THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2015-CP-40-01082

Karl T. Harbath, ...Respondent

v.

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

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

RESPONDENT'S MEMORANDUM OF LAW REGARDING APPEALABILITY

Melissa G. Mosier (S.C. Bar # 78693)
McWHIRTER, BELLINGER & ASSOCIATES, P.A.
119 East Main Street
Lexington, South Carolina 29072
(803) 359-5523 Phone
(803) 996-9080 Facsimile

John S. Nichols (SC Bar #4210)
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Attorneys for Respondent

Respondent provides the following memorandum in response to this Court's request that the parties file a memorandum regarding appealability of the order that is the subject of this appeal.

Brief Facts

On February 23, 2012 the Plaintiff, Mr. Harbath, acted as a spotter guiding a very heavy piece of machinery called a boom lift. Defendant Sanders drove the boom lift in question in and around the Michelin Plant located in Lexington, South Carolina. Sanders drove the boom lift when Mr. Harbath's right leg became pinned underneath it. Mr. Harbath became a below the knee amputee despite multiple surgical 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 Harbath and Sanders worked for a common employer, Black Box Network Services ("Black Box") installing 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, Plaintiffs filed the instant action in Richland County. Plaintiff filed his Proof of Service on the following persons/entities on the following dates: Sunbelt on March 12, 2015; Sanders on March 18, 2015; Bennett-Hall on April 2, 2015. Defendant Sunbelt answered on April 28, 2015 and Defendants Bennett-Hall and Sanders filed a joint answer on May 8, 2015. Sanders then obtained separate counsel. On June 8, 2015, Defendant Bennett-Hall filed an Amended Answer and Third Party Complaint against Black Box Network Services, Inc. asserting contractual indemnification ("Black Box"). In its Amended Answer Bennett-Hall sought to add Black Box, Mr. Harbath's actual and/or statutory employer, to be made a party to the suit for purposes of fault allocation, "even if immune from suit." Finally, Bennett-Hall requested offset against the actual and/or statutory employer.

On June 26 ,2015 Mr. Harbath timely filed a motion to strike Bennett-Hall's Amended Answer, arguing: that Bennett-Hall's introduction of an immune defendant would defeat a substantial right of the Plaintiff to choose his defendants; that 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; that the contractual indemnification claim could be timely brought after a settlement or verdict against Bennett-Hall; that because Black Box is an upstream employer, it could not be a tortfeasor and fault allocation to Black Box would be inappropriate; and finally, that 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 their obligation to pay.

Bennett-Hall submitted a memorandum in response to Mr. Harbath's motion to strike the Amended Answer on September 25, 2015. On September 28, 2015 oral argument was held and counsel for all parties involved participated in the hearing. An Order granting Mr. Harbath's Motion to Strike was filed on October 14, 2015.

On or about November 5, 2015, Bennett-Hall filed a motion to reconsider, and on December 10, 2015 the circuit court granted Bennett-Hall's motion as to one paragraph including findings of fault, but denied its motion as to the rest. Bennett-Hall timely filed a Notice of Appeal.

Discussion

Unless governed by an appealability statute, an interlocutory order is not immediately appealable unless it fits into one of the categories listed in section 14–3–330 of the South Carolina Code (1976 & Supp.2009). In *Thornton v. SCE&G*, this Court pointed out that "the use of the word 'strike' in both Rule 12(f) and section 14-3-330(2)(c) does not mean an order granting a Rule 12(f) motion is automatically immediately appealable." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011). Instead, appealability of an order granting a Rule 12(f) motion to strike is not absolute, and should be decided on a case-by-case basis. *Id.* In making this determination, emphasis should be placed on the effect of the order instead of the label given to it. *Id.* at 302-03, 705 S.E.2d at 478 (Ct. App. 2011).

In general, section 14–3–330(2) has been narrowly construed to disallow the immediate appeal of orders issued before or during trial. *Hagood v. Sommerville,* 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). Whether an order granting a Rule 12(f)

motion to strike is appealable under section 14–3–330(2)(c) depends on the effect of the individual order under the facts and circumstances of the case. Stated differently, it is not enough that an interlocutory order strikes out an answer or a part of it, the order must also affect a substantial right.

