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.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Is the Circuit Court's Order striking Bennett Hall's third party complaint and portions of its Answer immediately appealable?

II. Did the Circuit Court err in striking Paragraph 43 of Bennett-Hall's Amended Answer to keep an immune employer from becoming a party to the action since Mr. Harbath cannot sue an upstream employer in this tort action?

III. Did the Circuit Court err in striking Paragraphs 42 and 44 of Bennett-Hall's Amended Answer since the right to indemnity and set-off are only ripe upon a settlement or verdict?

IV. Did the Circuit Court err in striking Bennett-Hall's third party complaint for contractual indemnification since the statute of limitations does not accrue until a settlement or verdict against Bennett-Hall?

COUNTER-STATEMENT OF THE CASE

On February 18, 2015, Mr. Harbath filed a personal injury law suit asserting direct negligence claims against Bennett-Hall, Sanders, and Sunbelt Rentals. (R.pp.28-30, ¶¶27-34 and pp.32-33, ¶¶45-51). Mr. Harbath also sued Bennett-Hall alleging vicarious liability for the acts and omissions of its employee, Sanders. (R.pp.30-32, ¶¶35-44).

Bennett-Hall and Sanders filed a joint answer on May 8, 2015. (R.pp.35-44). Sanders then obtained separate counsel.

On June 8, 2015, Bennett-Hall filed an Amended Answer and Third Party Complaint against Black Box Network Services ("Black Box"), asserting contractual indemnification. (R.pp.46-59). Bennett-Hall's Amended Answer also included that the actual and/or statutory employer should be made a party to the suit for purposes of fault allocation, "even if immune from suit." (R.p.54, ¶43). Finally, Bennett-Hall requested offset against the actual and/or statutory employer. (R.p.54, ¶44).

On June 26, 2015, Mr. Harbath timely-filed a memorandum-style Motion to Strike pursuant to Rule 12(f), SCRCP. In support of his motion to strike the amended answer of Bennett-Hall, Mr. Harbath argued that: (1) the introduction of an immune defendant defeats a substantial right held by the Plaintiff to choose his defendants; (2) the contractual indemnification between Bennett-Hall and Black Box would introduce a contractual dispute into a tort case, inviting confusion of the issues and a trial within a trial; (3) the contractual dispute could be timely brought after a settlement or verdict against Bennett-Hall; (4) since Black Box is an upstream employer, it could not be a tortfeasor and fault allocation to Black Box would be inappropriate; (5) Bennett-Hall's

request to add Black Box to the tort case for the stated purpose of contribution is premature absent a settlement or verdict to trigger payment. (R.p.4; pp.67-71).

On September 23, 2015, Black Box moved to dismiss the third-party complaint against it, citing the doctrine of *lex loci contractus* and North Carolina's anti-indemnity statute. (R.pp.207-210).

Bennett-Hall filed a response to Mr. Harbath's Motion to Strike on September 25, 2015, and did not submit any arguments or case law to refute Mr. Harbath's contention that Black Box could not be added as a Defendant because Black Box could not be a tortfeasor or even a potential tortfeasor under the Contribution Among Joint Tortfeasors Act. (R.pp.138-146).

The Circuit Court held a hearing addressing both motions on September 29, 2015. (R.pp.224-262). At the conclusion of the hearing, the Court granted Mr. Harbath's Motion to Strike and reserved any ruling related to the alleged contractual indemnification, finding the matter not yet ripe for adjudication. (R.p.261, l. 7 - p.262, l. 1; p.2, ¶ 1).

The Court issued its formal Order on October 13, 2015. (R.p.12). On November 5, 2015, Bennett-Hall filed a Motion to Reconsider. (R.p.149). The Circuit Court denied Bennett-Hall's motion in large part, but removed findings of fault from the "Factual Background" section of the Order. (R.pp.2-3).

Bennett-Hall timely served a Notice of Appeal.

FACTS

For purposes of the issues before the Court, the basic facts are not in dispute. On February 23, 2012, 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. As Sanders drove the boom lift 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.

Mr. Harbath then pursued a tort action, alleging 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.

Within Mr. Harbath's tort action Bennett-Hall seeks to litigate its contractual dispute against Black Box for indemnification should Bennett-Hall be held liable for damages. (R.pp.55-58, ¶¶ 47-62). Bennett-Hall also seeks to allocate fault to Black Box,

who Mr. Harbath cannot sue due to the exclusive remedy doctrine as codified at S.C. Code Ann. § 42-1-540. (R.p.54, ¶43). Bennett-Hall further seeks to litigate its claims for setoff and contribution against the statutorily immune upstream employer, Black Box. *(Id.*, ¶42).

