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.
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.

APPELLANT'S INITIAL REPLY BRIEF

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I. The Circuit Court's Order is Immediately Appealable Under Section 14-3-330(2)(c) of the South Carolina Code.

At the beginning of this appeal, this Court requested the parties brief the appealability of the Circuit Court's order. After reviewing the appealability memoranda, Judge Cureton issued an order allowing the appeal to proceed. As argued in that memorandum and Appellant's brief, this order granting a Rule 12(f) motion to strike is immediately appealable under section 14-3-330(2)(c).

An order granting a Rule 12(f) motion is immediately appealable when that order (1) removes an issue from the case and (2) prevents the party from litigating the issue. Thorton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011). When an order strikes "out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading . . . ." Id. at 303, 705 S.E.2d at 479.

Respondent's Motion to Strike prevented Appellant from litigating a "good cause of action"—Appellant's third-party claim for contractual indemnity. Thorton, 391 S.C. at 303, 705 S.E.2d at 479; see also Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993) (providing an order affects a substantial right when the order "would discontinue an action, prevent an appeal, grant or refuse to grant a new trial, or *strike out an action or defense*" (emphasis added)). Appellant and BBNS has a pre-existing contractual arrangement whereby BBNS agreed to indemnify Appellant under certain conditions. The Circuit Court's order prevents

Appellant from asserting a valid cause of action for derivative liability under Rule 14(a), of the South Carolina Rules of Civil Procedure.

This error cannot be remedied through the course of the trial. Appellant can be artificially responsible for more than its share of liability at a trial without BBNS named as a third-party defendant. If Appellant must bring the contractual indemnity claim following a trial, BBNS can argue any potential finding by the jury with regards to Appellant's fault precludes Appellant from asserting the contractual indemnity clause. Further, contrary to Respondent's brief, the issue is not whether Appellant would be collaterally estopped from bringing a contractual indemnity action after this case is resolved. Rather, any potential finding by a jury against Appellant affects the contractual arrangement between Appellant and BBNS.

Respondent also argues this Court should treat the order as one denying a motion to amend while at the same time acknowledging the Circuit Court never construed this case as involving a motion to amend by Appellant. In his brief, Respondent cites to Baldwin Construction Company, Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004), to argue this order is not immediately appealable because the Circuit Court refused to allow the filing of an amended answer instead of striking a pleading. (Resp. Br. 10). Baldwin is irrelevant to this case because the appellant in Baldwin moved to file an amended answer over a year after filing their original answer. Baldwin, 357 S.C. at 146-47, 593 S.E.2d at 228-29. Here, Appellant amended its answer as a matter of right under Rule 15(a), SCRCP,[1] and Appellant never sought leave from the Circuit Court to amend

[1] Rule 15(a), SCRCP, provides a party may amend his pleading once as a matter of course at any time within 30 days after it is served.

its answer like the appellant in Baldwin.[2] Appellant never moved to amend its Answer, and thus, the issue was never raised to or ruled upon by the Circuit Court. In further support of his argument that this case involves a motion to amend, Respondent claims that the Circuit Court did not strike any pleading; however, the order is titled as "Striking Portions of the Amended Answer." Moreover, this Court in Thorton recognized that an order is immediately appealable when it *in effect* strikes a portion of a pleading. The effect of this order prevented Appellant from litigating the issues raised in those portions of the amended answer and third-party complaint that were struck, which renders this order immediately appealable under section 14-3-330(2)(c).

II. The Circuit Court Erred in Striking the Third-Party Complaint Without Recognizing an Employer Immune Under the Workers' Compensation Act May Contract Away Its Immunity.

