972) (holding a trial court's ruling may not exceed the limits and scope of the particular motion before it). The parties are still in the midst of discovery regarding these issues.

Furthermore, the issue of whether Sanders accounted for Plaintiff's whereabouts or if the incident caused Plaintiff to become an amputee is a determination for the jury to make.[2] See Vinson v. Hartley, 324 S.C. 389, 402, 477 S.E.2d 715, 721 (Ct. App. 1996) (holding the issues of negligence, contributory negligence, and proximate cause are generally questions for the jury); Cody P. v. Bank of Am., N.A., 395 S.C. 611, 621, 720 S.E.2d 473, 478 (Ct. App. 2011) ("Ordinarily, legal cause is a question of fact for the jury."). Plaintiff did not raise the issues of fault before the Court, and Bennett-Hall respectfully submits that it was improper for the Court to make these findings in light of the stated grounds for Plaintiff's motion and lack of any evidentiary inquiry into these issues in briefing or at the hearing. See Turbeville, 288 S.C. at 174, 341 S.E.2d at 652 (holding a trial court's ruling may not exceed the limits and scope of the particular motion before it); Vinson, 324 S.C. at 400, 477 S.E.2d at 720 ("In a negligence action, the plaintiff must prove proximate cause.").

Bennett-Hall submits the above-referenced portion of the Order should be struck and substituted with the following language:

> On the day of the accident, Plaintiff was injured during the course of guiding Sanders while he was driving the boom lift.

This substitution properly reflects the allegations and admissions represented in the pleadings.

Bennett-Hall also moves this Court to reconsider and correct the title of the Order to properly reflect the Court's disposition. The Order is currently titled, "Order Striking Portions of

[2] Bennett-Hall has demanded a jury trial. (See Amended Answer).

the Amended Answer of Defendant of Bennett-Hall Co. Inc." However, the Order had the effect of striking portions of the amended answer ***and*** Bennett-Hall's third-party complaint against BBNS. Accordingly, Bennett-Hall moves for an Order titled, "Order Striking The Third-Party Complaint and Portions of the Amended Answer of Defendant Bennett-Hall Co., Inc."

## II. The Issue Of Whether Bennett-Hall May Assert A Third-Party Complaint For Contractual Indemnification Against BBNS Is A Separate And Distinct Issue From Adding BBNS As A Joint Tortfeasor, And The Order Failed To Properly Address The Contractual Indemnification Issue.

### A. The Worker's Compensation Statutes Do Not Render BBNS Immune From Bennett-Hall's Claim Of Contractual Indemnification.

BBNS is not immune from a claim of contractual indemnification under the worker's compensation statutes. South Carolina state courts have not directly addressed this issue, and the cases cited in the Order do not apply to this case. However, the District Court of South Carolina, applying the law of the South Carolina appellate courts, has directly addressed this issue several times and found the South Carolina worker's compensation statutes do not bar a claim of contractual indemnification.

The Order strikes Bennett-Hall's Third-Party Complaint because "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." (Order p. 5). Bennett-Hall does not dispute BBNS is immune from tort liability. However, a claim for contractual indemnification is an exception to the general rule that an employer is immune under the worker's compensation statutes.

In support of striking Bennett-Hall's Third-Party Complaint against BBNS, the Court cites to Chester v. South Carolina Department of Public Safety, in which the Supreme Court held, "It is well-settled that a plaintiff has a sole right to determine which co-tortfeasor(s) she

will use." 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010). In Chester, the plaintiff had sued three state agencies under the Tort Claims Act, and the defendants sought to join other alleged tortfeasors as defendants under Rule 19(a), SCRCP, to apportion liability. Id. at 344, 698 S.E.2d at 559-60. The Chester Court was unwilling to allow a defendant to force a plaintiff to add other tortfeasors as defendants for the purpose of fault allocation. Id.

Here, Bennett-Hall (as a third party) and BBNS (as a statutory employer) cannot be joint tortfeasors. Gordon v. Phillips Utilities Inc., 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005); Indemnity Insurance Co. of North America v. Odom, 237 S.C. 167, 116 S.E.2d 22 (1960). In Gordon, after an employee received worker's compensation benefits from his employer, he filed a negligence suit against a third party, Phillips Utilities. Phillips Utilities filed for set-off for the amount of Gordon's worker's compensation benefits under section 42-1-580 of the South Carolina Code, which provides:

> When the facts are such at the time of the injury that a third person would have the right, upon payment of any recovery against him, to enforce contribution or indemnity from the employer, any recovery by the employee against the third person shall be reduced by the amount of such contribution of [sic] indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied.

The Court held an employer could not be liable to its employee in tort under the worker's compensation statutes, and thus, the third party did not have any right to contribution from the employer under section 15-38-20(A) of the South Carolina Code. Id. at 406, 608 S.E.2d at 426-27.

The Odom Court reached a similar result when it found an employer and a third party were not "joint tortfeasors" as to the employee because the liability of the employer arose out of the Worker's Compensation Act and not any theory of tort. 237 S.C. at 176, 116 S.E.2d at 27 ("The liability of the employer under the Workmen's Compensation Act arises out of contract

created by law and not out of any theory of tort, and such liability is not concerned with any negligence on the part of the employer or employee.").

Although section 42-1-580 created a right to contribution or indemnification against an employer, Odom and Gordon found a party suing in tort had no remedy under section 42-1-580. However, neither Odom nor Gordon addressed whether a third party could maintain a claim for contractual indemnification against an employer under section 42-1-580.

At the hearing, the Court indicated it was relying on Gordon and Chester because the District Court cases cited by Bennett-Hall did not establish precedent. However, the only cases that directly address whether a third party can maintain a claim for contractual indemnification against an employer under section 42-1-580 are the very District Court cases cited by Bennett-Hall, one of which is a published decision.[3] These are the only cases that directly address this issue.

For example, in BET Plant Services, Inc. v. W.D. Robinson Elec. Co. Inc., the District Court held, "[A] workers' compensation statute does not insulate an employer from liability under an express indemnification agreement." 941 F. Supp. 54, 56 (1996) (attached as **Exhibit A**). The District Court recognized that generally under section 42-1-580, an employer's payment of benefits to an employee satisfies all claims a third party may have against the employer arising out of the same accident, except in the cases involving a contractual indemnification claim. Id. at 56.

[3] Bennett-Hall acknowledges that reliance on an unpublished order is improper; however, BET Plant Services, Inc. v. W.D. Robinson Elec. Co. Inc., 941 F. Supp. 54 (1996), is a published decision. See Higgins v. Medical Univ. of S.C., 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) (noting reliance on an unpublished decision is improper). The other two unpublished decisions cited within this memorandum merely show how courts have applied BET Plant Services and distinguished contractual indemnification claims as an exception to the general rule. See id. at 600, 486 S.E.2d at 273 (providing circuit court orders may be submitted as memorandum of law on a particular issue).

The Court reached this finding by comparing two cases from the South Carolina state appellate courts: Fuller v. Southern Electric Service Co., 200 S.C. 246, 20 S.E.2d 707 (1942), and Daniels v. Conrad Construction Co. v. Joe Harden Builder, Inc., No. 93-UP-119 (S.C. Ct. App. April 22, 1993). In Fuller, an employee was injured by an independent contractor and sued the employer. Id. at 246, 20 S.E.2d at 712. Applying the precursor to section 42-1-580, the Supreme Court held the independent contractor could bring an action against the employer based on the employer's breach of an agreement to purchase liability insurance. Id. The Fuller Court reasoned the contract to purchase liability insurance was unrelated to the employee's accident and involved a "pre-existing arrangement" between the independent contractor and the employer. Id.

Similar to Fuller, the parties in BET Plant Services had an indemnification provision in a preexisting contract, which was unrelated to the employee's accident. 941 F. Supp. at 56. The District Court found Daniels was distinguishable because although the third party in that case asserted a contract claim, the claim actually sounded in tort and did not involve the pre-existing contract between the parties. Id. Moreover, unlike the third parties in Fuller and BET Plant Services, the Daniels third party did not bring a contractual indemnification claim against the employer. Id. Therefore, the District Court concluded the contractual indemnification claim against the employer should not be dismissed because section 42-1-580 did not insulate an employer from liability under an express indemnification agreement. Id. at 56.

As discussed in Bennett-Hall's Memorandum in Opposition to Plaintiff's Motion to Strike, the District Court again addressed this issue earlier this year. Applying BET Plant Services, the District Court again found section 42-1-580 did not insulate an employer from liability under an express indemnification agreement. Brayboy v. MST-Maschinenbau GmbH,

No. 4:14-CV-02965-RBH, 2015 WL 2062558, at *3 (D.S.C. May 4, 2015) (attached as **Exhibit B**). The Brayboy Court dismissed the third-party complaint, noting the third-party defendant was immune from liability absent an agreement to indemnify. Id. ("Here, there is no allegation of an express indemnification agreement. As a result, in the absence of an express agreement to indemnify, East Coast is immune from common law claims for indemnity from MST." (emphasis added)).