ARGUMENTS

Standard of Review

A motion to strike that challenges a theory of recovery in the complaint is comparable to a motion to dismiss under Rule 12(b)(6), SCRCP. *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997). In ruling on a motion to strike, the Circuit Court decides whether a party should be allowed to plead a defense or other matter, and makes no findings as to the existence of facts supporting what has been plead. *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372, (Ct. App. 1990). Striking from a pleading lies within the discretion of the trial judge. *Brown v. Coastal States Life. Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). Accordingly, the grant of a motion to strike will not be reversed except for an abuse of discretion or an error of law. *Id.* at 194-95, 213 S.E.2d at 728.

I. The Circuit Court's Order Is Not Immediately Appealable

Bennett-Hall asserts the circuit court's orders in this case are immediately appealable because the order "affect[s] a substantial right by striking a pleading." (App. Br. p. 14). Bennett-Hall contends 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." *Id.* These statements are essentially an argument that every order that strikes a pleading affects a substantial right and is, therefore, immediately appealable. The Court should not be persuaded by this argument.

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, which provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> * * *
>
> (2) 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, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> * * *

S.C. Code Ann. § 14-3-330 (1976 & Supp. 2015). Bennett-Hall contends the order is appealable under § 14-3-330(2)(c). This Court should reject that argument.

In *Thornton v. SCE&G*, the 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 (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 immediately 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). *See also Thornton*, at 304, 705 S.E.2d at 479 ("An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial.")

Here, Bennett-Hall seeks to inject an alleged contractual claim for indemnity from a third-party into Mr. Harbath's tort action. That issue is not material to Mr. Harbath's tort case against Bennett-Hall. And the circuit court's ruling does not prevent the issue of the third-party's liability to Bennett-Hall for contractual indemnity from being litigated on the merits, nor does it prevent Bennett-Hall from seeking to correct any errors in the trial court's order after trial. Bennett-Hall may timely commence an indemnification action against Black Box in a new and separate action in the event of a verdict against Bennett-Hall. Therefore, Bennett-Hall's substantial right to prove and preserve its alleged contractual right of indemnity, which is not material to its tort liability to Mr. Harbath, 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 claims for contractual indemnity or contribution are not even ripe and are potentially moot without a settlement or verdict against Bennett-Hall in Mr. Harbath's tort case.

Bennett-Hall's Amended Answer also seeks to allocate fault to Black Box. (R.pp. 55-58). However, in doing so Bennett-Hall impermissibly seeks to share blame with an immune upstream employer whom 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 against Bennett-Hall. *See First Gen. Servs. of Charleston, Inc. v. Miller*, 314, S.C. 439, 444, 445 S.E.2d 446, 449 (1994) (the right to contribution does not arise prior to payment, and where a defendant has made no payments to the plaintiff, no right to contribution from the third party yet exists; the Court held that since a third-party complaint is premised upon an existing right of the third-party plaintiff, defendant's impleader action against a third party for contribution was not ripe). Therefore, Bennett-Hall has not lost anything by the circuit court's Order striking this requested relief.

Furthermore, 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. *Id.* While the Order uses language indicating it is "striking" the answer, the fact is that Bennett-Hall filed an initial answer and that answer joined the issues in the case. Nothing has been struck from that pleading. Instead, the Circuit Court's Order 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, Bennett-Hall may then adjudicate whether it is entitled to indemnity from Black Box.

The Court should address the issue of appealability of the circuit court's order. *See Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010) (appellate court may address issue of appealability *ex mero motu*). The Court should adhere to *Thornton* and hold the order in this case is not immediately appealable under Section 14-3-330(2)(c).

II. The Circuit Court Properly Struck Bennett-Hall's Request to Apportion Fault to Black Box

Bennett-Hall agrees that Black Box is an upstream employer immune from tort liability by virtue of the exclusivity doctrine as set forth in S.C. Code Ann. § 42-1-540 (Supp. 2015). (App. Br. p. 16). According to S.C. Code Section 15-38-15(D) (Supp. 2015), a defendant can only shift blame to a "potential tortfeasor." The Circuit Court properly struck Paragraphs 43 of Bennett-Hall's Amended Answer because an employer immune from tort liability cannot possibly be a "potential tortfeasor."

a. Mr. Harbath's Employer is not a "Joint Tortfeasor" Subject to "Common Liability" with Bennett-Hall

Prohibiting the consideration of an employer's negligence places no additional burden on the third party defendant. *Indemnity Ins. Co. of North America v. Odom*, 237 S.C. 167, 176, 116 S.E.2d 22, 27 (1960). This is because 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) (an employer is not considered a "tortfeasor" for on-the-job injuries sustained by an employee for purposes of contribution statutes). Instead, the employer's liability is bounded by the Workers' Compensation Act, which is not concerned with the fault of the employer or its employees. *See, e.g., Nicholson v. S.C. Dept. of Soc. Servs.*, 411 S.C. 381, 390, 769 S.E.2d 1, 5 (2015) (Supreme Court noted the "Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation," and added "[r]equiring an employee to prove a fall was the 'fault' of the employer in creating a danger or hazard

is unfaithful to the principles underlying the creation of workers' compensation and turns the entire system on its head.").