A. The Third-Party Complaint Is Ripe Now.

The contractual indemnity claim is ripe. Respondent did not address this issue in his brief. Here, the Circuit Court erred in finding Appellant's third-party complaint was not ripe for adjudication by misinterpreting First General Services of Charleston, Inc. v. Miller in which the Supreme Court held the statute of limitations for an equitable indemnity claim did not begin to run until after a judgment was entered against a potential third-party plaintiff. 314 S.C. 439, 445 S.E.2d 446 (1994); (Amended Order, p. 6). This is a clear error of law when the First General Court also specifically held a third-party claim for equitable indemnity was ripe because the claim was created by operation of law where there was a special relationship between the parties or in cases of imputed

[2] Respondent also mistakenly asserts nothing has been struck from the Answer; however, the affirmative defenses struck by the Court's Order were raised in both the Answer and Amended Answer. (Resp. Br. 10).

fault. 314 S.C. at 442, 445 S.E.2d at 448; see also Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 313, 476 S.E.2d 708, 711 (Ct. App. 1996) (finding a circuit court erred in dismissing a counter-claim for equitable indemnification as the dismissal was premature when the allegations of the complaint were not determinative of the right to indemnity). Extending the reasoning behind First General of examining when the claim was "created" to determine if the claim is ripe, Appellant's claim for contractual indemnity was created by operation of law when Appellant and BBNS signed the Agreement at issue. The contractual indemnity claim is ripe now, and the Circuit Court erred in applying First General to find otherwise.

B. BBNS Contracted Away its Immunity Under the Workers' Compensation Act.

South Carolina's appellate courts have not yet addressed whether the Workers' Compensation Act insulates an employer from liability under an express contractual indemnification agreement. Several cases from the District Court recognized a third-party claim for contractual indemnity against an employer is an exception to the immunity granted under the Workers' Compensation Act. Generally, under section 42-1-580 of the South Carolina Code,[3] an employer's payment of benefits to an employee satisfies all third-party claims against the employer arising out of the same accident. BET Plant Services, Inc. v. W.D. Robinson Elec. Co. Inc., 941 F. Supp. 54, 56 (1996). The District Court, applying the law of South Carolina, found that the exception to this

[3] "*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.

general rule is when an employer contracts away its liability under a pre-existing indemnification agreement. Id.; see also Brayboy v. MST-Maschinenbau GmbH, No. 4:14-CV-02965-RBH, 2015 WL 2062558, at *3 (D.S.C. May 4, 2015); 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).

In BET Plant Services, the District Court relied on Fuller v. Southern Electric Service Company, in which the Supreme Court held the precursor to section 42-1-580 applied to the right of contribution or indemnity arising out of the facts existing "at the time of the injury." 200 S.C. 246, 20 S.E.2d 707, 712 (1942). The Fuller Court held section 42-1-580 did not apply to a *pre-existing contractual arrangement* between the employer and third-party. Id. Similar to Fuller and BET Plant Services, BBNS contracted away its immunity from liability under a pre-existing contractual arrangement with Appellant. Thus, Appellant's claim for contractual indemnity—a pre-existing contractual arrangement—is not barred by section 42-1-580. The Circuit Court erred in striking the third-party complaint and failing to recognize this important distinction under section 42-1-580.

C. The "Plaintiff Chooses" Rule Does Not Apply to This Case.

The Circuit Court erred in failing to allow Appellant to implead BBNS as a third-party defendant. The Circuit Court addressed the Motion to Strike as if Appellant was naming BBNS as a defendant, which Appellant never did. Respondent argues Chester v. South Carolina Department of Public Safety applies to this case because there is no difference between joining a party under Rule 19 and filing a third-party complaint under

Rule 14. (Resp. Br. 13);[4] 388 S.C. 343, 698 S.E.2d 559 (2010). In Chester, the Supreme Court held, "It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." 388 S.C. at 345, 698 S.E.2d at 560 (precluding the defendant from joining other alleged tortfeasors as defendants under Rule 19, SCRCP).

It is too attenuated to argue the holding in Chester and the joinder of defendants under Rule 19 extends to third-party practice. Following Respondent's logic ignores the fact that Rule 14 authorizes a defendant to bring into a lawsuit a non-party "who is or may be liable to him for all or part of the plaintiff's claim against him." Rule 14, SCRCP. An April 2016 update to Federal Practice & Procedure also recently recognized a "defendant, as a third-party plaintiff, may implead someone whom plaintiff could not sue directly," including a plaintiff's employer.[5] Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1447. By definition, a third-party defendant cannot be a co-tortfeasor with a defendant/third-party plaintiff because a judgment against a third-party defendant is for the benefit of the defendant/third-party plaintiff, not the original plaintiff. See First General Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994) ("Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to the third party."). Chester simply did not address third-party practice or prohibit third-party practice. Because

[4] "Whether under Rule 19, SCRCP, as in Chester, or Rule 14, SCRCP, in the instant case, the effect is the same—Bennett-Hall seeks to force Mr. Harbath to add an alleged tortfeasor to this case for the impermissible purpose of fault allocation." (Resp. Br. 13).