The day after this Court struck Bennett-Hall's Third-Party Complaint, the District Court again applied BET Plant Services and held a claim for contractual indemnification is the exception to the general rule that an employer is immune under the worker's compensation statutes. Labor Finders of S.C., Inc. v. Adams-Robinson Enters., Inc., No. CV 3:14-468-CMC, 2015 WL 5781407, at *4 (D.S.C. Sept. 30, 2015) (attached as **Exhibit C**). In fact, these three cases from the District Court, all applying the law of South Carolina, also follow a majority rule among other state courts that have considered the issue under similar worker's compensation statutes.[4]

To be clear, Bennett-Hall does not dispute that Plaintiff has a right to choose who he names as a defendant. Bennett-Hall also does not dispute that BBNS and Bennett-Hall can never

[4] See 3 Philip L. Bruner and Patrick J. O'Connor, Jr., Bruner & O'Connor Construction Law § 10:55 ("[A] majority of jurisdictions permit an employer to waive its protections under the workers' compensation laws. This is accomplished most often by the employer expressly agreeing to indemnify another against claims arising from injuries incurred by its employees."); 1 Modern Workers Compensation § 103:53 ("Recovery on an indemnity basis can be only on the basis of an express indemnity agreement."); Joel E. Smith, Annotation, Modern status of effect of state workmen's compensation act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman, 100 A.L.R.3d 350 ("[A]lthough the courts in a few cases have adhered to the view that the exclusive remedy provisions of the applicable state workmen's compensation act barred a claim for indemnity even if based on an express agreement between the third-person tortfeasor and the employer, the general consensus has been that an employer may expressly contract to indemnify a third-person tortfeasor and that such express contractual indemnity is not barred by exclusive remedy provisions.").

be joint tortfeasors, and the worker's compensation statutes generally shield an employer from liability by a third party. However, Bennett-Hall takes issue with the Order because that a third-party claim for contractual indemnification is an exception to this general rule.

Gordon, Odom, and Chester are distinguishable and do not speak to this issue. The third parties in Gordon and Odom did not assert claims for contractual indemnification, and those Courts did not have to reach this issue. Bennett-Hall has never sought to add BBNS as a joint tortfeasor. Rather, Bennett-Hall has filed a claim for contractual indemnification, requesting BBNS to indemnify it if the jury agrees Bennett-Hall is entitled to indemnification by BBNS for acts/omission under the parties' contract. These are distinct issues, which require a separate analysis (i.e., as recognized by the District Court in BET Plant Services, Brayboy, and Labor Finders).

Plaintiff may not be able to sue BBNS, but BBNS abrogated its immunity under the worker's compensation statutes when it agreed to indemnify Bennett-Hall in the Agreement. Similar to BET Plant Services, the Agreement between Bennett-Hall and BBNS is a "pre-existing arrangement" and unrelated to Plaintiff's injury. See BET Plant Servs., 941 F. Supp. at 56 ("Under [section 42-1-580], an employer's payment of benefits to an employee generally satisfies all claims that third parties might have against the employer arising out of the same accident. However, a workers' compensation statute does not insulate an employer from liability under an express indemnification agreement."); Brayboy, at *3 (same); Labor Finders, at *4 (same). The worker's compensation statutes do not shield BBNS from liability under an express indemnification agreement. Accordingly, Bennett-Hall respectfully requests this Court to reconsider its Order striking the Third-Party Complaint.

### B. The Contractual Indemnification Claim Is Ripe Now And The Third-Party Complaint Will Not Unduly Complicate The Proceedings.

The Order cites to First General Services of Charleston, Inc. v. Miller, for the proposition that Bennett-Hall's contractual indemnification claim is not ripe. 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). In First General, a home renovation company sued a homeowner for failure to pay the outstanding balance owed, and the homeowner filed counterclaims against the home renovation company based on his dissatisfaction with their work. Id. at 441, 445 S.E.2d at 447. In turn, the home renovation company filed a third-party complaint against its subcontractor, alleging claims of indemnity and contribution. Id. The third-party defendant moved to dismiss the third-party complaint, which the trial court granted. Id. The Supreme Court upheld the dismissal of the contribution third-party claim, but the Court found the trial court had erred in dismissing the equitable indemnification claim. Id. at 444, 445 S.E.2d at 448.

As to the contribution claim, the Court held that claim was not ripe because a third-party complaint must be premised upon an existing right. Id. at 443-44, 445 S.E.2d at 448. The right to contribution from the subcontractor did not exist until the home renovation company made a payment to the homeowner. Id. (citing S.C. Code Ann. § 15-38-20(B) ("*The right of contribution exists only in favor of a tortfeasor who has paid* more than his pro rata share of the common liability . . . ")). Because the home renovation company had not yet made a payment, its right to contribution did not exist, and thus, the third-party complaint was not ripe. Id. at 444, 445 S.E.2d at 448.

However, the Court found the trial court had erred in dismissing the third-party claim for equitable indemnification because that claim already existed. Id. The claim for equitable contribution existed because the homeowners had claimed the home renovation company was negligent in its restorations to a certain part of the house where the subcontractor was responsible

for those repairs. Id. at 443, 445 S.E.2d at 448. Unlike the contribution claim, the Court found the equitable indemnification claim was an existing right, thus, ripe for adjudication. Id. at 444, 445 S.E.2d at 448 ("Since a third-party complaint is premised upon an existing right of the third-party plaintiff, First General's impleader action against Servicemaster for contribution is not ripe. . . . Accordingly, First General may properly implead Servicemaster under Rule 14(b) as a third-party defendant for indemnity, but not for contribution." (citation omitted)).

Bennett-Hall's claim for contractual indemnification is ripe because Bennett-Hall has an existing right to enforce its contract with BBNS. If the First General Court found a claim for equitable indemnification was ripe at the time the third-party complaint was filed, it is even more so here when there is an express contract requiring BBNS to indemnify Bennett-Hall for BBNS's failure to supervise the temporary workers at the Michelin plant. See id.

The Order errs in citing to First General for the proposition that the contractual indemnification claim is not ripe and can be timely instituted if Plaintiff receives a judgment against Bennett-Hall. (Order p. 6). The running of the statute of limitations is a different legal issue than whether a claim is ripe, and the First General Court recognized that distinction. See id. The fact that the statute of limitations for an equitable indemnification claim did not begin to run until a judgment was entered against the defendant did not affect the First General Court from finding the equitable indemnification claim was ripe for adjudication. See id.

Further, Bennett-Hall has presented reasons for asserting its claim for contractual indemnification now. As discussed above, BBNS is not immune from liability under the worker's compensation statutes by Bennett-Hall's claim for contractual indemnification. Bennett-Hall has pled sufficient legal and factual grounds under which BBNS would be liable for indemnification. (Amended Answer ¶¶ 54-61). Additionally, the Third-Party Complaint will not

unduly complicate the proceedings, especially when Plaintiff has inserted the Agreement as a central issue to the litigation. For example, Plaintiff did not make a "mere reference" when he claimed to be a third-party beneficiary to the Agreement. (Complaint ¶¶ 29, 32, 40).

The discovery that takes place in the instant action is directly relevant to whether Bennett-Hall is entitled to contractual indemnification from BBNS. To the extent that issues relating to supervision, control, and oversight arise in discovery, Bennett-Hall should be able to explore these issues in the context of its contractual indemnity claim without have to – again – revisit them in any forthcoming claim if the Court affirms its Order. It is more efficient to allow discovery of those issues in the context of the current action that to require Bennett-Hall to conduct duplicative discovery later.

Finally, Bennett-Hall would be prejudiced if it is not allowed to assert its claim for contractual indemnification now because BBNS could use an adjudication against Bennett-Hall as a defense in any future action. If Bennett-Hall is found liable to Plaintiff, BBNS will use this as a defense, claiming it should not be required to indemnify Bennett-Hall under the Agreement for an action caused by Bennett-Hall's negligence. Bennett-Hall's third-party complaint is the simplest form of third-party practice under Rule 14(a), and striking third-party complaint would virtually eviscerate third-party practice in South Carolina.

## III. The Court Should Not Strike Paragraphs 42 and 44 Because BBNS Is Not Immune From Liability Under An Agreement That Contained An Indemnification Clause. Therefore, Bennett-Hall Has a Right to Indemnity Under Section 42-1-580 And Setoff Under Section 15-38-15(E).

In paragraph 42 of the Amended Answer, Bennett-Hall pled the application of section 42-1-580 and asserted its right to contribution or indemnity against actual or statutory employers. In paragraph 44, Bennett-Hall sought a credit or setoff under section 15-38-15(E). It is undisputed that Odom and Gordon found a party suing in tort had no remedy under section 42-1-580.

However, neither Odom nor Gordon addressed whether a third party could maintain a claim for contractual indemnification against an employer under section 42-1-580. As explained in greater detail in section IIA, the worker's compensation statutes do not insulate an employer from liability under an express contractual agreement. See BET Plant Servs., 941 F. Supp. at 56 ("Under [section 42-1-580], an employer's payment of benefits to an employee generally satisfies all claims that third parties might have against the employer arising out of the same accident. However, a workers' compensation statute does not insulate an employer from liability under an express indemnification agreement."). Bennett-Hall does have a right to contribution and indemnity under section 42-1-580, and thus, paragraph 42 should not be struck.