An order affects a substantial right by striking a pleading if the order removes a material issue from the case and prevents litigation of the issue on the merits so that errors may be corrected during trial or on appeal. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). Here, Bennett-Hall seeks to inject an alleged contractual claim for indemnity into Mr. Harbath's tort action. However, Bennett-Hall may timely commence an indemnification action against Black Box in a new and separate action in the event of a verdict against it. Therefore, Bennett-Hall's substantial right to prove and preserve its alleged contractual right of indemnity will not be lost by having to institute a separate action at a later time. Moreover, as the circuit court pointed out, Bennett-Hall's claim for contractual indemnity is not ripe and is potentially moot without a settlement or verdict against it.

Bennett-Hall's Amended Answer also seeks to allocate fault to Black Box. However, in doing so Bennett-Hall impermissibly seeks to share blame with an immune upstream employer who the Plaintiff himself could never sue. Therefore, Bennett-Hall is not losing out on a substantial right to fault allocation against Black Box, because Bennett-Hall is not permitted to try to shift blame to an entity immune from suit and who is not a potential tortfeasor. *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005) (concluding that because under the Workers' Compensation Act employer could not be liable in tort to employee, employer was not "jointly and severally

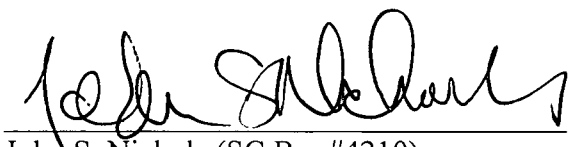
liable in tort" for employee's injury and thus there could be no right of contribution under the Contribution Among Joint Tortfeasors Act for the third-party defendant; Court expressly stated "[t]he third party defendant and the employer are *not* joint tortfeasors.").

Bennett-Hall's Amended answer seeks contribution from Black Box. However, Black Box's right to contribution is not ripe until after a settlement or verdict. Therefore, Bennett-Hall has not lost anything by the circuit court's Order striking this requested relief.

Finally, the effect of the trial court's order is to deny Bennett-Hall the right to amend its answer. The denial of a motion to amend is not immediately appealable. *Baldwin Const. Co., Inc. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004). While this case does not involve a motion to amend, the effect of what Bennett-Hall has attempted is the same, that is, filing an amendment to their previous answer. The trial court prevented Bennett-Hall from doing so. That decision is not subject to an immediate appeal. *Baldwin*. While the order uses language indicating it is "striking" the answer, the fact is that Bennett-Hall has an answer they have filed and that answer joined the issues in the case. Nothing has been struck from *that* pleading. Instead, the order here does not permit Bennett-Hall to amend the answer it has on file. Under *Baldwin*, that ruling is not immediately appealable. After all, the issue may never come up after trial if Bennett-Hall should prevail, and nothing prevents Bennett-Hall from raising this issue after the trial on the merits. Furthermore, if Plaintiff obtains a verdict against Bennett-Hall, it may then adjudicate whether it is entitled to indemnity from Black Box.

For the reasons stated, this Court should dismiss this appeal and remit this case to the circuit court.

Respectfully submitted,



John S. Nichols (SC Bar #4210)
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Melissa G. Mosier (S.C. Bar # 78693)
McWHIRTER, BELLINGER & ASSOCIATES, P.A.
119 East Main Street
Lexington, South Carolina 29072
(803) 359-5523 Phone
(803) 996-9080 Facsimile
melissam@mcwhirterlaw.com

Attorneys for Respondent

February 22, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-01082

Karl T. Harbath, ... Respondent,

v.

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

Of whom

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

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Notice of Appearance, Motion to Accept Memorandum Out of Time,* and the conditionally filed *Memorandum of Law Regarding Appealability* by mailing copies of the same by electronic mail and hand delivery to the following address:

Brian A. Comer
Kerri B. Rupert
Collins & Lacy, PC
1330 Lady St.
Columbia, SC 29201
bcomer@collinsandlacy.com
krupert@collinsandlacy.com

Erin Bridges

February 22, 2016

Erin Bridges

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

February 22, 2016

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Karl T. Harbath v. Stephen Sanders
Case Tracking No.: 2015-002566

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of a Notice of Appearance in reference to the above matter. Also enclosed please find the original and seven (7) copies of the Motion for the Court to Accept the Memorandum Out of Time and the conditionally filed Memorandum of Law Regarding Appealability. I have also enclosed a proof of service of these documents on counsel for the Appellant, and a check in the amount of $25.00 for filing this motion. Please return the additional filed copies to me via our courier.

Thank you for your attention to this mater. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Melissa G. Mosier, Esquire
Brian A. Comer, Esquire
Kerri B. Rupert, Esquire