Bennett-Hall argues that its liability may be artificially enhanced because Black Box cannot be added to the verdict form. This argument misses the point that Mr. Harbath has brought direct negligence claims against Bennett-Hall which exist and were breached independently from any contractual obligations between Bennett-Hall and Black Box.

In conclusion, since Black Box could not be liable to Mr. Harbath, no verdict for damages in his favor could ever be entered against it. As a result, per S.C. Code Ann. Section 15-38-15(C)(3) (1985), Bennett-Hall does not have a justiciable claim for apportionment of fault against Black Box (or any other employer or upstream employer broadly referred to in its Amended Answer). To the extent that Bennett-Hall is held liable by a jury in this case, it retains the right to recover against Black Box for its disputed contractual indemnification claim in a separate proceeding.

b. Bennett-Hall's Amended Answer Adding an Immune Defendant Violates Mr. Harbath's Substantial Right to Choose His Defendants

It is well-settled that the plaintiff has the sole right to choose his defendants. *E.g.*, *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 55 S.E.2d 68 (1949). In *Chester v. S.C. Dept. of Pub. Safety,* 388 S.C. 343, 698 S.E.2d 559 (2010), Chester sued three state agencies subject to the Tort Claims Act (TCA), and one of the TCA defendants contended, and the trial court agreed, that they were entitled to compel the plaintiff to add other alleged tortfeasors in order to ensure a proportionate verdict. *Id.* at 346, 698 S.E.2d at 560. The Supreme Court held that a defendant could not force a plaintiff to add other

alleged tortfeasors for the purpose of fault allocation, as this frustrates a tort plaintiff's right to choose his defendants. *Id.* at 344, 698 SE.2d at 559-60.

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. *Cf. First Gen. Servs. of Charleston, Inc. v. Miller*, 314, S.C. 439, 445 S.E.2d 446 (1994) (under Rule 14, SCRCP, the outcome of the principal claim must impact the third-party defendant's liability; however, no right exists to implead a third-party defendant who is directly liable to the plaintiff. Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 1446). While Black Box is not considered a "joint tortfeasor" for purposes of tort liability, Black Box did have direct liability to Mr. Harbath through his workers' compensation claim.

More recently, in *Neeltec Enterprises, Inc., v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012), the defendant requested that the plaintiff remove him from the suit to substitute two different defendants. Plaintiff did not consent to the substitution, and the circuit court granted the defendant's motion to remove him from the suit and substitute two different defendants. *Id.* The Supreme Court 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.* at 566, 725 S.E.2d at 927. Id.

The principle that the plaintiff is the architect of the complaint was again recently reaffirmed by the Supreme Court in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In *Morrow*, the plaintiffs filed vicarious liability and direct negligence claims against a long-term care facility for the injuries

suffered by a patient. *Id.* at 535-36, 773 S.E.2d at 144-45. The defendants moved to bifurcate the trial between the nursing home claims and the corporate negligence claims. Defendants argued that bifurcation was appropriate because the plaintiffs could only move forward on the corporate negligence claims if they were successful against the nursing home. The Supreme Court held that the trial court's order affected a substantial right held by the plaintiffs (the right to choose whom to sue) and allowed the appeal to proceed. *Id.* at 538-39, 773 S.E.2d at 146-47. As the Court articulated, "[t]he effect of this order is to prevent the [plaintiffs] from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing." *Id.* at 539, 773 S.E.2d at 146. The same is true in the instant case – Mr. Harbath selected the defendants to sue, yet Bennett-Hall seeks to add a defendant who might have direct liability to Mr. Harbath in workers' compensation but who is immune from tort liability.

For these reasons the Court should affirm the Circuit Court's grant of the Motion to Strike Paragraph 43.

III. The Circuit Court Properly Held That Bennett-Hall Does Not Have a Current Right to Setoff or Contribution Against an Immune Employer under *Gordon v. Phillips Utilities*

In Paragraph 44 of its Amended Answer, 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." In Paragraph 42, Bennett-Hall seeks to assert a right of contribution or indemnity against "such actual and/or statutory employer(s)."

In *Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) 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 S.C. Code Ann. § 42-1-580 (Supp. 2015), and argued that S.C. Code Ann. §15-38-20(A) (1985) 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 Code Section 42-1-580, the General Assembly intended to provide a remedy for a third party when an employer negligently contributed to an injury.