In Gordon, the Court found a party must have a right to contribution under section 42-1-580 to seek a right of set-off under the Contribution Among Joint Tortfeasors Act. 362 S.C. at 406, 608 S.E.2d at 427 ("The [Contribution Among Joint Tortfeasors Act, however, does not help Phillips because there is no right to contribution available to it under the [Worker's Compensation] Act. Pursuant to the Act, when two or more persons are jointly or severally liable in tort for the same injury to person, there is a right of contribution among them. As Seven Star, pursuant to the Workers' Compensation laws, could not be liable to Gordon in tort, there can be no right of contribution under the Act for Phillips." (citation omitted)). Because Bennett-Hall has a right to contribution or indemnity under section 42-1-580 based on its claim of contractual indemnification, it concordantly has a right to set-off. Accordingly, Bennett-Hall requests this Court to reconsider the Order striking paragraphs 42 and 44.

## IV. Paragraph 43 Should Not Be Struck From The Amended Answer. The Law Is Unclear As To Whether An Employer Is Considered A "Potential Tortfeasor" To Be Listed On The Verdict Form For Purposes Of Fault Allocation.

Paragraph 43 of the Amended Answer requests any actual and/or statutory employer be listed on the verdict form for purposes of allocation of fault under section 15-38-15. As a threshold matter, paragraph 43 is a separate and distinct defense from the Third-Party Complaint for contractual indemnification. As discussed above, an express indemnification contract is an exception to the general rule that an upstream employer cannot be liable to a third party under the worker's compensation statutes. A ruling on the Third-Party Complaint for contractual indemnification should have no effect on a ruling about allocation of fault on the verdict form. Bennett-Hall is permitted to plead inconsistent defenses and claims to give it the benefit of all possible claims. See MacFarlane v. Manly, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980) ("Defendants are permitted to plead inconsistent defenses.").

Bennett-Hall respectfully requests this Court to reconsider its Order striking paragraph 43 because the law in South Carolina is not settled on this issue. As cited by Plaintiff at the hearing, the District Court recently certified the following question to the Supreme Court after finding South Carolina law was unclear:

> Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the Court allow the jury to apportion fault against the nonparty employer by placing the name of the employer on the verdict form?

Machin v. Carus Corp., C/A No. 3:12-02675-JFA (D.S.C. April 24, 2015) (attached as **Exhibit D**); see also Appellate Case No. 2015-000901.

Under section 15-38-15(D), a defendant retains 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. Id. (emphasis added). Although

South Carolina's Contribution Among Joint Tortfeasors Act clearly permits the apportionment of fault among defendants, the effect of section 15-38-15(D) with respect to the allocation of fault among non-parties has been hotly debated. The Supreme Court has not resolved this issue,[5] let alone when it involves the context of worker's compensation.

The cases cited by Odom and Gordon are again inapplicable to this issue. Those cases stand for the proposition that a third party and employer are not joint tortfeasors. Paragraph 43 merely seeks to add BBNS to the verdict form for purposes of allocation of fault. A majority of other state courts considering this issue have found that allocating fault to an employer does not destroy the employer's immunity from suit.[6] Immunity means that an employer cannot be sued, but it does not mean that the employer is not at fault. This follows the plain meaning of section 15-38-15(D), which allows a defendant to name any "potential tortfeasor, whether or not a party" on the verdict form for fault apportionment. Id. § 15-38-15 (emphasis added).

More than simply mirroring common law permitting a defendant to use the "empty chair" defense, the statutory language requires a non-party to be on the verdict form to allow a jury to determine whether a party is entirely or partially at fault. Id. The liability between the defendants would be artificially increased if BBNS or Cornerstone were not added as a non-party

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[5] See Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012) (avoiding decision on whether it was error to exclude a non-party from the verdict form because the defendant requesting apportionment to a non-party had been deemed reckless such that it was not afforded the Act's protections).

[6] See Ocsio v. Fed. Express Corp., 33 A.3d 1139, 1146-47 (N.H. 2011); Glenn v. Union Pac. R.R. Co., 2011 WY 126 (Wyo. 2011); Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107, 1114-15 (Miss. 2003); Keith v. United States Fid. & Guar. Co., 694 So. 2d 180, 182 (La. 1997); Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083 (Colo. 1996); Allied-Signal, Inc. v. Fox, 623 So. 2d 1180, 1182 (Fla. 1993); Brown v. Boyer-Washington Blvd. Assoc., 856 P.2d 352, 354 (Utah 1993); DaFonte v. UpRight, Inc., 828 P.2d 140 (Cal. 1992); Dietz v. General Elec. Co., 821 P.2d 166, 171 (Ariz. 1991); Bode v. Clark Equip. Co., 719 P.2d 824, 827 (Okla. 1986); Espaniola v. Cawdrey Mars Joint Venture, 707 P.2d 365 (Haw. 1985); Powers v. Kansas Power & Light Co., 671 P.2d 491, 498-99 (1983); Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987); Johnson v. Niagra Mach. & Tool Works, 666 F.2d 1223 (8th Cir. 1981).

to the verdict form for the purposes of fault allocation. Again, the overwhelming majority of states have concluded that it is appropriate to allow the jury to allocate fault to an immune non-party employer. If the Court did not strike paragraph 43, nothing would prevent Plaintiff from opposing any future motion — when the law will be more settled — by Bennett-Hall to add BBNS to the verdict form.

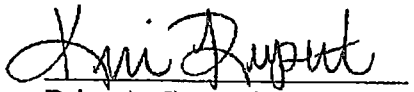
## CONCLUSION

Bennett-Hall respectfully requests this Court to reconsider its October 13, 2015 Order striking Bennett-Hall's third-party complaint and portions of its amended answer. The worker's compensation statutes do not shield BBNS from Bennett-Hall's contractual indemnification claim. The claim is ripe, and Bennett-Hall would be prejudiced if not allowed to bring it now. Further, given the fact that BBNS is not immune from Bennett-Hall's contractual indemnification claim, the Court should not strike paragraphs 42 and 44. Finally, the Court should reconsider striking paragraph 43 because the law is unsettled about whether an employer may be listed on the verdict for purposes of fault allocation or if a third party is entitled to a setoff from any settlement by the employer.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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ATTORNEYS FOR BENNETT-HALL CO., INC.

Columbia, South Carolina
November 5, 2015

**CERTIFICATE OF SERVICE**
(2015-CP-40-01082)

The undersigned employee of Collins & Lacy, P.C., hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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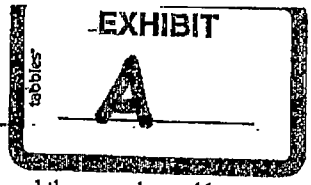
**PLEADING: Memorandum of Law in Support of Bennett-Hall's Motion to Reconsider the Order Striking Bennett-Hall Amended Answer**

Susan R. McLeod

Columbia, South Carolina
November 5, 2015




941 F.Supp. 54
United States District Court,
D. South Carolina,
Charleston Division.

BET PLANT SERVICES, INC. d/b/a BPS Equipment Rental and Sales, Plaintiff,
v.
W.D. ROBINSON ELECTRIC COMPANY, INC., Defendant.

C/A No. 2:96–1796–18. | Oct. 11, 1996.

After lessor of equipment settled personal injury claims of employee injured by equipment, lessor brought action against employer for breach of contract and indemnity. Employer moved to dismiss claims or for judgment on pleadings. The District Court, Norton, J., held that: (1) breach of contract claim was barred by workers' compensation statute, but (2) lessor could bring indemnification claim under express indemnification agreement.

Motion granted in part and denied in part.

West Headnotes (6)

[1] **Federal Civil Procedure**
⇐ Insufficiency of claim or defense

Defendant may not prevail on motion for judgment on the pleadings if there are pleadings that, if proved, would permit recovery for plaintiff.

14 Cases that cite this headnote

[2] **Workers' Compensation**
⇐ Operation and Effect in General

Under South Carolina law, lessor of equipment could not bring breach of contract claim against employer of worker injured by equipment on ground that employer failed to properly instruct employees in use of equipment as required by lease agreement, after employer paid workers' compensation benefits and lessor settled worker's claims, as claim related to facts existing at time of injury and thus was barred by workers' compensation statute. S.C.Code 1976, § 42–1–580.

Cases that cite this headnote

[3] **Workers' Compensation**
⇐ Indemnity, contractual

Under South Carolina law, lessor of equipment could bring indemnification claim against employer of worker injured by equipment after lessor settled worker's claims against it, although employer paid workers' compensation benefits to worker, as lease agreement included indemnification provision, and thus claim involved preexisting arrangement unrelated to worker's accident. S.C.Code 1976, § 42–1–580.

Cases that cite this headnote

[4] **Workers' Compensation**
⇐ Action by Third Person Against Employer

**Workers' Compensation**
⇐ Indemnity in general

Under South Carolina law, exclusive remedy provision of Workers' Compensation Act was inapplicable to third party's claims against employer for breach of contract and indemnity. S.C.Code 1976, § 42–1–540.