[5] The new update recognizes this right to implead may be limited by state law to cases where the third-party claim is based on an "independent duty" of the employer to the third party claiming indemnity. As discussed above, Appellant had a pre-existing contractual arrangement with BBNS that arose prior to the injury at issue that creates the "independent duty."

Appellant properly impleaded BBNS as a third-party defendant, the Circuit Court erred in striking the third-party complaint.

Respondent also makes the argument for the first time on appeal that Appellant improperly impleaded BBNS as a third-party defendant. (Resp. Br. 13). Because Respondent did not raise this argument before the Circuit Court, it is not preserved for appellate review. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611 n.7, 518 S.E.2d 591, 598 n.7 (1999) (providing an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved for appellate review). Moreover, the impleader of BBNS as a third-party defendant was proper. Appellant had a substantive right to shift liability to BBNS pursuant to the indemnity clause in the Agreement. See James F. Flanagan, South Carolina Civil Procedure (2d ed. 1996) ("Without a substantive right to shift liability to the third-party defendant, impleader is improper."). Contrary to Respondent's argument, Appellant does not contend BBNS is directly liable to the plaintiff. Instead, under Rule 14, Appellant's potential liability may be passed on to BBNS through the contractual indemnity provision. Further, allowing Appellant to assert its third-party claim now, results in the "just, speedy, and inexpensive determination" by resolving these issues now. (Resp. Br. 17); Rule 1, SCRCP; see also Wright, Miller, and Kane, Federal Practice and Procedure: Civil 3d § 1442 ("The primary purpose of any procedure authorizing the impleader of third parties is to promote judicial efficiency by eliminating 'circuity of actions'"); Noland Co. v. Graver Tank & Mfg. Co., 301 F.2d 43 (4th Cir. 1962) (same).

III. The Circuit Court Erred in Striking Paragraph 43 of the Amended Answer.

The Circuit Court struck paragraph 43 of the Amended Answer, in which Appellant asserted the right to request any actual and/or statutory employer be listed on the verdict form for purposes of fault allocation under section 15-38-15(D) of the South Carolina Code. Section 15-38-15(D) provides, "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." (emphasis added). The Circuit Court concluded Appellant did not have a justiciable claim for apportionment of fault against BBNS or any other employer because Respondent's employer(s) would be immune from tort liability under the Workers' Compensation Act. (Amended Order p. 7).

As an initial matter, Appellant asserted the right to argue for an allocation of fault for non-party employers on the verdict form as a separate and distinct defense than the third-party contractual indemnity claim. See Rule 8(e)(2) ("A party may also state as many separate causes of action or defenses as he has regardless of consistency . . ."). Appellant respectfully asserts that the outcome of the Court's ruling on this issue should not affect Appellant's third-party claim. The jury verdict form would be different depending upon whether BBNS was named as a third-party defendant versus if BBNS (or any other statutory employer) was added to the verdict form for purposes of fault allocation. If BBNS was a third-party defendant, the jury would allocate fault among the named defendants. The jury would then have to determine the merits of the third-party complaint and whether BBNS must indemnify Appellant for Appellant's share of the verdict. On the other hand, the purpose behind paragraph 44 and fault allocation under

section 15-38-15 is to list any non-party employer on the verdict form for the jury to properly allocate fault when determining the named defendants' liability.

With regard to the merits of the Circuit Court's order, allowing a jury to allocate fault to a non-party employer does not destroy the non-party employer's immunity from suit. Under section 15-38-15(C), the jury's allocation of fault must equal one hundred percent on the verdict form. Without the inclusion of the non-party employer on the verdict form for purposes of fault allocation, any allocation of fault to the defendants is artificially increased. The percentage of BBNS's (or any other employer's) fault is a material issue to apportioning liability among Appellant and the two other named defendants. Contrary to the Circuit Court's order, the non-party employer still remains immune from liability.[6] Appellant also does not violate the "plaintiff chooses" rules because the non-party employer would not be liable to Respondent.