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 found Section 42-1-580 inapplicable in a trial brought by the employee against a third party. In no uncertain terms, the Court went on to say that "[t]he third party defendant and the employer are not joint tortfeasors." *Id.*

Like the defendant in *Phillips*, Bennett-Hall asks this Court to apply Section 42-1-580 in a way that our Supreme Court expressly rejected about ten years ago. The Circuit Court properly held that pursuant to S.C. Code Ann. § 15-38-15(E) Bennett-Hall does not have a current, credible claim for setoff or contribution against Black Box or Cornerstone (or any other employer or upstream employer broadly referred to in its Amended Answer). Therefore, the Circuit Court properly struck Paragraphs 42 and 44 of Bennett-Hall's Amended Answer.

This Court should affirm that decision.

IV. The Circuit Court's Order Does Not Legally Prejudice Bennett-Hall's Right to Pursue a Contractual Claim Against Black Box Should it Be Held Liable in Tort

Bennett-Hall's allegations against the proposed third-party defendant are for indemnification, an action which can be instituted in the event of a judgment against Bennett-Hall. Simply stated, there is no legal prejudice to Bennett-Hall in waiting until Mr. Harbath's action is over to institute a separate action for contractual indemnification. *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." *citing Choate v. United States*, 233 F.Supp. 463 (W.D. Okla. 1964) and 3 Moore's *Federal Practice* §14.09). Bennett-Hall fails to provide this Court with a reason why this contested contractual claim with Black Box must be brought now, within Mr. Harbath's personal injury case.

Bennett-Hall has asserted its third-party claim against Black Box based upon an alleged breach of the "Agreement for Supplying Temporary Technical Personnel," a

contract between Bennett-Hall and Black Box. Proving Black Box's alleged liability to Bennett-Hall for breach of the Personnel Agreement will require a trial within a trial on a collateral issue. Not only does this violate the Mr. Harbath's substantial right to choose his defendants, but this would open the door to distracting the jury and confusing them from the issues central to the Mr. Harbath's personal injury case.

The allegations Bennett-Hall makes against Black Box make it clear that two cases would be tried at once – a breach of contract case between Bennett-Hall and Black Box and Mr. Harbath's tort case against three potential tortfeasors. This would violate Rule 1, SCRCP, which provides that the Rules of Civil Procedure are to be construed to "secure the just, speedy and inexpensive determination of every action."

Bennett-Hall argues that Black Box could use any liability ruling in this case against it in a later-filed contractual indemnity case. (App. Br. p. 15). The Court should not be persuaded by this argument.

Collateral estoppel prevents a party from relitigating an issue already decided in a previous action. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App.2009). One asserting offensively collateral estoppel must demonstrate that the issue in the second lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App.1984).

Mr. Harbath has not asserted any claims against Black Box, instead, Mr. Harbath asserts direct claims against Bennett-Hall for the negligent hiring, supervision and retention of Sanders. (R.pp.28-29, ¶28). Mr. Harbath's mention of the contract between Bennett-Hall and Black Box merely provides context as to how Sanders came to be at the

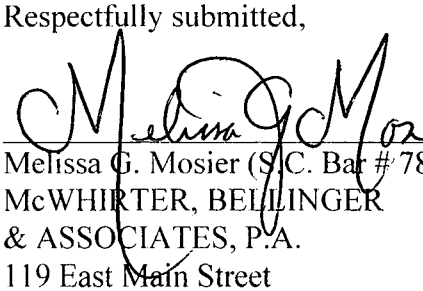
jobsite on the day Mr. Harbath was injured. Mr. Harbath fails to see how discovery into Bennett-Hall's direct negligence could legally prejudice Bennett-Hall in its contractual dispute with Black Box. Those matters will fail to satisfy all three elements necessary to invoke collateral estoppel under *Beall*.

This Court should reject Bennett-Hall's argument and should affirm the trial court's decision to strike those portions of the amended answer.

CONCLUSION

For these reasons, Mr. Harbath respectfully requests that the Court affirm the Circuit Court's Amended Order Striking Portions of Bennett-Hall's Amended Answer and remand this case to the Circuit Court to proceed through the discovery process.

Respectfully submitted,



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October 12, 2016

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Stephen Sanders, Bennett-Hall Co., Inc.,
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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 *Final Brief of Respondent* and *Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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October 17, 2016

Erin Bridges

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully Submitted,

October 12, 2016

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October 17, 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 unbound and fifteen (15) bound copies of the Final Brief of Respondent in reference to this matter. I have also enclosed a Certificate of Compliance and proof of service on counsel for the Appellant. 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

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

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Kerri B. Rupert, Esquire