1 Cases that cite this headnote

[5] **Workers' Compensation**
⇐ Action by Third Person Against Employer

Under South Carolina law, employer's payment of workers' compensation benefits to employee generally satisfies all claims that third parties might have against employer arising out of same accident. S.C.Code 1976, § 42–1–580.

1 Cases that cite this headnote

[6] **Workers' Compensation**
⇐ Indemnity, contractual

Workers' compensation statute does not insulate employer from liability under express indemnification agreement.

2 Cases that cite this headnote

**Attorneys and Law Firms**

*55 Duke Highfield, Charleston, SC, for plaintiff.

John Tiller, Charleston, SC, for defendant.

**ORDER**

NORTON, District Judge.

This action is before the court on Defendant's Motion to Dismiss or in the alternative for Judgment on the Pleadings.

**I. Background**

Defendant contracted with Plaintiff for the rental of a lift to be used on certain contracting jobs. The parties' agreement contains a clause which provides for indemnification of Plaintiff by Defendant in the event that Plaintiff must pay damages for any occurrence arising out of the use of the equipment during the rental period. The agreement also states that Defendant must properly instruct its employees in the use of the equipment and ensure the safety of its employees in their use of it.

Plaintiff seeks damages it incurred as a result of an accident in which one of Defendant's employees, Stephen Moore, was injured while operating the lift. At the time of the accident, Moore was Defendant's employee. Defendant paid worker's compensation benefits to Moore for the accident. Moore subsequently sued Plaintiff for negligence, strict liability, and breach of warranties. Plaintiff incurred damages defending and settling Moore's claims. Plaintiff has brought a contractual indemnification and breach of contract claim against Defendant.

Defendant moves to dismiss the Complaint or in the alternative for a judgment on the pleadings, based upon the South Carolina Workers' Compensation Act ("the Act"). Defendant argues that, pursuant to the Act, it has satisfied any claims Plaintiff may have against it.

**II. Analysis**

When considering a motion to dismiss, the court must consider the facts pled in the Complaint in the light most favorable to the non-moving party. *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94 (4th Cir.1992). A Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957).

[1] When considering a motion for judgment on the pleadings, the same standard as that for a motion to dismiss applies. *Craigs v. General Elec. Capital Corp.*, 12 F.3d 686 (7th Cir.1993). Essentially, a defendant may not prevail on a motion for judgment on the pleadings if there are pleadings that, if proved, would permit recovery for the plaintiff. *Holmes v. Curtis Publishing Co.*, 303 F.Supp. 522 (D.S.C.1969).

[2] [3] [4] [5] [6] Plaintiff's breach of contract claim should be dismissed while his indemnification claim should not. Defendant's arguments are based on the South Carolina Workers' Compensation Act, specifically § 42–1–580 [1] relating to third party claims. Section 42–1–580 provides:

> When the facts are such that at the time of the injury the third person [Plaintiff] would have the rights, upon payment of any recovery against him, to enforce contribution or indemnity from the employer [Defendant], any recovery by the employee [Moore] against the third person [Plaintiff] *56 shall be reduced by the amount of such contribution or indemnity and the third person's [Plaintiff's] right to enforce such contribution against the employer [Defendant] shall therefore be satisfied.

S.C.Code Ann. § 42–1–580. Under this section, an employer's payment of benefits to an employee generally satisfies all claims that third parties might have against the employer arising out of the same accident. However, a workers' compensation statute does not insulate an employer from liability under an express indemnification agreement. *See Bell Helicopter Textron, Inc. v. United States*, 967 F.2d 307 (9th Cir.1992) (noting that Alaskan workers' compensation laws permit an employer to be joined as a third-party defendant only when another party

asserts an express indemnity claim against it); *Bieger v. Consolidation Coal Co.*, 650 F.Supp. 1294 (W.D.Va.1987) (finding that an express contract of indemnity would not be invalidated by the Virginia Workmen's Compensation Act); *Burnette v. Gen. Elec. Co.*, 389 F.Supp. 1317 (W.D.Va.1975) (allowing defendant to bring a third-party action against plaintiff's employer despite the employer's participation in workmen's compensation when the participating employer had specifically contracted to indemnify the defendant); *see also Fuller v. Southern Electric Service Co.*, 200 S.C. 246, 20 S.E.2d 707 (1942).

In *Fuller*, an employee was injured by an independent contractor and sued him. The independent contractor attempted to bring the employer into the action as a third-party defendant, alleging that the employer breached its contract with him to purchase liability insurance. The court refused to allow the independent contractor to defend the action against him based upon his contract with the employer. However, the court held that he could bring a separate action against the employer for breach of contract because it was unrelated to the employee's accident and involved a "preexisting arrangement" between him and the employer. Similarly, Plaintiff's contract with Defendant contains an indemnification provision which is a preexisting arrangement with Defendant unrelated to Moore's accident.

Defendant argues that *Daniels v. Conrad Construction Co. v. Joe Harden Builder, Inc.*, No. 93–UP–119, unpublished opinion (S.C.Ct.App./April 22, 1993), establishes that a third-party cannot maintain an action against an employer for indemnification. *Daniels* is distinguishable from the present case primarily because it involved a tort claim, not a contract claim. In *Daniels*, an employee was injured by one of his employer's subcontractors. The employee recovered workers' compensation from his employer and then sued the subcontractor. The subcontractor attempted to bring a third-party action against the employer seeking contribution and indemnification. He alleged that the employee's accident was a result of the employer's negligence in failing to install safety railings. The court ultimately dismissed the subcontractor's Complaint, explaining that the workers' compensation laws barred the third-party suit against the employer. The subcontractor had not brought an independent breach of contract or contractual indemnification claim against the employer.

The subcontractor subsequently brought a separate action against the employer for negligence, indemnity, and breach of contract. *Conrad v. Harden*, C/A No. 95–CP–07–1127. He did not bring an independent contractual indemnification claim. Apparently, the breach of contract claim was based upon the subcontractor's contract with the employer, which required the installation of safety railings. The trial court dismissed the action, concluding that the workers' compensation laws barred the action. *Conrad v. Harden*, C/A No. 95–CP–07–1127, (March 10, 1995) (order granting motion to dismiss). The trial court ultimately determined that the subcontractor's breach of contract claim related to facts existing "at the time of the injury" and, thus, was barred by section 42–1–580 of the South Carolina Workers' Compensation Act.

In addressing the breach of contract claim, the *Conrad* court distinguished the *Fuller* case. *Fuller* involved a preexisting contract and a situation in which the employee's accident would have happened regardless of the employer's breach of contract to purchase insurance. *Conrad* involved a subcontract *57 with a provision requiring the employer to install safety railings. The subcontractor argued that the employee's accident would not have happened but for the employer's failure to install safety railings, as required by the contract. Similar to *Conrad*, Plaintiff's breach of contract claim is based upon contractual language requiring Defendant to instruct its employees, namely Moore, in the proper use of equipment. Plaintiff's argument appears to be that, but for Defendant's alleged failure to instruct, Moore's injury would not have occurred.

Plaintiff's indemnification claim is analogous to *Fuller*, while his breach of contract claim is analogous to *Conrad*. As in *Fuller*, Moore's accident would have happened regardless of Defendant's alleged failure to indemnify Plaintiff. However, as in *Conrad*, Moore's accident allegedly would not have happened but for Defendant's breach of contract. Accordingly, Plaintiff's breach of contract claim should be dismissed. Plaintiff's contractual indemnification claim should not.

It is therefore,

**ORDERED**, that Defendant's Motion to Dismiss Plaintiff's Breach of Contract Claim is **GRANTED**. Defendant's Motion to Dismiss Plaintiff's Contractual Indemnification Claim and Motion for Judgment on the Pleadings are **DENIED**.

**AND IT IS SO ORDERED.**

**All Citations**

941 F.Supp. 54

Footnotes

1 Defendant also cites to § 42–1–540, the exclusive remedy provision, arguing that its only obligation to Moore was for benefits due under the Act. Although Defendant may be correct, the exclusive remedy provision is inapplicable to Plaintiff's claims against Defendant.

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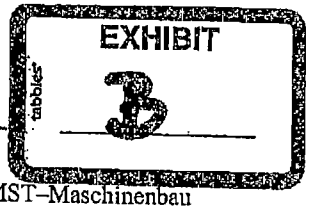


2015 WL 2062558
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Florence Division.

Vinnia C. BRAYBOY, Plaintiff,
v.
MST–MASCHINENBAU GMBH; MST–Dranbedarf GmbH; Defendants/Third Party Plaintiff.
v.
East Coast Erosion Blankets, LLC, Third–Party Defendant.

Civil Action No. 4:14–cv–02965–RBH. | Signed May 4, 2015.

**Attorneys and Law Firms**

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Robert E. Sumner, IV, Lesley Anne Firestone, Moore and Van Allen, Charleston, SC, for Defendants/Third Party Plaintiff.