Respondent cites to Neeltec Enterprises, Inc. v. Long and Morrow v. Fundamental Long-Term Care Holdings, LLC to support his argument that he has a right to choose who may be named as a defendant in this case. Neeltec, 391 S.C. 563, 725 S.E.2d 926 (2012); Morrow, 412 S.C. 534, 773 S.E.2d 144 (2015). As an initial matter, this fails to recognize that Appellant never attempted to join BBNS as a defendant in this case. Appellant sought to implead BBNS as a third-party defendant or, in the alternative, to have BBNS on the verdict form for purposes of fault allocation. Further, the issue in both Neeltec and Morrow was whether an order was immediately appealable within the meaning of section 14-3-330. See Neeltec, 391 S.C. at 566, 725 S.E.2d at 928 (finding a

[6] This issue is pending before the Supreme Court in a case that was certified to the Court by District Court Judge Joe Anderson. Judge Anderson found South Carolina law was unclear about whether an employer could be added to the verdict form for purposes of fault allocation. See Machin v. Carus Corp., Appellate Case No. 2015-000901.

plaintiff's right to choose her defendant was a "substantial right" within the meaning of section 14-3-330(2)(a)); Morrow, 412 S.C. at 539, 773 S.E.2d at 144 (finding a trial court's order bifurcating the proceedings was immediately appealable). Neither Neeltec nor Morrow addresses the issue on appeal—whether fault may be allocated on the verdict form to BBNS under section 15-38-15.

IV. The Circuit Court Erred in Striking Paragraphs 42 and 44 of the Amended Answer.

Paragraph 42 of the Amended Answer pled the right to contribution or indemnity against any actual and/or statutory employer. The Circuit Court struck paragraph 42 by finding an immune employer could not be a joint tortfeasor subject to a contribution or indemnity action. The Court erred in prematurely striking paragraph 42 and preventing Appellant from presenting any evidence in support of this defense. First, the Circuit Court failed to recognize the Workers' Compensation Act does not insulate an employer from liability under an express indemnification agreement. See BET Plant Servs., 941 F. Supp. at 56 ("[A] workers' compensation statute does not insulate an employer from liability under an express indemnification agreement."). Second, under Fuller, section 42-1-580 only applies to a right of contribution or indemnity arising out of the facts existing "at the time of the injury," and not to some pre-existing arrangement between an employer and a third party. 200 S.C. at 246, 20 S.E.2d at 712. Appellant has shown there are two exceptions that would have led to a right of indemnity—an express indemnification agreement or a pre-existing arrangement between Appellant and a statutory employer.

The Circuit Court also struck paragraph 44 of the Amended Answer, in which Appellant sought a proportional credit or offset pursuant to section 15-38-15(E) for

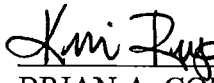
amounts paid by the actual and/or statutory employer. The Circuit Court erred in striking paragraph 44 because it interpreted the right to an offset under section 42-1-580, not section 15-38-15 of the South Carolina Contribution Among Joint Tortfeasors Act. (Amended Order p. 8). Accordingly, the Circuit Court erred in striking the defenses asserted in paragraphs 42 and 44.

V. Conclusion

For the reasons stated within Appellant's brief and this reply brief, Appellant respectfully requests this Court reverse the Circuit Court's Order Striking Portions of the Amended Answer.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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August 25, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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v.

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

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

PROOF OF SERVICE

I hereby certify that I served a copy of Appellant's Initial Reply Brief upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on August 25, 2016, addressed to the following:

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August 25, 2016

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
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Re: Karl T. Harbath v. Stephen Sanders, et al.
Appellate Case No. 2015-002566
Case No. 2015-CP-40-01082
Claim No. 550-081747-001
C&L File No. 000001-02261

Dear Ms. Kitchings:

Enclosed for filing are an original and two (2) copies of Appellant Bennett-Hall Company, Inc.'s Initial Reply Brief in connection with the above matter. Please return a file-stamped copy to us via the awaiting courier.

By copy of this correspondence, we are hereby serving a copy of the same to opposing counsel. If you have any questions, please do not hesitate to contact our office.

Respectfully,

Kerri Rupert for
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