**ORDER**

R. BRYAN HARWELL, District Judge.

*1 This matter is before the Court on Third–Party Defendant East Coast Erosion Blankets, LLC's [ECF # 28] motion to dismiss for failure to state a claim. Also before the Court are motions to amend the third-party complaint by Defendants, MST–Maschinenbau GmbH and MST–Dranbedarf GmbH [ECF31, 41]. For the reasons stated below, the Court grants East Coast's motion to dismiss and denies MST's motions to amend the third-party complaint. [1]

***Procedural and Factual Background***

This case arises out of Plaintiff employee Vinnia C. Brayboy's on the job injury while employed by Third–Party Defendant East Coast Erosion Blankets, LLC (hereinafter "East Coast"). Plaintiff was allegedly injured in connection with the use of a machine manufactured by Defendants, MST–Maschinenbau GmbH and MST–Dranbedarf GmbH, to make erosion control blankets. As a result of the on the job injury, Brayboy sought and was provided workers' compensation benefits. Brayboy then brought the current products liability action against Defendants MST–Maschinenbau GmbH and MST–Dranbedarf GmbH (collectively referred to as "MST") alleging causes of action for negligence, strict liability, and breach of implied warranty. MST filed an answer [ECF # 13] and a third-party complaint [ECF # 16] against Brayboy's employer, East Coast, alleging a cause of action for equitable indemnity against East Coast. East Coast filed an answer to the third-party complaint along with a motion to dismiss. MST then filed a motion and amended motion seeking to amend the third-party complaint to add a cause of action for implied contractual indemnity. East Coast responded arguing the proposed amendment to the complaint would be futile.

**I. Motion to Dismiss**

East Coast has moved to dismiss the third-party complaint arguing that it is immune from equitable indemnity claims based on the exclusivity provisions of the South Carolina Workers' Compensation Act. East Coast also argues that MST cannot obtain indemnity because South Carolina does not permit a tortfeasor to obtain equitable indemnity from another alleged tortfeasor. Additionally, East Coast argues that MST cannot recover its fees and costs in a third-party complaint because fees and costs are not derivative of any liability or amounts potentially owed by MST to Brayboy.

When reviewing motions made under Federal Rule of Civil Procedure 12(b)(6) or 12(c)[2], the court must accept all well-pled allegations in the plaintiff's complaint as true and draw all reasonable factual inferences from those facts in the plaintiff's favor. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir.2009); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999). The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S.Ct. at 1969. A complaint attacked by a motion to dismiss will survive if it contains "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974; *see also, Giarratano v. Johnson*, 521 F.3d 298, 302 (4th

Cir.2008); *Self v. Norfolk Southern Corp.*, No. 07–1242, 2008 WL 410284, at *1 (4th Cir. February 13, 2008) (unpublished).

*2 In this case, MST manufactured the erosion control blanket machine that ulimtately injured East Coast employee, Vinnia Brayboy. MST does not allege that the equipment contract between it and East Coast provided for any express right of indemnification, nor that East Coast ever agreed to do so. MST seeks equitable indemnification from East Coast alleging that East Coast purchased the blanket machine, made alterations without MST's knowledge, and refused to install a recommended safety measure on the blanket machine. It is undisputed that Brayboy sought and collected workers' compensation benefits from East Coast for his on-the-job injury.

East Coast argues that under S.C.Code Ann. § 42–1–580, which addresses contribution and indemnity from an employer, East Coast is immune from any indemnification claims unless there is an express contract providing for indemnification. *See BET Plant Servs., Inc. v. W.D. Robinson Elec. Co., Inc.*, 941 F.Supp. 54, 56 (D.S.C.1996) (stating that § 42–1–580 generally satisfies all claims that third parties might have against the employer arising out of the same accident unless there is an express indemnification agreement). MST, relying on cases construing the Federal Employees' Compensation Act ("FECA"), the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), and the Tennessee Workers' Compensation Act, argues that federal authority permits third-party indemnity claims against employers regardless of the exclusivity provisions in workers' compensation cases. MST also argues that South Carolina does not bar third-party indemnity claims in the workers' compensation context and that the S.C. Workers' Compensation Act governs rights between employer and employee and was not intended to control rights and interests of third parties such as MST.

S.C Code Ann. § 42–1–580, entitled "Effect of rights of third party against employer on employee's recovery," provides:

> When the facts are such at the time of the injury that a third person would have the right, upon payment of any recovery against him, to enforce contribution or indemnity from the employer, any recovery by the employee against the third person shall be reduced by the amount of such contribution of indemnity and the third person's right to enforce such contribution against the employer shall thereupon be satisfied.

S.C.Code Ann. § 42–1–580.

In *BET Plant Servs., Inc. v. W.D. Robinson Elec. Co., Inc.*, Judge Norton explained that § 42–1–580 generally satisfies all claims that third parties might have against the employer arising out of the same accident except in the limited circumstance where there is an express indemnification agreement. 941 F.Supp. 54, 56 (D.S.C.1996). Drawing on the reasoning from a published South Carolina Supreme Court case, *Fuller v. Southern Elec. Serv. Co.*, 200 S.C. 246, 20 S.E.2d 707 (S.C.1942), and an unpublished South Carolina Court of Appeals case, *Daniels v. Conrad Constr. Co. v. Joe Harden Builder, Inc.*, No. 93–UP–119 (S.C. Ct.App. April 22, 1993) (unpublished), the court held that a third party could not maintain an action against an employer who was covered under the S.C. workers' compensation statute unless there was a pre-existing express contractual agreement for indemnification. *BET Plant Servs., Inc.*, 941 F.Supp. at 56–57. The reasoning and result in *BET Plant Services* is persuasive, especially in light of the unpublished S.C. Court of Appeals case referenced in *BET Plant Services*. The cases relied on by MST, on the other hand, do not involve the S.C. Workers' Compensation Act or provisions similar to § 42–1–580.

*3 In *Freeman Mech., Inc. v. J.W. Bateson Co., Inc.*, 316 S.C. 95, 447 S.E.2d 197 (S.C.1994), the South Carolina Supreme Court held that a general contractor could not be sued by a sub-contractor for common law indemnity since the general contractor was covered under the exclusivity provisions of the S.C. Workers' Compensation Act. In that case, the South Carolina Supreme Court found that "because [general contractor] was potentially liable under the Act for workers' compensation benefits paid ..., [general contractor] also enjoys immunity created by the Act from common law claims." *Freeman Mech., Inc.*, 447 S.E.2d at 98.

In this case, East Coast paid benefits to Brayboy under the S.C. Workers' Compensation Act. "Under [Section 42–1–580], an employer's payment of benefits to an employee generally satisfies all claims that third parties might have against the employer arising out of the same accident." *BET Plant Servs., Inc.*, 941 F.Supp. at 56. A workers' compensation statute, however, does not insulate an employer from liability under an express indemnification agreement. *Id.* Here, there is no allegation of an express indemnification

agreement. As a result, in the absence of an express agreement to indemnify, East Coast is immune from common law claims for indemnity from MST.[3] MST has, therefore, failed to state a claim for relief that is plausible on its face. *Twombly*, 127 S.Ct. at 1974.

**II. Motions to Amend Third–Party Complaint**

MST filed a motion to amend and amended motion to amend its third-party complaint to add a cause of action for implied contractual indemnification. MST argues that the "Equipment Contract," which is essentially a purchase agreement for the blanket machine that injured Brayboy, provides a basis for implied contractual indemnification. MST contends that the contract for sale included detailed specifications for the installation and operation of the blanket machine. MST argues that the contract for sale carried with it an implied indemnification term for any liability that results from a failure to comply with the specifications set forth in the contract and any specifications recommended thereafter. MST argues that because East Coast failed to maintain the machine according to specifications, altered the blanket machine, and refused recommended safety measures (made eight years after the sale of the machine), it impliedly agreed to indemnify MST for any liabilities arising out of these specific alleged undertakings. East Coast responds arguing that MST's proposed amendment is futile because under S.C.Code Ann. § 42–1–580, MST cannot seek indemnification from East Coast unless there is an express indemnification agreement.

Under Rule.15(a)(2) of the Federal Rules of Civil Procedure, a party may amend its complaint "only with the other party's written consent or the court's leave." Fed.R.Civ.P. 15(a)(2). The Federal Rules instruct courts to "freely give leave when justice so requires." *Id.* However, "[a] district court may deny a motion to amend when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the amendment would be futile," *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir.2010).

*4 MST's proposed amendment fails for the same reason its equitable indemnification claim, discussed more fully above, fails. East Coast, having provided workers' compensation benefits to Brayboy pursuant to the S.C. Workers' Compensation Act, is immune from common law claims for indemnification by MST. *See Freeman Mech., Inc.*, 447 S.E.2d at 98; *BET Plant Servs., Inc.*, 941 F.Supp. at 56–57. MST has not alleged an express agreement to indemnify. MST's proposed amendment is futile as it fails to state a claim that is plausible on its face. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir.2008); *Syngenta Crop Prot., Inc. v. EPA*, 222 F.R.D. 271, 278 (M.D.N.C.2004). The motion to amend and amended motion to amend the third-party complaint are denied.

***Conclusion***

For the reasons stated above, East Coast's [ECF # 28] motion to dismiss the third-party complaint is **GRANTED.** MST's [ECF # 31] motion to amend the third-party complaint and [ECF # 41] amended motion to amend the third-party complaint are **DENIED.**

**IT IS SO ORDERED.**

**All Citations**

Slip Copy, 2015 WL 2062558

Footnotes

1 Under Local Civil Rule 7.08 (D.S.C.), "hearings on motions may be ordered by the Court in its discretion. Unless so ordered, motions may be determined without a hearing." Upon review of the briefs, the Court determined that a hearing was not necessary.

2 When reviewing a motion made under Federal Rule of Civil Procedure 12(c), the court applies the same standard applicable to motions made under Rule 12(b)(6). *Massey v. Ojanlit*, 759 F.3d 343, 347 (4th Cir.2014); *Burbach Broad. Co. v. Elkins Radio Corp.* ., 278 F.3d 401, 405–6 (4th Cir.2002); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999).

3 Despite MST's arguments, there is no authority for permitting an equitable indemnification claim against an employer who is subject to or has paid workers' compensation benefits under the S.C. Workers' Compensation Act. *See, e.g.* Grady L. Beard, Esq. et al., *The Law of Workers' Compensation Insurance in South Carolina*, Ch. 11 V., (6th ed.2012). Indeed, MST appears to acknowledge as much when it states in its brief that "South Carolina should look to the United States

Supreme Court, the Fourth Circuit, and federal district courts for guidance on this issue, which have all recognized that third-party indemnity claims are permitted to be brought against an employer despite the exclusive remedy provisions contained in workers' compensation acts." [MST's Response in Opposition to Motion to Dismiss, ECF # 32, at pg. 16]. As a federal court sitting in diversity, it is not this Court's function to create new law or causes of action that are contrary to South Carolina law. *See Guy v. Travenol Labs., Inc.*, 812 F.2d 911, 916 (4th Cir.1987).

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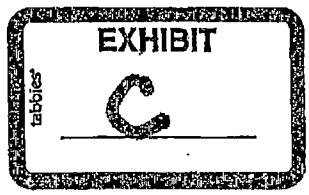


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | | |
|---|---|---|
| Labor Finders of South Carolina, Inc., | ) | Civil Action No. 3:14-468-CMC |
| Plaintiff, | ) | |
| -versus- | ) | **OPINION and ORDER** |
| Adams-Robinson Enterprises, Inc., | ) | |
| Defendant. | ) | |

This matter is before the court on Defendant's motion for summary judgment. ECF No. 26. Plaintiff responded in opposition to Defendant's motion, ECF No. 30, and Defendant filed a reply to Plaintiff's response. ECF No. 32. After receiving permission to do so, Plaintiff filed a surreply in response to Defendant's reply. ECF No. 36. For the reasons noted below, Defendant's motion is denied. This matter is set for trial during the court's term beginning November 12, 2015.

## I. Background

In the light most favorable to Plaintiff, the facts are as follows. Defendant Adams-Robinson Enterprises, Inc. ("Adams-Robinson") was hired to construct a wastewater treatment plant in Columbia, South Carolina. In April 2010, Fred Harris ("Harris"), Vice President and General Superintendent of Adams-Robinson, stopped at Labor Finders of South Carolina, Inc.'s ("Labor Finders") Rosewood Drive office in Columbia, South Carolina, to discuss the possibility of using workers provided by Labor Finders to work at the Columbia wastewater treatment construction site (hereinafter the "job site"). Harris met with Labor Finders' Branch Manager John Gill ("Gill") and told Gill the categories of laborers Adams-Robinson would need. At that meeting, Gill told Harris

that Labor Finders provided workers' compensation insurance coverage to all of its laborers. Harris and Gill did not discuss, nor did Gill provide, a copy of Labor Finders' standard work order.

On May 4, 2010, Gill sent Harris an e-mail in which he set out Labor Finders' pay rate and bill rate for the different types of laborers requested by Harris.[1] Labor Finders first sent laborers to the job site on July 13, 2010. As was Labor Finders' routine, each Labor Finders' worker took a work order with him or her to the job site, kept the work order and presented it to Adams-Robinson at the end of the work day or week. After verifying the hours worked, an Adams-Robinson employee signed the work order and returned it to the worker. Labor Finders then used that work order to pay its worker at the end of each work day or week. Labor Finders submitted invoices and copies of the work orders to Adams-Robinson for payment. Adams-Robinson reviewed the work orders both at the job site office trailer and at its headquarters in Dayton, Ohio. After the invoices and work orders were reviewed and approved in both places, Adams-Robinson issued payment to Labor Finders for services rendered by Labor Finders employees.

On July 14, 2010, Labor Finders personnel faxed Adams-Robinson a New Customer Credit Application ("Credit Application") to Adams-Robinson's Dayton, Ohio corporate office. This Credit Application noted that Labor Finders' workers had been sent to the work site on July 13, 2010. The Credit Application states: "Terms and conditions of temporary usage are detailed on the back of each Labor Finders work order. The customer [Adams-Robinson] is responsible for the supervision of Labor Finders employees while on the customer work site."

On July 15, 2010, Anita Dudding, on behalf of Adams-Robinson, signed the Credit

[1]The pay rate is the hourly rate paid to the laborer by Labor Finders. The bill rate is what Labor Finders charges per laborer per hour worked. A percentage of the bill rate is used to pay for workers' compensation insurance.

Application. Ms. Dudding was authorized to review, modify, and sign the Credit Application on behalf of Adams-Robinson. Ms. Dudding crossed out some of the provisions in the Credit Application but not the two above-quoted sentences. Adams-Robinson knew about the terms contained in the Credit Application on July 15, 2010, including that there were terms and conditions detailed on the back of every work order.

The work order states on the first page: "CUSTOMER AGREES TO THE TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE HEREOF . . . ." Among the terms and conditions on the reverse side of the work order is an indemnification clause:

> 4. It is expressly agreed and understood that Customer will hold harmless, defend, and indemnify Labor Finders for any and all claims, losses, or causes of action resulting from Customer's failure to properly supervise, train, or provide necessary safety standards compliance while Labor Finders employees are under the Customer's control. Further, Labor Finders reserves the right to subrogate any and all costs incurred by Labor Finders or their insurance company for claims that arise from Customer's failure to supervise or comply with safety standards, for injuries or death by Labor Finders employees as a result of Customer's acts or omissions.

During the 30(b)(6) deposition of Michael Bradley Adams, Vice President and General Manager of Adams-Robinson, Defendant acknowledged this language was on the back of all work orders submitted to it. Depo. of Michael Bradley Adams (30(b)(6)) at 114, 118-19, ECF No. 30-4. As noted above, Adams-Robinson employees verified the number of hours worked and signed the work orders. Adams-Robinson never refused to pay an invoice based upon a work order, and with the exception of one invoice, paid every invoice submitted to it for Labor Finders' workers in full.[2]

Johnny Woodle ("Woodle") was a worker provided by Labor Finders to Adams-Robinson

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[2]The only missing work order was Woodle's work order for the week he was injured. However, Adams-Robinson verified that Woodle worked that week, and does not dispute that he was working at the site under the direction of Adams-Robinson's employees at the time of the accident.

at the job site beginning October 27, 2010. Woodle worked on a pipe laying crew supervised by Rob Blankenship, an Adams-Robinson employee who worked under and reported to Doug Harris. Woodle received weekly training from Adams-Robinson at safety talks regularly held on Mondays. On January 20, 2011, Woodle, along with Adams-Robinson employee Durwin Dylan Blankenship, entered a trench that was in the process of being sloped and made safe for entry.[3] Shortly after Woodle and Blankenship entered the trench, dirt caved in from the sidewalls, completely covering Woodle and partially covering Blankenship. Woodle and Blankenship were taken to the hospital for treatment. Woodle filed a workers' compensation claim against Labor Finders.

Adams-Robinson agrees the trench was not safe at the time of the accident that injured Woodle. Depo. of Michael Brantley Adams (30(b)(6)) at 124-25, 198, ECF No. 30-4. Doug Harris, who was the project superintendent for entire worksite, testified at his deposition that no one should have been in the trench or the pipe leading into the trench. Depo. of D. Harris at 106, 170-71, ECF No. 30-2.

During the entire course of the business relationship, no one from Adams-Robinson ever told Labor Finders that it (Adams-Robinson) would not be bound by the terms and conditions on the back of the work orders. Furthermore, following the incident, an OSHA investigator drew the attention of Michael Bradley Adams and Fred Harris to the terms and conditions on the work orders, yet Adams-Robinson continued to use Labor Finders workers and continued to sign work orders and and pay invoices from Labor Finders after the January 2011 incident.

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[3]Woodle testified that his supervisor, Rob Blankenship, directed him to enter the trench; Blankenship testified that he directed Woodle to enter the pipe in the trench.

## II. Standard

Summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Rule 56(c)(1) provides as follows:

> (1) A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers or other materials; or
>
> (b) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

## III. Discussion

Adams-Robinson argues that it is not bound by the indemnification language on the back of the work orders because the parties had an oral contract which did not include the work orders' indemnification language. Labor Finders contends that the parole evidence rule is applicable to the

parties' relationship as any oral agreement was modified by the Credit Application and work orders. Adams-Robinson replies that because there was no written contract, the parole evidence rule does not apply. Adams-Robinson further contends the Credit Application and work orders do not modify the parties' oral agreement because these documents do not contain any reference to the scope of work to be done or compensation to be paid.

Summary judgment must be denied as there exists a disputed issue of material fact regarding whether the Credit Application and work orders were a part of the parties' agreement. *See Keith v. River Consulting Inc.*, 618 S.E.2d 302 (S.C. Ct. App. 2005) (circuit court erred in granting summary judgment when genuine issue of material fact existed regarding whether indemnification agreement on back of job ticket was part of contract between the parties). Defendant cites *Work Connection, Inc. v. Universal Forest Prods., Inc.*, No. C3-01-1643, 2002 WL 1275700 ( Minn. Ct. App. 2002) (unpublished), to support its position that the indemnification language on the back of the work orders was not part of the parties' bargain. However, in *Work Connection*, there was no dispute that the defendant was "unaware of the indemnification clause on the back of the form." *Work Connection*, 2002 WL 1275700 at *3. That is not the case here. Both the Credit Application and the work orders, which Adams-Robinson employees had access to and were reviewing and signing at least weekly, contained language specifically referencing the work orders and the terms on the reverse of the work orders, which contained the indemnification language at issue.

Adams-Robinson also argues that because it bargained for and paid for workers compensation insurance as part of the "bill rate" it remitted to Labor Finders, the indemnity clause included on the back of the work orders should not provide a "windfall" to Labor Finders. Mem. Supp. Summ. J. at 11, ECF No. 26. No windfall occurs when a negligent party is required to

indemnify another's insurer for its own negligence.

Adams-Robinson also contends that as Woodle's statutory employer, it should benefit from the protections afforded under the Worker's Compensation Act. *See* S.C. Code Ann. § 41-1-400. However, as noted by Labor Finders, "a workers' compensation statute does not insulate an employer from liability under an express indemnification agreement." *BET Plant Svcs., Inc. v. W.D. Robinson Elec. Co., Inc.*, 941 F. Supp. 54, 56 (D.S.C. 1996). The statutory employer provision does not insulate Adams-Robinson from a breach of contract action by Labor Finders when Adams-Robinson's negligence or failure to supervise caused the accident. Therefore, a factfinder must also determine whether the accident was caused by Adams-Robinson's negligence or failure to supervise.

## IV. Conclusion

For the reasons noted above, Defendant's motion for summary judgment (ECF No. 26) is **denied.** This matter shall proceed to trial during the court's term of court beginning November 12, 2015. The Clerk shall issue a roster notice.

**IT IS SO ORDERED.**

s/ Cameron McGowan Currie
CAMERON McGOWAN CURRIE
SENIOR UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
September 30, 2015


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

| | |
|---|---|
| John William Machin,<br><br>Plaintiff,<br><br>vs.<br><br>Carus Corporation,<br><br>Defendant. | C/A No.: 3:12-02675-JFA<br><br>ORDER<br>FOR CERTIFICATION |

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SOUTH CAROLINA SUPREME COURT

This Court has determined that the above-captioned case involves questions of law of the State of South Carolina, which are most probably determinative of Plaintiff John William Machin's motion for a new trial, ECF No. 247, pending before this Court. There appears to be minimal controlling precedent in the decisions of the Supreme Court of the State of South Carolina concerning workers' compensation *coupled with* the South Carolina Contribution Among Tortfeasors Act, S.C. CODE ANN. § 15-38-15, effective July 1, 2005. Accordingly, pursuant to South Carolina Appellate Court Rule 244, the United States District Court hereby certifies the questions of law addressed below to the Supreme Court for instructions based on the following facts and procedural background:

## INTRODUCTION

Plaintiff, John William Machin, a resident of the County of Lexington, South Carolina and employee of the Town of Lexington (the "Town"), initiated this action seeking actual and punitive damages against Carus Corporation ("Carus"), The Andersons, Inc. f/k/a Golden Eagle Products, Inc. ("The Andersons"), Fetter & Sons Farms LLC ("Fetter & Sons"), and Terry J.

Weiser, allegedly emanating from a workplace injury on April 13, 2010. As a result, Plaintiff inhaled a substantial amount of the chemical, Totalox. This Court has diversity jurisdiction over this action because Carus, The Andersons, and Fetter & Sons, are all corporations with their formation and principal place of business outside of South Carolina. Additionally, Terry Weiser is a resident of a state other than South Carolina.

## BACKGROUND FACTS

Carus is an international company engaged in the creation and manufacture of chemical products for the municipal and industrial markets with a majority used in environmental applications. Carus uses varieties of the chemical, permanganate, to develop deodorizers that are marketed under a variety of trade names including Totalox. Totalox is an odor eliminator that provides a food source for the anaerobic bacteria in sewer systems and prevents the anaerobic bacteria from exhibiting or producing hydrogen sulfide.

Totalox has its own Material Safety Data Sheet ("MSDS") to communicate to users the applicable hazards, warnings, recommended personal protective equipment and product information. Totalox is a proprietary chemical whose formula was developed by Carus and includes the chemicals, sodium permanganate and calcium nitrate. Carus manufactures Totalox through a tolling arrangement, where one party—the toll producer or toller—performs a manufacturing process on the goods of another party—the owner. At the time of Plaintiff's incident, Carus's toller was The Andersons.[1] The Andersons accepted delivery of permanganate from Carus and blended it with its own stock of calcium nitrate and water.

[1] At the time of the incident, Golden Eagle Products, Inc. was a division of New Eezy-Gro, Inc., an Ohio based corporation. Post incident, The Andersons acquired New Eezy-Gro, Inc. in a stock purchase.

The Town, in order to transport sewage from far-reaching areas of its water district, uses more than seventy-five lift stations that pump wastewater from low-lying areas to higher elevations. To service its growing northeastern edge, the Town constructed the Millstream regional station near Twelve Mile Creek in 1999. Wastewater is pumped from smaller lift stations to Millstream. Sewage passes through Millstream and into the nearby City of Cayce, home of the Joint Municipal Water & Sewer Commission plant, which provides a single location for water treatment for several Lexington County municipalities.

In 2003 or earlier, the Town contracted with Carus to provide deodorizers for its wastewater system. Initially branded as ECONOX, the chemicals were delivered by truck in 275-gallon portable totes. Like the MSDS, the totes' labels contained warnings to avoid breathing a mist of the product, and recommended the use of a respirator. Each tote had a circular lid on top for venting and a valve on the bottom for dispensing. In the early years of the Millstream station, only a few totes were necessary for deodorization. The totes were situated on a concrete slab surrounded by gravel. The deodorizer was injected into the sewer main by way of a feed pump leading from the totes. As each tote was emptied, another full tote was set in its place.

As the Town grew, so did its use of the Millstream lift station and use of the Cayce-based water treatment plant. The City of Cayce became concerned with odor levels, as well as corrosion caused by the increased sewage from Millstream, and mandated further reduction of hydrogen sulfide. The Cayce mandate compelled both an increase in the Town's deodorizer order and a larger on-site container system at Millstream. In light of this growth and conversations with Town employees, Carus issued a proposal in September 2009 for the

installation of a large-volume tank to hold the Totalox. The Town did not order the tank, opting to design and construct its own in-house system instead.

In late 2009, Town utility employees began work on the in-house container system to hold the increased volume of Totalox—the three totes of Totalox became fifteen. The Town used PVC pipes and fittings to tie together fifteen portable totes into a container system for Totalox. The new configuration allowed tanker trucks to deliver Totalox directly to Millstream.[2] Once the tanker attached its line to the tote configuration, chemical would offload and Town employees would close the valve on each tote as it filled. Employees would continue closing valves until all fifteen totes were filled or the tanker was empty.

To facilitate delivery of its products, Carus provided The Andersons with the identity of the Carus customer who was to receive each order of Totalox. On occasion, The Andersons used its own tanker trucks to transport orders of Totalox to Carus customers. On other occasions, The Andersons used third party carriers to transport loads of chemicals from The Andersons's plant to Carus customers.

For the Totalox order delivered on April 13, 2010, purportedly one day earlier than scheduled, The Andersons retained Fetter & Sons to transport the chemical. David Patton, a Town employee, was usually on site at the Millstream lift station when Totalox deliveries were made. On April 13, 2010, Patton was ill and Adrian Taylor, another Town employee, was on vacation, so Plaintiff was assigned by the utility department to attend the delivery and off-loading. The Fetter & Sons driver, Terry Weiser, arrived at Millstream and began off-loading. Plaintiff was joined at the lift station by three other Town employees. Plaintiff and his coworkers moved regularly among the totes to close valves as the system filled. Plaintiff was

[2] Before the container configuration, TOTALOX was delivered in the individual portable totes to the central utility office, and Town employees would truck the totes to the lift station.

not wearing a respirator during the offloading of Totalox. After the totes had filled, Terry Weiser cleared his line with a charge of air. Under pressure, one or more of the tote valves broke and a significant amount of Totalox was released into the air. Plaintiff was exposed to the chemical. Plaintiff alleges that such exposure to Totalox has caused him to suffer from reactive airways syndrome, which is known as chemically induced asthma or obstructive lung disease.

## PROCEDURAL BACKGROUND

Plaintiff initiated this action on August 14, 2012 against Carus, The Andersons, Fetter & Sons, and Terry Weiser, invoking this Court's diversity jurisdiction. Plaintiff also filed a workers' compensation claim against the Town, receiving a modest award.

Fetter & Sons and Terry Weiser settled with Plaintiff on February 6, 2013. Carus and The Andersons proceeded to trial on January 26, 2015. During pre-trial conferences, the parties and this Court discussed extensively what, if anything, the Court would tell the jury regarding Plaintiff's workers' compensation recovery. Ultimately, this Court held that Carus and The Andersons retained the right to make the so-called "empty chair" defense—asserting the Town's negligence was the sole proximate cause of Plaintiff's injuries; however, the parties were not allowed to mention workers' compensation and the Court did not instruct the jury regarding workers' compensation.

Shortly after jury deliberations began, the jury sent out a question: "Why is the Town of Lexington not included in the lawsuit?" In response, and again after a lengthy discussion with the parties, this Court informed the jury that they were to consider only the evidence presented and the Court's instructions on the applicable law.[3] While the jury continued deliberations,

[3] Specifically, this Court stated "I am somewhat constrained in how I respond to that, and I have to say this, and you may not be satisfied with this answer, but this is the answer I'm required to give. You have heard the evidence pertinent to this case. You have heard my instructions on the

Plaintiff took a voluntary nonsuit as to The Andersons. In turn, the Court amended its verdict form[4] for the jury showing only defendant Carus. The jury returned a verdict for Carus.

Plaintiff promptly filed a motion for a new trial upon the grounds that this Court erred in refusing any argument or jury instructions about workers' compensation, and allowing Carus to argue its empty chair defense placing responsibility for Plaintiff's injuries on the Town.

NATURE OF THE CONTROVERSY

Significant for purposes of this certification is the Plaintiff's position that, under South Carolina statutory law, only the amount of compensation paid by an employer under workers' compensation is declared to be inadmissible evidence. S.C. CODE ANN. § 42-1-570. Thus, it is Plaintiff's position that issues involving workers' compensation are admissible, only the amount of compensation is inadmissible.

The Plaintiff relies heavily on a 1967 South Carolina Supreme Court case, *Powers v. Temple*. In *Powers*, the court granted plaintiff's request for a new trial when the defendant mentioned the amount of workers' compensation paid, and the plaintiff was not allowed to counter that the money was all paid to the insurance carrier and not the plaintiff. 250 S.C. 149, 165, 156 S.E.2d 759, 766–67 (1967). The *Powers* court stated "[u]pon such new trial, both the

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law applicable to this case. We have given you a verdict form that walks you through the questions that would will need to answer to properly decide this case. That is all of your concern in this case. That is your—that is your mission in this case is to answer those questions on the verdict form unanimously under the law that I have given you and the evidence that I have allowed you to hear. And that is the length—that is the extent of my response to your question."

[4] The verdict form was another point of disagreement between the parties. Carus and The Andersons requested the Court to place the Town on the verdict form, thereby allowing the jury to apportion fault to the Town. After reviewing S.C. CODE ANN. § 15-38-15 (2005), the Court denied such request and only placed the actual defendants on the form, omitting any non-party or dismissed parties.

matter of Workmen's Compensation and the covenant not to sue should be withheld from the jury in the absence of any factual issue arising thereabout for its determination." *Id.*

The Plaintiff maintains that Carus brought into question, via the empty chair defense, the Town's alleged negligence by offering evidence that the Town was responsible for Plaintiff's injuries for: (1) using an inadequate storage system to store and off-load Totalox, (2) not informing Plaintiff of the hazards associated with Totalox, and (3) not providing MSDS-based training regarding the safe handling of the product as required by the Occupational Safety & Health Administration's ("OSHA"). Consequently, the Plaintiff argues that fairness necessitates explaining to the jury why he did not sue the Town, the nature of workers' compensation, and the limits on recovery under the South Carolina Workers' Compensation Act. The Plaintiff believes the jury delivered a defense verdict because the jurors reasoned that Plaintiff already received full compensation for his injuries via workers' compensation.

The Plaintiff also argues that allowing Carus to point blame at the Town was another error made by this Court. In short, Plaintiff argues that under S.C. CODE ANN. § 15-38-15(D),[5] the Town could never be a "potential tortfeasor" because workers' compensation arises out of contract created by law and not out of any theory of tort.[6] Accordingly, Plaintiff requested that the Court prohibit any discussion about the Town's negligence, or at a minimum, explain to the jury that it may not assess fault against any employer, as the employer's legal responsibility has been determined in another forum, specifically, the South Carolina Workers' Compensation Commission.

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[5] (D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party. S.C. CODE ANN. § 15-38-15 (2005).

[6] To support its position, Plaintiff cites *Indemnity Ins. Co. of North America v. Odom*, 237 S.C. 167, 176, 116 S.E.2d 22, 27 (1960) and *Gordon v. Phillips Utilities Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005).

In opposition, Carus argues that evidence bearing on the Town's conduct and legal duties under the OSHA Hazard Communication regulations were directly relevant to its claims and defenses. Carus cites numerous cases from other jurisdictions that allow defendants to argue the empty chair defense notwithstanding disallowing apportionment of fault to immune, non-party employers. Accordingly, Carus asserts that the Court did not err in allowing it to argue the empty chair defense, or charging the jury regarding the sophisticated user doctrine, intervening/superseding cause, and the Town's hazard communication and training obligations under OSHA. Moreover, Carus argues that the exclusivity of the workers' compensation remedy, Plaintiff's receipt of workers' compensation, and the no-fault workers' compensation framework were wholly collateral and irrelevant to the only issue before the jury—whether negligence on Carus's part proximately caused Plaintiff's injury. It is Carus's position that any jury charge or explanation that addressed workers' compensation would confuse, mislead, or distract the jury from the real issue of the case.

## QUESTIONS CERTIFIED

Plaintiff's Motion and Memorandum in Support of Motion for New Trial and Defendant Carus Corporation's Response to Plaintiff's Motion for New Trial briefs this issue of state law and the Court has determined that the answer under existing South Carolina precedent is not clear. Accordingly, pursuant to South Carolina Appellate Court Rule 228, the United States District Court hereby certifies the following questions to the Supreme Court:

1. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the jury hear an explanation of why the employer is not part of the instant action?

2. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job,

may a defendant argue the empty chair defense and suggest that Plaintiff's employer is the wrongdoer?

3. In connection with Question 2, if a defendant retains the right to argue the empty chair defense against Plaintiff's employer, may a court instruct the jury that an employer's legal responsibility has been determined by another forum, specifically, the South Carolina Workers' Compensation Commission?

4. Under South Carolina law, when a Plaintiff seeks recovery from a person, other than his employer, for an injury sustained on the job, may the Court allow the jury to apportion fault against the non-party employer by placing the name of the employer on the verdict form?

Because the answers to these questions are most probably determinative of the motion for a new trial, this Court takes under advisement the Plaintiff's Motion for a New Trial, ECF No. 247, until the South Carolina Supreme Court answers these certified questions.

IT IS SO ORDERED.

April 24, 2015
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

EXHIBIT
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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 A. G... **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 )<br>)<br>COUNTY OF RICHLAND )<br>)<br>)<br>Karl T. Harbath, )<br>)<br>Plaintiff, )<br>)<br>-vs- )<br>)<br>)<br>Stephen Sanders, )<br>Bennett-Hall Co., Inc., and )<br>Sunbelt Rentals, Inc. )<br>)<br>Defendants. )<br>) | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTH JUDICIAL CIRCUIT<br><br>Case No.: 2015-CP-40-01082<br><br>**AMENDED**<br>**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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge



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Appellate Case No. 2015-002566
Case No. 2015-CP-40-01082

Karl T. Harbath, .....Respondent,

v.

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

Of whom Bennett-Hall Co., Inc. is the .....Appellant.

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**PROOF OF SERVICE**

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I hereby certify that I served a copy of the Appellant Bennett-Hall Co., Inc.'s Memorandum of Appealability upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on February 19, 2016, addressed to the following:

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Respectfully submitted,

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ATTORNEYS FOR APPELLANTS BENNETT-HALL CO., INC.

February 19, 2016
Columbia, South Carolina

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February 19, 2016

**VIA HAND DELIVERY**
The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

***Re: Karl T. Harbath v. Stephen Sanders, Bennett-Hall Co., Inc., and Sunbelt Rentals, Inc.***
***Civil Action No. 2015-CP-40-01082***
***Claim No. 550-081747-001***
***C&L File No. 000001-02261***

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of Appellant Bennett-Hall Co., Inc.'s Appealability Memorandum in the above-referenced matter. Please return a filed, stamped copy of same to me with my courier.

By copy of this letter, I am serving copies of the same on all counsel of record.

Thank you for your time and attention. Should you have any questions, please do not hesitate to contact me.

Respectfully,

Brian A. Comer

BAC:srm
Enclosures

cc: Melissa G. Mosier, Esquire
Thomas McRoy Shelley, Esquire
Catherine Wrenn, Esquire
Catherine Garbee Griffin, Esquire